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AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON

Appeal from India.

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BENGAL MUNICIPAL ACT (III, B. C., of 1884), s. 245—Improvement of bustee—

Bustee containing pucca buildings, if comes within the operation of the section.] A Municipality is competent to deal with a collection or blocks of huts under sec. 245 of the Bengal Municipal Act even though within the area which is locally called a bustee there may be pucca buildings. **NAYAN MANJARI DASSI v. CHAIRMAN OF THE COMMISSIONERS OF THE HOWRAH MUNICIPALITY** ... 445

BENGAL TENANCY ACT (VIII of 1885), secs. 11, 12—Darpatti lease—Stipulation in kabuliyaat hypothecating other properties to secure payment of rent and performance of obligations of lease—Stipulation, if ceases to be operative upon transfer of lease—Effect of transfer on liability to pay rent, etc., and on personal covenants—Stipulation, if offends against rule of perpetuities.] When the transfer of a permanent tenure is complete under sec. 12 of the Bengal Tenancy Act, then, if the vendor's liability is one consequent on the privity of estate, that liability ceases. **Kristo Ballav Ghose v. Kristo Lal Singh, L. L. R. 16 Cal. 642 (1889) and **Girish Chunder Guha v. Khagendra Nath Chatterjee**, 16 C. W. N. 64 (1911), referred to. The same principle having been applied to the original lessee, the liability of the lessee for the rent ceases upon such transfer. **Hemendra Nath Mukerji v. Kumar Nath Roy**, 12 C. W. N. 478 (1908), referred to. But the fact that the original lessee ceases to be tenant upon such transfer does not absolve him from his personal covenants. **Rupchand Ghose v. Narendra Krishna Ghose**, 19 C. W. N. 112 (1914), referred to. Where the lessee by his kabuliyaat hypothecated certain other properties to secure the due payment for all time of the rent reserved and the performance of the other obligations arising thereunder, and there was nothing in the kabuliyaat to indicate that the security would be extinguished on the lessee's liability to pay the rent ceasing with the transfer of the lease. **Held**:—That security created by the kabuliyaat upon the hypothecated properties was not extinguished in consequence of the transfer and the acceptance of rent by the lessor from the transferee. **Bijay Chand Mohatab v. Sarat Chandra Adhya**, 29 C. L. J. 476 (1918), distinguished. That such a security is not repugnant to the rule of perpetuities and can be validly created. **KANAI LAL GHOSH v. BASANTA BEMARI SEN** ... 1020**

... s. 50 (2)—Quotation, whether tenant held at a uniform rate for 20 years, whether of fact or law—Slight variation in rent, if affects presumption.] Before a presumption under sec. 50 (2) of the Bengal Tenancy Act can be raised, it must be found as a fact that the tenant has held at a uniform rent or rate of rent for 20 years. This question is a question of fact and not of law and not even of mixed fact and law, upon which the finding of

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the Court of first appeal is conclusive. *Paran Chandra Sow v. Kanta Mohar Maalik*, 39 C. L. J. 437 (1924). *Satis Chandra Biswas v. Nil Madhub Saha*, 37 C. L. J. 598 (1922) and *Mohini Kanta Saha Chowdhury v. Prem Nath Neogy*, 1 L. R. 49 Cal. 661; s. c. 35 C. L. J. 309 (1922), referred to. A slight variation in the rent, even though unexplained, does not deprive the tenant of the benefit of the presumption under sec. 50 of the Act. *Tara Kumar Ghose v. Kumar Arun Chandra Singh*, 36 C. L. J. 389 (1922), relied on. *ALL-MUDDIN-MOLLAH v. K. S. BONNERJEE* 500

48. 102 (b), 115 and 50—Entry of "settled raiyat" in record-of-rights, effect 81—Presumption under s. 50, if ousted by s. 115 when such entry is made—S. 30, enhancement of rent. The Appellants were recorded as settled raiyats in the record-of-rights which was finally published in 1888. About 35 years after the landlords sued for enhancement of rent. Held—That the entry in the record-of-rights meant that the Appellants were merely occupancy raiyats not holding at fixed rates and that being so the mere fact that the landlords did not think fit to enhance the rent since that record was made cannot be deemed to raise a presumption of fixity of rent in favour of the Appellants. The making of an entry of "settled raiyats" was a sufficient compliance with sec. 102 (b) and when such an entry was made in the record-of-rights the presumption under sec. 50 of the Act was ousted by the operation of sec. 115. *Kamaluddin Ahmad v. Kumar Ramanand Singh*, [1924] Pat. 1 (1923), distinguished. If the entries in the record-of-rights do not record particulars under the provisions of sec. 102 (b) or do not record them rightly, then sec. 115 has no application and the presumption under sec. 50 applies. The provisions of sec. 102 are not mandatory, but provide that certain matters may be included either without or in addition to the other particulars set out in the section. *MOFIZUDDIN CHOWDHURY v. RAJENDRO NATH SANYAL* 209

sec. 103B, sub-sec. (3), entry in record-of-rights regarding existing rent, if can be rebutted by evidence of matters apparent on the face of the proceedings of the Revenue Officer himself—Sec. 102 (e), determination of rent according to instructions of superior officer, legality of. In determining the existing rent under sec. 102 (e), Bengal Tenancy Act, the Revenue Officer, though he had relevant evidence before him, did not apply his own judgment thereto but applied the principles which had been formulated for his guidance by his superior officer. In some subsequent suits for rent. Held—That the presumption under sec. 103B (3) may be rebutted by either evidence external to the settlement proceedings or evidence of matters apparent on the face of those proceedings. In the present case the very statement of the Revenue Officer's reasons for determination of the

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rent showed that he did determine the existing rent, and did not apply his own judgment to the consideration of the evidence before him but applied the principles which had been formulated for his guidance by his superior officer. In the circumstance the rent that he had determined was not the rent actually payable but an imaginary rent. *Bogha Mower v. Ram Lakshman*, 27 C. L. J. 107 (1917), followed. *Secretary of State v. Nitya Singh*, 1 L. R. 21 Cal. 38 (1893). *Luchmi Pershad v. Ekdeshwari Singh*, 13 C. W. N. 181 (1908) and *Sheonandan Pershad Sukul v. Bacha Raut*, 3 C. L. J. 284 (1908), referred to. *RAMA NATH SAUT v. OFFICIAL TRUSTEE OF BENGAL* 517

secs. 105, 105A—Suit by landlord for additional rent in respect of additional area—Decision of Special Judge appealable to High Court when question of principle as to basis upon which rent is to be settled is involved—Duty of Special Judge to settle just and equitable rent irrespective of contract between parties—"khod khasta nal," if of 16 cubits or 14 cubits—Finding as to the length of such nal, a finding of fact when such finding is based on evidence and not merely on construction of kabuliyaat. The Appellants were tenants under the respondents who sued for additional rent in respect of additional area in the dawl kabuliyaat it was stipulated that for excess lands found on measurement the tenant would pay separate rent according to the khod khasta nal and khod khasta rate of the Pergana. The tenants contended that the khod khasta nal meant a pole of 16 cubits while the landlords contended that it was one of 14 cubits. The Special Judge in reversing the decision of the Settlement Officer accepted the latter contention. Held—That there being nothing in the kabuliyaat for guidance as to the proper meaning of the expression "khod khasta nal" evidence was admissible to show what the expression meant in the zemindary in question and the finding of the Special Judge based on evidence was a finding of fact binding on the High Court in second appeal. Where the decision of the Special Judge does not merely settle a rent but involves some question of principle as to the basis upon which rent is to be settled the decision of the Special Judge is appealable to the High Court. That in coming to a decision under sec. 105 of the Bengal Tenancy Act, the Special Judge would consider the rate of rent mentioned in the kabuliyaat but if he finds that a strict adherence to the rate mentioned in the kabuliyaat would make the rent in excess of what he considers a fair and equitable rent he is bound by the terms of sec. 105 to so adjust the rent, irrespective of any contract between the parties, as to make it just and equitable. *PRASANNA KUMAR RAY v. ARUN CHANDRA SINGHA* 353

secs. 105, 109—Application for settlement of fair rent under

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sec. 105 withdrawn with leave to sue in Civil Court—Effect—Suit for enhancement, if lies.] Per Curiam (Suhrawardy, C., dissenting)—When an application for settlement of rent is made under sec. 105 of the Bengal Tenancy Act and subsequently withdrawn, though with the permission of the Court a suit on the same subject-matter (for enhancement of rent) is barred by the provisions of sec. 109 of the Bengal Tenancy Act. PURNA CHANDRA CHATTERJI v. NARENDRA NATH CHOWDHURY . 755

sec. 100—Chur, meaning of—Reformations, in situ, or "chur." The word "chur" as used in sec. 100 of the Bengal Tenancy Act must be understood in its ordinary sense of land formed by natural action, that is to say, it is a word referring to the character of the soil, and not to the site of the deposit. Lands which are reformations in situ would be chur lands within the section. CHANDRA KUMAR AICH v. JIBAN KRISHNA NATH MAHAJAN ... 297

BUILDING CONTRACT—Stipulation to deduct

commission on agreed rates of payment on completion—Alteration in the work substantially increasing it in size and dimensions—Stipulation, if applies to it.] In a building contract under which a particular building of given size and dimensions was to be completed within a year it was stipulated that at the final adjustment of accounts, 10 per cent. of the scheduled rates for articles supplied whatever their cost had been would be deducted from the amount found due to the builder. But as work progressed, the dimensions of the work were nearly doubled so that it could not be and was not completed within a year: Held—That the failure to complete during the year was not due to any fault of the builder and the stipulation for deduction of commission did not apply to the new conditions, which came into existence subsequently to the contract. SAHU RAM KUMAR v. MUHAMMAD YAQUB ... 461

BURMESE BUDDHIST LAW—Inheritance—

Partition with sons and daughters by father after wife's death—Deed apparently of partnership, really of division—Ambiguity—Subsequent conduct, admissibility of—Marriage after partition—Claim to father's inheritance against step-mother, if lies—Wife's position, that of partner.] In the Burmese social and legal system, the wife is, to all intents and purposes, a partner. U. N., a Burman trader, on the death of his wife M. G. with whom he carried on a profitable business in rice, and in contemplation of a second marriage, executed with his children by M. G. a document which purported to be a deed of partnership. But it contained a number of provisions appropriate only to a division of family property on the demise of one of the parents, the subsequent conduct of the parties pointing the same way: Held—That the deed was more a division of rights and interests than a deed of part-

BURMESE BUDDHIST LAW—concl'd.

nership. The conduct of the parties to a contract reduced into writing may not vary or alter it but their conduct may help to explain or elucidate a contract open to different meanings. The Judicial Committee agreed with the Judicial Commissioner in accepting the authenticity and binding character of a Dhammathat which lays down that the children have after partition with their surviving parent no right in the property retained by the latter as against their step-mother or step-father. MA THAUNG v. MA THAN ... 559

Succession — "Onas," who is—if confined to son.]

The designation orasa in the Dhammathats is not limited to a son, and it connotes the eldest or first born child who is competent to undertake the responsibilities of the deceased parent, the eldest born, if a son, on the death of the father, the eldest born, if a daughter, on the death of the mother, the other parent being living. In either case the orasa succeeds to a fourth of the inheritance on the death of the surviving parent. KIRKWOOD v. MAUNG SIN ... 653

Inheritance — Step-sons, if exclude collaterals of step-mother—Non-residence with step-mother and failure to bury her, if disqualification—Step-mother's share in her parent's estate remaining undivided at her death, succession to—Each of filial relations—Onus.] According to Burmese Buddhist law, step-children are descendants and necessarily omit collaterals, for by Buddhist law property never ascends so long as it can descend. But as regards the share of inheritance to which the step-mother was entitled in her deceased parent's estate which still remained undivided the step-children and the collaterals share half and half. It is not incumbent on the person who proves that he is an heir to prove further that he has not broken filial relations in such a case. The fact that the step-children did not live with the deceased step-mother and did not bury her, did not constitute such a breach of filial relations as would deprive them of their right to inherit Quare.—Whether in a contest between step-children and step-grandchildren, the former exclude or share with the latter. Semble.—The strict Buddhist view that intestacy is compulsory has been so far impinged upon that a Burmese Buddhist is allowed to make a will. MAUNG DWE v. KHOO HAUNG SHEIN ... 824

CALCUTTA RENT ACT (III of 1920, B. C., as amended by Act II of 1923, B. C., and Act I of 1924, B. C.), s. 1, subs. (4), first proviso—Proceeding pending on 31st March 1924, for standardisation of rent in respect of premises, rent of which exceeded Rs. 250 a month on 1st November 1918, effect of proviso on—Statute, interpretation of—Temporary Act, extension of, in part, if saves pending proceedings under part not extended—Application to part of premises leased as a whole, when rent ap-

CALCUTTA RENT ACT—contd.

portionable to part exceeds Rs. 250 a month.) The Calcutta Rent Act III of 1920, B. C., a temporary Act, having been extended by the Amending Act II of 1923, B. C., to 31st March 1924 ceased to operate after that date, and the Amending Act I of 1924, B. C., extended it for a further period of three years only as regards premises the rent of which did not exceed two hundred and fifty rupees a month or three thousand rupees a year on the 1st of November 1918. It ceased to operate as regards premises carrying a higher rent on that date and proceedings for standardisation of rent, even though commenced before the 31st March 1924 and pending on that date, were not saved, there being no provision to that effect in the Amending Act. Proceedings pending on the 31st March 1924 in respect of a part of premises let out as a whole on the 1st November, 1918 ceased to be maintainable after that date if the share of the rent allocated to the part upon apportionment was found to exceed Rs. 250 a month.

KUNDAMUL DALIMIA v. W. DYER 281

s. 11, sub-ss. (1), (4) and (5)—Deposit of rent with the Rent Controller—Tender on the re-opening day after the holidays—Inability to pay owing to refusal to accept rent by the cashier in the Rent Controller's Office, effect of—Payment next day, effect of—Breach of terms of the tenancy by removal of fixtures when possession was given up, whether such removal disentitles the tenant to the protection of the Rent Act, during the period of holding over.] The tenants occupied certain premises and agreed to pay rent at Rs. 1,050 for a term of 10 years under a lease, dated the 10th April 1911, commencing from 1st January, 1911. The rent was payable on the 5th of every month. The lease expired on 31st of December 1920 and the tenants continued to remain in possession until 31st January 1923 when they vacated the premises. In July 1920 the landlord had given notice to vacate the premises as the same was required for the purpose of rebuilding, and had refused to accept the rent after December 1920. The tenants, in consequence, deposited Rs. 1,155 a month being the standard rent payable in respect of the premises to the Controller of Rents regularly. Tender of the rent for September 1922 made on the 5th October was refused by the landlord, and the office of the Controller having remained closed on account of holidays from before the 19th October, the tenants sent their clerk to deposit the rent on the 23rd October, the first day since the 19th available for the deposit of rent with the Controller, but as on that day there were many people waiting he was asked to come on the following day to make payment. On the 24th the rent was deposited and the receipt was dated 24th October 1922. The landlord sued for ejectment and mesne profits: Held—That the rent became due on the 5th of the month succeeding that for which it was payable.

CALCUTTA RENT ACT—concl'd;

As the landlord refused to accept the rent, it was the duty of the tenants to deposit the rent within 19th of the month. The deposit made on the 24th October under the circumstances as aforesaid was good payment under the Rent Act. The lease provided that "the lessees should not remove any fixtures or buildings and will at the expiration or other sooner determination of the said term peaceably and quietly surrender and yield up to the lessor the said premises together with all erections, buildings, fixtures and things in good and substantial repair and condition." When the tenants left the premises in January 1923, they removed certain fixtures in breach of the terms of tenancy. Held—That the fact that the Defendants had committed a breach of the covenant when they gave up possession of the premises was not sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the end of December 1920. Held, under the circumstances, that the landlord was not entitled to any mesne profits in respect of the period during which the tenant was in possession. G. M. HAY v. BONOMALI MULLICK 636

s. 15, application for standard rent made by tenant, if becomes inoperative when he ceases to be a tenant—New tenant, if a necessary party to the proceeding—Civil Procedure Code (Act V of 1908), Or. 1, r. 9, dismissal for non-joinder of parties.] A tenant applied for standardisation of his rent, but before the application came on for hearing he was ejected from the premises in pursuance of a decree of the Calcutta Small Cause Court. Subsequently the Rent Controller dismissed the application for fixation of standard rent on the ground that the applicant was no longer a tenant of the premises: Held—That there is nothing in the Act which provides that the application shall become inoperative, although properly made in the first instance, because subsequent to the making of the application but before the rent was standardised, a change of tenant took place. The words "tenant, if any" in sec. 15, cl. (4), indicate that it is possible that when the time comes for the Rent Controller to give notice of his intention under the Act one of the parties may have ceased to be either a landlord or a tenant. The Act does not make it obligatory upon the applicant for standardisation of rent to make all persons interested in the litigation parties to the proceeding except the landlord, and this view finds support from sec. 15, cl. (4) of the Act which provides that the Rent Controller shall duly consider any application received by him from any person interested. The new tenant, if he so chooses, may make an application to the Rent Controller to be heard at the time of the hearing of this case. Further, Or. 1, r. 9, C. P. C., provides against the dismissal of a case for want of proper parties. F. D. BELLOW v. T. ELKE ... 80

CESSION OF TERRITORY by treaty—Act of State—Reservation of proprietary right of subjects, if enforceable in Court by latter—Subsequent recognition of right by new Government, necessity to prove—Onus—Pleadings—Government, if has, to plead “Act of State”—General proclamation to uphold existing rights, if gives subjects right to enforce treaty—Potta and kabuliya, exchange of, if imports conferment of farming or proprietary right—Costs—Arrangement of records, duty of solicitor as to.] When a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. The result, in all cases, is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the High Contracting Parties. *Secretary of State for India v. Bai Rajbai*, L. R. 42 I. A. 229; s. c. 19 C. W. N. 1087 (1915), *Secretary of State for India v. Kamachee Boye Sahaba*, 7 M. J. A. 476 (1839) and *Cooke v. Sprigg*, [1899] A. C. 572, referred to. A general proclamation by the new Government that existing rights would be upheld does not confer on the municipal Courts the right to adjudicate as upon rights which existed before the cession. It can in any case never prevail against exact determinations in individual cases made upon investigation, e.g., in this instance, that the Naik Appellants were not entitled to hereditary rights but might be continued as lease-holders so long as they behaved themselves. Once cession is admitted, the onus is cast on the claimants to show acts of acknowledgment which give them the right they wish to be declared. It is not necessary for the Government to take the plea of Act of State. The mere fact that the document of title held by the Appellants was called a potta and that they executed a kabuliya in similar terms is not conclusive of the question of whether they were mere lease-holders, i.e., farmers of revenue, or were true proprietors paying a jammabundi to the overlord, for the term potta might quite appropriately be used for the instrument fixing such jammabundi. Animadversions by the Judicial Committee on the confusing arrangement of the records, which, had the Appellants been successful, their Lordships would not have hesitated to penalise by disallowing in toto the solicitors' fee for perusing the record. **NAYAK VAJESIN**

CESSION OF TERRITORY—concl.

- GJI JORAVARSINGJI v. SECRETARY OF STATE FOR INDIA** ... 317
- CHAMPERTY AND MAINTENANCE**, law of, if applicable in India—Agreement to charge fruits of litigation with moneys advanced for prosecuting it—Fruits derived from compromise, if bound. See under contract.
- VENKATA SUBHADRAYAMMA JAGAPATI GARU v. POOSAPATI VENKATAPATI RAJU GARU** ... 57
- CHARS**, newly formed—Liability of, to additional assessment—Reg. II of 1819, ss. 3 and 31—Reg. XI of 1825, 4th Rule of Act IX of 1847; Chars formed on beds of rivers, proved to have existed at the time of the Decennial Settlement are liable to be assessed with additional revenue, notwithstanding the fact that the beds were declared at the time to belong to persons as proprietors. The Secretary of State for India in Council v. Maharajah of Burdwan, L. R. 49 Cal. 103; s. c. 26 C. W. N. 619 (Pt. C.) (1921), relied on. **SECRETARY OF STATE FOR INDIA IN COUNCIL v. SARAT SUNDARI DEBI** ... 195
- “—” meaning of—Reformations in situ, if “chur.” See Bengal Tenancy Act, s. 180. **CHANDRA KUMAR AICH v. JIBAN KRISHNA NATH MAHAJAN** ... 290
- CHARGE—suit to declare G. P. Notes charged with debt—Attachment of notes in execution of money decree pending suit—Consent decree declaring charge—Priority of claims.]** A mortgagee A filed a suit on 8th January 1924 against the mortgagor B for a declaration that certain G. P. Notes do stand charged for the repayment of his claim and on 20th March 1924 a consent decree was passed declaring such charge. Prior to this suit C, another creditor of B, had filed a suit on 21st November 1923 for the recovery of certain sum and obtained a decree against B on 7th January 1924 for the sum advanced. In execution of this decree C attached the said G. P. Notes and in pursuance of the order, dated 3rd March 1924, the same were made over to the Sheriff of Calcutta to the credit of this suit. A applied in execution for the sale of the said G. P. Notes by the Registrar and prayed that the sale proceeds be paid first to him in satisfaction of his decree and the balance, if any, be paid to C. Order of the Court was that the application be granted. *Jogendra v. Debendra*, L. R. 26 Cal. 127 (1898), *Sudindra v. Budan*, L. R. 9 Mad. 80 (1885), *Deefholts v. Peters*, L. R. 14 Cal. 631 (1887), and *Thakur Prasad v. Fakirullah*, L. R. 22 I. A. 44; s. c. I. L. R. 17 All. 106 (1894), followed. **JOTINDRA NATH DUTT v. DEBENDRA NATH DUTT** ... 731
- CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI of 1876)**, secs. 2, 3, 10, 12, 13 to 18, 19, 21—Manager, position and powers of, with reference to estate—Whether he is servant or agent of Government—Agreement for lease with Government to which Manager no party, if specifically enforceable—Execution of formal contract when con-

CH. NAG. ENCUM. ESTATES ACT—concl.
 [The Manager appointed under the Chota Nagpur Encumbered Estates Act is alone fully and completely vested in the management of the estate and the vesting in him continues during the tenure of his office. The owner being expressly disabled from making any effective contract with regard to the property, no other officer, whether political or departmental, could occupy the place or enjoy or exercise the rights of the disposal of the estate, the management whereof is vested in the Manager and the Manager alone. The Manager is neither the servant nor the agent of another, be that other either a private intervener or a public or political or departmental officer. The Manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act. Where negotiations carried on between certain persons and the officials of the Government to which the Manager, for the time being was no party terminated in a letter written by the Lieutenant Governor stating that the Government would accept a proposal to grant a lease, provided that an agreement embodying the terms was prepared and executed by the proper officer representing the Court of Wards; but no such agreement was in fact prepared or executed: Held—That the execution of the agreement by the Manager was under the terms of the letter a condition precedent to the formation of a binding contract, and it was more than a condition precedent, since there was no agreement at all to which the person in *titulo deminii*, namely, the Manager, was a party such as could be specifically enforced. *Von Hatzfeldt Wildenburg v. Alexander*, [1912] 1 C.M. 284, referred to. *SETH HUKUM CHAND v. RAJA RAN BAHADUR SINGH* ... 342

CHOUKIDARI CHAKRAN LANDS resumed
 by Government and transferred to Zemindar—Suit by zemindar against putnidar for assessment of fair and equitable rent—Liability of putnidar to pay rent—Non-payment of rent for twelve years, effect of.] The Plaintiff who was the Zemindar sued the putnidar for assessment of fair and equitable rent on certain Choukidari Chakran lands which were resumed by Government and transferred to the Zemindar: Held—That inasmuch as the *kabuliyat* did not show that at the time of the inception of the lease the profit from the Choukidari Chakran lands was included in the assets on which the rent was assessed the Zemindar was entitled to have rent assessed upon these lands. That at the time of the grant the Zemindar had some interest in the lands which he could transfer, to the putnidar and therefore from the inception of the putni tenancy the putnidar was the tenant of those lands and the resumption by Government and transfer to the Zemindar created no new jural relation between the parties. The fact that the putnidar did not pay rent for more than 12 years did

CHOUKIDARI CHAKRAN LANDS—concl.
 not give him a right by adverse possession to hold the land without payment of rent. *PRYAMBADA DEBI v. MONAHAR MUKHOPADHYA* ... 328

CIVIL COURTS ACT (XII of 1887), s. 19—
 Munsif, pecuniary limits of jurisdiction of—Suit for possession and mesne profits properly brought in Munsif's Court and decreed—Civil Procedure Code (Act V of 1908), ss 6 and 15—Or. 20, r. 12, application under, to assess mesne profits *pendente lite* and after decree, if lies in Munsif's Court where they exceed Munsif's pecuniary jurisdiction—Appeal, forum of, where amount assessed exceeds Rs. 5,500. *Per Curiam* (Walmsley, J., dissentiente)—Where a suit is properly brought in the Court of a Munsif for recovery of possession of land, and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction. The value of such a suit for purposes of jurisdiction is the value of the immovable property (plus mesne profits up to the date of the suit where such profits are claimed). If a suit is rightly entertained as within the jurisdiction of the Munsif and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. The forum of appeal is determined by the value of the suit and not by the amount decreed. *Per Walmsley, J.*—Mesne profits *pendente lite* are not to be considered in determining the value of the suit for purposes of jurisdiction. A Munsif, upon an application under Or. 20, r. 12 of the Civil Procedure Code, by a person who has recovered a decree for possession in his Court, may pass a decree for mesne profits *pendente lite* up to the limits of his pecuniary jurisdiction. Such a person forakes his right to ask for an enquiry under r. 12 (1) (c) of Or. 20 and the final decree under r. 12 (2), if the amount claimed by him makes a resort to a Court of superior jurisdiction necessary, in which case he must institute a fresh suit subject to the ordinary law of limitation. *BAIDYADHAR BACHAR v. MANINDRO NATH DAS* ... 869

CIVIL PROCEDURE CODE (Act V of 1908), s. 11, Explan. IV—Res judicata: constructive—Ex parte decree for rent, if and when operates as res judicata in regard to pleas which ought to have been taken—Separate tenancy, plea of, if maintainable in future suit.] A joint ex parte decree for the entire rent of a tenure against all the tenants operates as res judicata in a subsequent suit against them for such a joint decree, disentitling any one of them to object to the passing of a joint decree and estops him from setting up the case of a separate tenancy in respect of his own share in the tenure, on the ground that this question of separate tenancy should have been raised in defence in the previous suit, within the

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meaning of Exp. IV, sec. 11, Civil Procedure Code, whereby the decree in the said previous suit could have been defeated, varied or affected. *Madhusudan Shaha Mundal v. Brae*, I. L. R. 16 Cal. 300 (F. B.) (1889) and *Woomesh Chandra Maitra v. Barada Das Maitra*, I. L. R. 28 Cal. 17 (1900), explained. There can be no estoppel against a statute, and what is illegal cannot be legalised by operation of the doctrine of *res judicata*. *Kailash Mondul v. Baroda Sundari Dasi*, I. L. R. 24 Cal. 711: s. c. 1 C. W. N. 565 (1897), not approved. *Jamadar Singh v. Serazuddin Ahmad Chowdhury*, I. L. R. 35 Cal. 979: s. c. 12 C. W. N. 882 (1908), approved. The decision in a previous rent suit, whether *ex parte* or contested, operates as *res judicata* in a subsequent rent suit even for a different period, if it decides any question which arises in the suit or omits to decide a question which ought to have been decided. If objection were taken by a party. *Hiranmoy Kumar Shaha v. Ramjan Ali Dewan*, 20 C. W. N. 48 (1915), referred to. SAROJINI DEBYA LAKSHI PRIYA GUHA

Or. 23, rr. 1 and 2—Suit by remote reversioner to declare alienation by Hindu widow invalid—Case of collusion between immediate reversioner and widow given up and no case of title by family custom to sue made till death of widow pending suit—Amendment to change suit to one for recovery of possession upon title by family custom refused—Dismissal of suit by Court with liberty given to Plaintiff to bring fresh suit for possession—Order, if valid—Fresh suit for possession on basis of family custom, if licit—*Res judicata*—Plaintiffs who were remote reversioners expectant on the death of a Hindu widow, one G being the immediate reversioner according to law, sued her grandson J for a declaration of the invalidity of a deed of gift by the widow to the latter and in reply to J's defence that G and not the Plaintiffs had the right to sue maintained that G was colluding with the widow. They did not in their pleadings claim to be by family custom equal in degree with G, until the widow having died in the course of the suit, they applied for amendment of their plaint praying for recovery of possession of a certain share on the additional averment that according to a family custom they and G were equal reversionary heirs. The amendment was refused and on the admission of the Plaintiffs' Counsel that apart from custom their suit must fail, the Court dismissed the suit, but in the course of the judgment the Court stated. "The death of the lady has given the Plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession," though there was no application by the Plaintiffs to withdraw the suit and the suit was dismissed and not withdrawn: Held—That to establish their title to impeach the widow's gift, the Plaintiffs might and ought to have set

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sue and impeach the family custom, since they did not rely on collusion between the widow and G, and a subsequent suit by them to recover possession on the strength of the alleged family custom was barred by Expl. IV to sec. 11 of the Civil Procedure Code. That the previous suit having been dismissed by the Judge he had no power to give leave to institute a fresh suit on the same matter. *Doorga Pershad Singh v. Doorga Kunwari*, I. L. R. 5 I. A. 149: s. c. 1 L. R. 4 Cal. 190 (1878). *Zemindar of Pittapuram v. Proprietors of the Mulla of Kolanka*, L. R. 5 I. A. 206: s. c. 1 L. R. 2 Mad. 23 (1878). *Mussummat Chand Kour v. Parbat Singh*, I. L. R. 15 I. A. 156: s. c. 1 J. R. 16 Cal. 98 (1888). and *Kailash Mondul v. Baroda Sundari Dasi*, I. L. R. 24 Cal. 711 (1897), considered and observation of Banerjee, J., in *Kailash Mondul v. Baroda Sundari Dasi*, I. L. R. 24 Cal. 711 (1897), commented in. FATEH SINGH v. JAGANNATH BAKHSI SINGH

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s. 11—Second suit by same Plaintiff claiming under different title—Previous decision upheld in the High Court on ground of limitation, but not on question of title—Declaration of title refused in a suit for possession which was dismissed as time-barred—Decision, if bars further enquiry into title—Sec. 11, Expl. V—Estoppel—Change of position. A previous suit for recovery of a leasehold interest, claimed by the Plaintiffs as heirs of their father, was dismissed by the High Court as barred by limitation, in view of the finding of the lower Appellate Court that the dispossession took place more than 12 years before the suit. The present suit for recovery of the proprietary interest claimed by the Plaintiffs as reversionary heirs of the last full owners on the death of two Hindu widows was resisted on the ground of *res judicata* as also of estoppel. Held—That the suit was not barred by the principle of *res judicata*, because (i) the Plaintiffs were not litigating under the same title, and (ii) any decision of the lower Appellate Court in the previous suit, as to the title of the widows by adverse possession, could not be conclusive in the present suit inasmuch as the appeal to the High Court destroyed the finality of such decision; and the final judgment in the case, having proceeded on the ground of limitation only, had the effect of leaving all other questions open between the parties. *Sheosagar Singh v. Sitaram Singh*, I. L. R. 24 Cal. 616: s. c. 1 C. W. N. 297 (P. C.) (1897), and *Chunder Coomar Mitter v. Sib Sundari Dasse*, I. L. R. 8 Cal. 631 (1882), followed. *Gangabishen Bhugut v. Roghoonath Ojha*, I. L. R. 7 Cal. 381 (1881). *Ghurphakni v. Purnmeshar Doyal Dubey*, 6 C. L. J. 653 (1907). *Abdulla Ashgar Ali Khan v. Ganesh Das*, I. L. R. 45 Cal. 442: s. c. 22 C. W. N. 121 (P. C.) (1917) and *Nilvaru v. Nilvaru*, I. L. R. 8 Bom. 110 (1881), referred to. Held also—That the refusal of the prayer, in the previous suit, for a declaration that the Defen-

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debts had no title, was no bar, under sec. 11, Exh. V of the Civil Procedure Code, to the present claim inasmuch as the declaration sought was not one under sec. 43 of the Specific Relief Act, but only leading up to the main relief, namely, possession. *Walihan v. Jogeswar Narayan*, I. L. R. 35 Cal. 189; s. c. 12 C. W. N. 227 (P. C.) (1907), referred to. Held further—That there was no estoppel, because as regards the inconsistent statements of the Plaintiffs themselves, there had been no change in the position of the Defendants by reason thereof, nor were the Plaintiffs bound by the statements of their father through whom they did not claim the property in suit. *Bahadur Singh v. Mohar Singh*, I. R. 29 I. A. 1; s. c. I. L. R. 24 All. 94; C. W. N. 169 (1901) and *Rangaswami Gounden v. Nachiappa Gounden*, I. L. R. 42 Mad 523; s. c. 23 C. W. N. 777 (P. C.) (1918), followed. **NRIPENDRA NATH BHOWMIK v. BASANTA KUMAR LAHIRI** ... 861

[See Res judicata. **MAHARAJA DHIRAJ SIR RAMESHWAR SINGH v. HITENDRA SINGH** ... 413

ss. 73, 63, Or. 21, rr. 84, 85—Rateable distribution, application for, made before balance of sale proceeds deposited, if made before "assets received" by Court—Sales in lots—Balance deposited for some before and others after application—Applicants for execution in inferior Courts, if entitled to participate in assets without application for execution in superior Court.] Until the sale becomes a concluded transaction by deposit of the balance of the purchase money under Or. 21, r. 85 of the Civil Procedure Code, there are no assets in the hands of the Court within the meaning of sec. 73 of the Code, and a decree-holder who has applied to the Court for execution before the balance is paid up is entitled to participate in the sale proceeds under that section. Where, therefore, properties being sold in lots, the balance of the purchase money was paid in Court as regards some of the lots before but as regards the others after such application, the applicant would be entitled to participate in the sale proceeds of the latter but not of the former lots. *Ramjas Agarwala v. Guru Charan Sen*, 14 C. W. N. 396 (1909) and *Maharajah of Burdwan v. Apurba Krishna Ray*, 15 C. W. N. 872 (1911), referred to. Holders of decrees of inferior Courts, whereof execution has been stopped by the superior Court under sec. 63 of the Code, are entitled to apply to the latter Court for rateable distribution under sec. 63 read with sec. 73 of the Code without any further application. *Clark v. Alexander*, I. L. R. 21 Cal. 200 (1893), *Bejay Singh Dudhuria v. Hukum Chand*, I. L. R. 29 Cal. 773 (1902), *Har Bhagat v. Ananta Ram*, 2 C. W. N. 128 (1897), *Ramjas Agarwala v. Guru Charan Sen*, 14 C. W. N. 396 (1909), *Krishna Kumar Ghosh v. Pasupati Baharjee*, 23 C. W. N. 740 (1904) and *Mondal & Co. v.*

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Fazul Ellanie, I. L. R. 41 Cal. 825 (1914), referred to. **GIRINDRA NATH RAY v. KEDAR NATH BIDYANTA** ... 575

s. 92—"Interest," which relates must possess—Descendants through female or founder, it have "interest" to demand administration or chatram—User of chatram, if necessary qualification—Appointment or manager of property treated as private property, if appointment of trustee—Gift to dharmam—Uncertainty.] The consent of the Advocate-General to the institution of the suit by the Plaintiffs would not bring the suit within sec. 92 of the Civil Procedure Code, unless the Plaintiffs had an interest in the trust. The bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him no such interest. To hold otherwise would defeat the object of the section, which is to prevent people interfering by virtue of it in the administration of charitable trusts merely in the interest of others and without any real interest of their own. But the descendant, although in the female line of the founder of a chatram have an interest in the proper administration of the trust sufficient to enable them to maintain a suit under sec. 92, although they themselves may never find it necessary to use the chatram as a rest house or to obtain food there. *Ramachandra Aiyar v. Parameswaran Unni*, I. L. R. 42 Mad 360 (1918), referred to. Where V was appointed by S manager of properties which though in fact trust properties were alleged by S to belong to himself as proprietor: Held—That this did not amount to appointing V as trustee of the trust properties. *Boidyo Gauranga Sahu v. Suderi Mata*, I. L. R. 40 Mad. 612 (F. B.) (1916), referred to. *Jan Ali v. Ram Nath Mundul*, I. L. R. 8 Cal. 32 (1882), doubted. A bequest, not to dharmam generally, but to a specifically indicated existing charity, is not void for uncertainty. *Runchordas Vandrawandas v. Parvatibhai*, I. L. R. 26 I. A. 71; s. c. 3 C. W. N. 621 (1899), distinguished. **VAIDYANATHA AYYAR v. K. SWAMINATHA** ... 154

s. 100—Second appeal—Issue of law, construction of documents, when—Misdirection in point of law.] Where the question to be decided is one of fact, it does not involve an issue of law merely because documents, which were not instruments of title or contracts or statutes or otherwise the direct foundation of rights but were really historical material, have to be construed for the purpose. There is no ground for a second appeal upon a question of fact unless it can be shown that the lower Appellate Court misdirected itself in point of law in dealing with this question upon the evidence. **THE MIDNAPUR ZAMINDARY CO. v. UMA CHARAN MANDAL** ... 331

s. 105—Order setting aside abatement and allowing substitution, if may be questioned in an appeal from the decree—Affecting deci-

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sion of case," meaning of.] The Code of Civil Procedure does not allow an appeal from an order setting aside an statement and allowing substitution, and such an order cannot be challenged in an appeal from the final decree. Such an order is not one which affects the decision of the case with reference to its merits within the meaning of sec. 105, C. P. C. The fact that such an order was made in the same judgment as the decree in the suit makes no difference. **SHYAMA BIFI v. MADHU SUDAN DAS MAHANTA**

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s. 109, cls. (a) and (c)—Leave to appeal to Privy Council.—“Decree or final order passed on appeal”—Order of remand—Interlocutory order—Or. 23, r. 3, recording of compromise under Preliminary decree—Appeal to High Court against order recording compromise and against preliminary decree—Order by High Court holding compromise not made out and remanding case to lower Court for trial, if interlocutory order.] Where the trial Court recorded a compromise and passed a preliminary decree in accordance therewith and on appeal, a Division Bench of the High Court, holding that the compromise had not been made out set aside the order recording the compromise and the decree based thereon, and remanded the case to the lower Court for trial, and against this decision of the Division Bench application was made for leave to appeal to His Majesty in Council: **Held**—That the order of the Division Bench remanding the case to the trial Court for trial must be regarded as an interlocutory order and it was not a “decree” or “final order” passed on appeal within sec. 109, cl. (a) of the Code of Civil Procedure. **Alexander John Forbes v. Ammeeronissa Begum**, 10 Moo. I. A. 340 (1865) and **Maharaja Maheshur Singh v. The Bengal Government**, 7 Moo. I. A. 283 (1859) referred to **Held further**—That this was not a case in which the High Court should grant a certificate under cl. (c) of sec. 109 of the Code of Civil Procedure. **Per Rankin, J.**—Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court. **Secretary of State for India in Council v. British India Steam Navigation Company**, 13 C. L. J. 90 (1911), referred to. The mere dismissal of an application for recording an adjustment coupled with an order that it is therefore necessary for the case to be tried in the ordinary way does not stand in such a relation to the proceeding before the Court as to entitle it to be regarded as something which conclusively adjudicates upon the rights of the parties which were really the subject-matter of the litigation. It merely negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of. The contention that the order must be final because it set aside a decree cannot be sustained. **Soubendra Nath Mitter v. M. Tarubala Dass** ... 832

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Or. 1, r. 3, Or. 24, r. 4—Mortgage suit—Joinder as Defendant of alleged benamdar of mortgagor in whose name property was purchased—Joinder, if competent and proper—Party claiming title adversely to mortgagor, if and when may be joined—Cross-objections, when lie—Or. 41, r. 22—Mortgage by deposit of title deeds—Letter of deposit not registered—Mortgage, if valid—Transfer of Property Act (IV of 1882), s. 59; **Per Sanderson, C. J.**—Speaking generally; it may be said that a suit to enforce a mortgage, in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of mortgagor are sought to be investigated, is open to objection on the ground of misjoinder and inconvenience. The question, however, is not one of jurisdiction, and at most the misjoinder is an irregularity or inconvenience. **Per Rankin, J.**—The correct view in the matter is to ask whether the case does or does not come under Or. 1, r. 3 of the Civil Procedure Code. If it comes under the rule, it is open to the Defendants to ask for a separate trial as a point not of law but of convenience. There is need for a high degree of caution before permitting questions of paramount title to be investigated in a mortgage suit. Both as to competence and convenience there will generally be much to consider. Where the interest of a Respondent was really adverse to the Appellant's though the latter unnecessarily in his memorandum of appeal took, as against the other Respondents, grounds of appeal which were open not to the Appellant but to the first-named Respondent: **Held, per Rankin, J.**—That the first-named Respondent can take the same grounds as cross-objection in the appeal, this not being a case of a purely lateral cross-objection between the Respondents in which the Appellant was not interested. **Per Curiam.**—A letter which recorded a previously completed transaction of mortgage by deposit of title deeds did not require to be registered. **Subramonian v. Lutchman, I. L. R. 50 Cal. 338; s. c. 28 C. W. N. 1 (P. C.) (1922), applied BHUBAN MOHAN GHOSH v. CO-OPERATIVE HINDUSTHAN BANK**

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Or. 6, r. 16, exercise of jurisdiction under—Admissibility of contemporaneous oral evidence not to be decided on an application to strike out—Evidence Act (I of 1872), s. 82, proviso (3).] The Court should not, as a rule, decide an important point as to the relevancy of matters on an application to strike out. Whether an oral agreement contemporaneous with a written document is admissible in evidence will depend to some extent as to how the case is presented at the trial. The jurisdiction of the Court under Or. 6, r. 16 should be exercised with great care and caution. A written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations in it are such as cannot afford a defence to the

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action and which, if not struck out, would unnecessarily delay the suit. **ANDERSON KIRKWOOD TENNENT v. WALTER MITCHELL** ... 670

Or. VI, r. 17—

Suit by consignee against Agent of Railway Company for loss of goods consigned—Suit, if may be ordered to proceed against Company—Misdescription or suit against wrong party—Suit against wrong person—Substitution of proper party, after limitation, if should be allowed—Limitation Act (IX of 1908), s. 22—Remand order, appeal against—Civil Procedure Code (Act V of 1908), Or. XLI, r. 23, Or. 43, r. 2 (n).]

In a suit by a consignee for the value of goods lost brought against the "Agent Sahep Bahadur" of a Railway Company to which the same had been made over for carriage, the Agent for the time being who appeared objected inter alia that the suit as framed, viz., against him, did not lie, and that it was also barred by reason of non-compliance with secs. 75 and 77 of the Railways Act. The trial Court upheld all three objections in bar and dismissed the suit without determining the amount of the damages suffered. On appeal, the lower Appellate Court held that

action of the Plaintiff was to sue the Railway Company and directed the plaint to be amended and the suit to proceed in the trial Court against the Railway Company. It also passed an order for refund to the Appellant of the court-fee paid on the memorandum of appeal: Held—That the trial Court having dismissed the suit on preliminary points, the order of remand came within Or. 41, r. 23, C. P. C. and an appeal lay against the order under Or. 43, r. 1 (n), C. P. C. *Semle, per Suhrawardy, J.*—The lower Appellate Court was not justified in remitting the suit without determining the other two preliminary questions on which the suit had been dismissed: Held—That it was a case not of misdescription but of the substitution of one party for another who had been wrongly sued, and the amendment, having been applied for at a time when the suit, if instituted, would have been barred by limitation should not have been granted. *Ramdas Sein v. Mr. Cecil Stephenson*, 10 W. R. 366 (1868), *Nubeen Chunder Pal v. Mr. Cecil Stephenson*, 15 W. R. 534 (1871), *India General Steam Navigation and Railway Company, Limited v. Lal Mohan Shaha*, I. L. R. 43 Cal. 441 (1915), referred to. *East Indian Railway Company v. Ram Lakh Ram*, I. L. R. 3 Pat. 230; [1924] Pat. 9 (1923), approved. The *Saraspur Manufacturing Company, Ltd. v. B. B. and C. I. Railway Company*, I. L. R. 47 Bom. 785 (1923), distinguished. **AGENT, BENGAL NAGPUR RAILWAY v. BEHAR LAL DUTTA** ... 614

Or. 9, r. 8—S. 115—Suit if may be dismissed, after decree, for default—Partition suit, preliminary decree—Date fixed for proceeding with enquiries ordered

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in decree—Default by Plaintiff—Proper order to make in the case.] A preliminary decree in a partition suit ordered partition of certain properties in definite shares and certain other enquiries. The trial Court thereafter fixed a day for hearing the parties with reference to further proceedings, when the Defendants or some of them were represented though they took no steps, but neither the Plaintiff nor his pleader appeared. The Court thereupon dismissed the suit for want of further prosecution purporting to act under Or. 17, r. 2 read with Or. 9, r. 8 of the Civil Procedure Code. Held—That the order did not come under Or. 17, r. 2 of the Code and was without jurisdiction. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. After decree, it is open to any party to a suit, to whose interest it is that further proceedings be taken to initiate the supplementary proceedings in order to have the decree enforced though in the ordinary case it is the Plaintiff who moves. The proper order for the Court in the circumstances was to make an order adjourning the proceedings sine die with liberty to the Plaintiff to restore the suit to the list on payment of all costs and court-fees (if any) thrown away. The order was properly set aside by the High Court under sec. 115 of the Civil Procedure Code. **LACHMI NARAIN MARAWARY v. BALMAKUND MARAWARY** ... 391

Or. 21, r. 66—

Sec. 47—Objection by judgment-debtor as to incorrect statement of boundaries in sale proclamation—Order on decree-holder to furnish correct boundaries failing which execution case to be dismissed—Order, if appealable under sec. 47.] In execution of a decree for rent the decree-holder applied for the sale of the land. On notice under Or. 21, r. 66, C. P. C., the judgment-debtor put in an objection on the ground that the boundaries of the land were not correctly stated in the sale proclamation. The Munsif decided in favour of the judgment-debtor and ordered the decree-holder to furnish a true description of the land within a specified time failing which the execution case was to be dismissed. Held—That the Munsif's order amounted to a judicial determination of the rights of the parties and was a final order under sec. 47, C. P. C., and was appealable. **DEVENDRA NATH BASU v. KAILASH CHANDRA KALU** ... 550

Or. 32, rr. 3, 16,

sec. 85—Ruling Chief, Respondent in appeal arising in connection with his zemindary in British India, death of, pending appeal—Succession to State of heir who is over 15 but under 16 years of age—Application for substitution—Heir, if minor—Indian Majority Act (IX of 1875)—Hindu law. Dayabhaga School, age of majority under—Guardian ad litem, if should be appointed—Notice of appeal, whom to be served on.] A Ruling Chief of a Feudatory State who was Respondent in an appeal pending in

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the High Court in a case which had arisen in connection with his zemindary within British India died leaving as his heir the present Ruling Chief who succeeded to the State of his father with the approval of the British Government. The latter had completed his 15th but not his 16th year. On an application for his substitution in the place of the deceased Chief on the record of the appeal. **Held**—That the Ruling Chief not being domiciled in British India, the Indian Majority Act did not apply to him and he was not a minor within the meaning of Or. 32 of the Civil Procedure Code. That he had attained majority under the Dayabhaga law by which he was governed. That it was therefore not necessary to appoint a guardian ad litem to represent him in the appeal. **Ordered**—That notice of the appeal be served on the Ruling Chief through the Vice-President of the Council of Administration constituted for the administration of the State, who had been appointed Manager of the Chief's zemindaries in British India and agent of the Chief under sec. 85 of the Civil Procedure Code. **RAMESH CHANDRA DAS v. MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR**

Or. 34, r. 1, non-compliance with the provisions of, effect of—Or. 1, r. 9, C. P. C., applicability of, in mortgage suits—Suit to enforce a mortgage—Omission of a debtor from suit—Decree for proportionate share—Splitting up of mortgage debt.] Non-compliance with the provisions of Or. 34, r. 1, Civil Procedure Code is not necessarily fatal to a suit to enforce a mortgage. The provisions of Or. 1, r. 9 is applicable to a mortgage suit as well as to any other suit. **Har Chandra Roy v. Mahomed Husein**, 25 C. W. N. 594 (1920), relied on **Basiruddin Biswas v. Debendro Nath Biswas**, 12 C. W. N. 911 (1908), **Shaha Saheb v. Sadashiv**, I. L. R. 43 Bom. 575 (1918), **Sheetahal Ojha v. Modan Rai**, I. L. R. 28 All. 174 (F. B.) (1905) and **Sanwal Singh v. Ganesh Lal**, I. L. R. 85 All. 441 (1913), referred to. Where a person having a share in the equity of redemption has not been made a Defendant, there should be a decree proportionate to the shares of the persons actually made Defendants. **Hari Kissen Bhagat v. Veliat Hossein**, I. L. R. 30 Cal. 755; s. c. 7 C. W. N. 723 (1903), followed. **Sanwal Singh v. Ganesh Lal**, I. L. R. 35 All. 441 (1913), dissented from on this point. **KHERODAMOYI DASI v. HABIB SHAHA**

Or. 34, rr. 4 and 5, Or. 9, rr. 6 and 13; Or. 43, r. 1, cls. (c) and (d)—Appeal from interlocutory orders, preferred after the passing of the final decree, if maintainable.] The Appellant J applied under Or. 9, r. 13 of the Code of 1908 for setting aside an ex parte preliminary mortgage decree passed against him under Or. 34, r. 4 and this said application having been dismissed for default on 16th February 1921, the date on which the said pre-

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liminary mortgage decree was made final under Or. 34, r. 5, the Appellant made an application under Or. 9, r. 9 on 25th February 1921 for setting aside the order dismissing his application under Or. 9, r. 13 for default. This latter application was dismissed on 7th April 1921. The Appellant then preferred an appeal to the High Court on 15th May 1921 against both the interlocutory orders, dated respectively the 16th February 1921 and 7th April 1921. **Held**—That the appeal from the interlocutory orders made under Or. 9, r. 13 and Or. 9, r. 9 respectively preferred after the passing of the final decree in the case under Or. 34, r. 5 was not maintainable. The right of appeal against interlocutory orders ceases with the disposal of the suit. **Madhusudan Sen v. Kamini Kanta Sen**, I. L. R. 32 Cal. 1023; s. c. 9 C. W. N. 895 (F. B.) (1905), and **Nanibala Dasi v. Ichhamoyee Dasi**, 40 C. L. J. 291 (1923), followed and referred to. **JOGENDRA NARAYAN DAS v. SATYENDRA CHANDRA GHOSH MOULIK**

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Or. 40, r. 2—Receiver, appointment of—Mahomedan law—Matwali of a wakf estate—Claimant for the office—Right to apply for such appointment—Prima facie title, to be proved—Expediency of appointing a Receiver, where no party in possession.] An order appointing a Receiver will not be made ordinarily at the instance of a Plaintiff having merely a shadowy claim where it has the effect of depriving a Defendant of de facto possession, since that might cause irreparable wrong. It is sufficient if a prima facie title to the property over which the Receiver is sought to be appointed is made out. Where property is shown to be in medio, i.e., in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble and as no one seems to be in actual lawful enjoyment of the property, no harm can be done to any one by taking it and preserving it for the benefit of the litigant who may prove successful. **ALKAMA BIBI v. SYED ISTAK HOSAIN**

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Or. 43, r. 1 (m)—Suit for accounts—Preliminary decree, by consent, referring final decision to arbitrators—Award, remitted for reconsideration—Award set aside, because of arbitrators' default—Order, if one refusing to record compromise—Appeal.] Where in a suit for accounts, a preliminary decree was passed leaving the final accounting to the decision of certain persons named and the said persons made an award which was set aside by the Court on the failure of the arbitrators to reconsider it: **Held**—That there was an intervention on the part of the Court at the instance of the parties by which the Court referred the matter to arbitration. Therefore the matter came within the second schedule of the Code of Civil Procedure, and no appeal lay against the order of

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the Court setting aside the award; under Or. 43, r. 1 (m), as against an order refusing to record a compromise. **MUNSHI MASIHUL AZAM v. GOLZAR AHAM-MAD MIA** ... 795

Or. XLVI, r. 1—Reference to High Court, if can be made by Rent Controller of Calcutta; The Rent Controller of Calcutta is not competent to make a Reference to the High Court under Or. XLVI, r. 1 of the Code of Civil Procedure. **D. TANGRED v. D. N. MULLIK** ... 521

Or. 47, r. 1—Review—Error apparent on the face of the record. See Review. **BRINDABON CHANDRA GHOSH v. DAMODAR PRASAD PANDAY** ... 148

Sch. II, paras. 1, 15, 16—Execution proceedings, arbitration in—Validity—Objection that proceeding ultra vires overruled by Court—Order, if conclusive; The Second Schedule of the Code of Civil Procedure does not apply to execution proceedings. Where a judgment-debtor having claimed to have satisfied the decree by payment out of Court, the executing Court before which the question was raised with the consent of the parties, referred the question to arbitration which resulted in an award: **Held**—That the reference to arbitration was without jurisdiction and ultra vires of the executing Court, and the award in consequence was illegal and unenforceable. Paras. 15 and 16 of Sch. II of the Code presuppose a valid reference under para. 1 of the Schedule. The order of the Court overruling the objection as to jurisdiction was therefore not conclusive under those paragraphs. **T. WANG v. SONA WANGDI** ... 886

COMPANIES ACT, INDIAN (VII of 1913).

Application under Act relating to Companies doing business in the mofussil to be made in the Original Side of the High Court; Applications under the Indian Companies Act relating to Companies doing business in the mofussil are to be made in the Original Side of the High Court. **THE JACADISHPORE TEA CO., LD MESSRS McLEOD & CO.** ... 404

s. 12—Application for alteration of Memorandum of Association, if lies in the Appellate Side of the High Court; An application under sec. 12 of the Companies Act for the alteration of the Memorandum of Association of a Company must be made in the Original Side of the High Court. **THE MOHINI MILLS v. SUSOMA DEBI** ... 403

s. 89—Hundi, endorsed by Managing Agents of Company, when binds Company—Negotiable Instruments Act (XXVI of 1881), ss. 26, 27, 28—Proper test—Endorsement as agent of Company—Words, whether decorative and descriptive; Where Mitter and Sons who were Managing Agents of the Lister Antiseptic Dressing Co., Ltd., endorsed certain hundis drawn in their favour to the Plaintiffs in the following manner: "Mitter

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and Sons and Mitter and Sons, Managing Agents, Lister Antiseptic Co., Ltd.; **Held**—That the endorsement did not bind the Company, as by it the responsibility of the Company was not made plain and could not be instantly recognised as the document passed from hand to hand. The test laid down in **Sadasuk Janki Das v. Maharaja Sir Kishan Pershad**, L.R. 16 I. A. 36; s. c. I. L. R. 46 Cal. 663; 23 C. W. N. 937 (1918), was not satisfied where one person might upon a consideration of the endorsement suppose that the responsibility of the Company was intended to be involved whilst another might come to the opposite conclusion. **SREELAL MANGITULAL v. THE LISTER ANTISEPTIC DRESSING CO., LD** ... 828.

s. 171—Original Side Rules under Companies Act, Rule 35—Winding up of Company by Court—Pending suits in other Courts to enforce mortgage claims—Sale of properties by winding up Court with consent of mortgagee, if a ground for re-calling leave to continue his suit—Stay of suits in other Courts and inquiry of all claims by winding up Court, if may be ordered by latter Court; An order to wind up a Company having been made by the High Court on its Original Side on the 4th June 1923, orders were made by the said Court on the applications of the Plaintiffs in two suits brought by them in the Court of Unao to enforce their several claims as mortgagees to continue those suits on the 13th August 1923 and 21st November 1923, respectively. Meanwhile on the 6th August 1923 the properties of the Company (over which mortgagee rights were being claimed in the suits) were at the instance of the Plaintiffs of one of the suits ordered to be sold by the winding up Court and were sold in September 1923, the sale-proceeds being kept in the custody of the Imperial Bank. On the 5th February 1924, a Defendant in both the said suits moved the High Court for an order for staying the suits in the Unao Court and for an enquiry into the question of the priorities of the several claims against the Company by the High Court in the matter of the liquidation of the Company, and the Court having ordered accordingly: **Held** (on appeals by the Plaintiffs in the Unao Court suits)—That the order for sale was without prejudice to the rights of those who claimed to be secured creditors and without prejudice to such proceedings as the secured creditors might ordinarily be entitled to take, irrespective of the winding up Court, for the purpose of enforcing their securities. That the leave previously given to the Appellants to enforce their rights by means of suits should not have been recalled, the position having remained the same, the sale by the winding up Court notwithstanding. That in **Re Pacaya Rubber and Produce Company, Limited**, [1913] 1 Ch. 213, was no authority for the order of the Unao Court staying the suits in the Unao Court and

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directing enquiry into the question of priorities by the winding up Court. **SIR HUKUMCHAND KASLIWALA V. RADHA-KISSEN CHAMARIA** ... 715

COMPROMISE, order recording, followed by decree—**Order,** if may be appealed from after decree passed—**Appeal against decree.** [An appeal was filed, only against the order recording a compromise or a partial settlement of a suit under Or. 23, r. 3, C. P. C. although there was a decree in pursuance of the order: **Held**—That the appeal was incompetent in that a decree having been passed, before the appeal was filed, an appeal lay from the decree and not from the order which was superseded by the decree. **THE BENGAL COAL COMPANY V. APCAR COLLIERIES, LTD.** ... 928

DECREE—Condition that Plaintiff should pay a certain amount within given time to recover possession—**Payment made in Court, if sufficient—Right of mortgagee or vendee of Plaintiff to pay—Payment by mortgagee, withdrawn to defeat right of vendee from mortgagor—Condition, if fails and how it may be made good.** [By a compromise decree Plaintiffs were to have six months to pay a certain amount to Defendant and if payment was made within that time Plaintiffs were to recover possession, otherwise the suit was to stand dismissed: **Held**—That though payment might have been made to the Defendant in person, the condition was equally satisfied by payment in Court which in the circumstances was the appropriate mode of satisfying the condition. That a mortgagee from the Plaintiffs had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless. The deposit in this case made by the mortgagee within the allotted time was withdrawn by him with the object of defeating the claims of one E under a contract of sale (which was specifically enforced) made by the mortgagor in his favour. **Held**—That the benefit of the deposit necessarily inured to all parties having an interest in the condition being performed. But the deposit having been withdrawn by the mortgagee, the only way to do justice between the parties was to allow E to make the deposit, such deposit to be regarded as made within time. **Esmail Allarakhia v. Dattatraya Ram Chandra** I. L. R. 45 Bom. 967 (1920), affirmed. **MAHOMED RAHIMTULLA HAJI JOOSAB V. ESMAIL, ALIARAKHIA** ... 584

CONTEMPT OF COURT—Process-server insulted—Insult and maltreatment before service, if contempt of Court—Good service—Apology. [A process-server was insulted in most filthy language, caught by his throat and severely pushed out of the room by the Plaintiff while effecting service of a notice; service was subsequently effected by him by affixing a copy on the outer door: **Held**—That when a process-server

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in execution of his duty has been abused and assaulted, it is a contempt of Court, as it is an attempt to obstruct or rudely interfere with the administration of justice. "Those who have duties to discharge pursuant to the orders of Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders." "The test is, did the person in question abuse or maltreat the serving clerk while he was engaged in the execution of his duty." **A. H. SKONE V. V. M. BASON** ... 766

CONTRACTS, validity or—Agreement: to charge fruits or litigation with moneys, advanced for prosecuting it—Fruits derived from compromise, if bound—**Champerly and maintenance, law of, if applicable in India—Money borrowed by trustee or beneficiary with trustee's concurrence to prosecute suit to preserve property—Lender's lien on same—Agreement, if relates to existing or non-existing property—Subsisting agreement, if binds property not existing at its date when it comes into existence—Contract, when terminates, upon breach—Ambiguous contract, construction of—Reference to surrounding circumstances.** [R claimed to be the owner in absolute vested interest of a zemindari, subject to the life interest of C. C having set up title as adopted son of the former owner—which if established would exclude R—R instituted a suit for establishment of his claim against C, but being in want of money to finance the litigation settled the property in suit in trust on P in favour of himself and two other beneficiaries with authority to manage the property and conduct litigations and manage them in such a way as he might think fit for the preservation of the properties. R and P with the concurrence of the other beneficiaries subsequently entered into an agreement with the Rajah of T, under which the Rajah offered to advance money for the prosecution of the suit on terms and conditions agreed to by the former, of which the following are material:—(a) We shall not compromise with the Defendant or file *razinama* or withdrawal without your consent. (b) It is agreed that if Mr. K. A., Vakil, advises us that it would be better for us to compromise we should agree to it and compromise or withdraw the suit. (c) Moreover, out of the moveable and immovable properties that may be obtained by such compromise, etc., we shall pay to you the principal money advanced by you with interest at Rs. 1 per cent. per mensem from the respective dates." After about Rs. 98,000 had been so advanced by the Rajah, R failed to furnish accounts and vouchers demanded by the Rajah under the terms of the agreement, whereupon the Rajah without repudiating the agreement (as he might have done) stopped advancing further sums.

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R. treated the agreement as terminated and subsequently compromised the suit, in result of which he and his co-beneficiaries received 2½ lacs of rupees. Held—That the agreement was a subsisting one, since a party to a contract cannot put an end to it by committing a breach of it, the other party not having repudiated it as he might have done. That the agreement was perfectly legal, being one by the Plaintiffs to the suit to assign to the Rajah parts of the fruits they might acquire in an action at law and the law of champerty or maintenance, not being applicable in India. That there is no distinction on this point between the fruits of an action which the Plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour. *Glegg v. Bromley*, [1912] 3 K. B. 479, referred to. That the agreement related to existing and not non-existing things and was entirely different in its nature and character from one assigning a mere expectancy. That even if the money given to the Plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence at the date of the compromise decree, the agreement being a subsisting one attached to the things so coming into existence subsequently. That upon a true construction of the agreement, the consent of the Rajah, or the Vakil was a condition precedent only when it was possible for them to give it and not when that became impossible, and the fact that in the circumstances the Rajah did not consent to the compromise did not prevent the agreement from attaching to the money received under it. In the construction of written or printed documents, it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. Regarding the provisions of the trust deed, held, that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it or some of it to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, and in the event of the suit being successful would have been entitled to a lien on the property gained for the sum advanced. If the trustee not having money of his own available, borrowed money from a third party for the said purposes, and actually used it to promote those purposes, then, in case the litigations were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. Also, if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit from a third party for the above purposes and so applied it, then, in the event of the

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litigation being successful, the person who advanced the money would be equally entitled, standing in the shoes of the settlor, to a lien on the property preserved for the trust by the outlay. *VENKATA SUBHADRAYAMMA JAGAPATI GARU v. POOSAPATI VENKATAPATI RAJA GARU* ... 57

"F. O. B. New York"

Stipulation, whether a term or a condition—Breach of such term, whether entitles other party to repudiate contract—Commission agency—Indemnity. The Defendants-Respondents S. Rohomotollah & Co., a firm in Calcutta, placed an order on 25th November 1919 with the Plaintiffs-Appellants Dayton Price & Co., Ltd., of New York through their agents, Messrs Muller and Phipps, to ship 100 gross Paris garters manufactured by Messrs. A. Stein & Co. of Chicago "at the best prevailing price, shipment soonest." "F. O. B. New York." S. Rohomotollah & Co. agreed to pay the draft of the Plaintiffs for the amount due in respect of the said goods. There was a great deal of difficulty in getting the goods shipped at that time as there was an embargo upon export shipments from New York. The goods were despatched by rail on 21st July, 1920 to Montreal and were shipped from Montreal on 20th September 1920. On arrival of goods, the Defendant Company refused to pay the draft, the exchange and the market having gone against him. The Plaintiff Company sued for the loss, being the difference between the contract price and the market rate on the due date. The Defendant Company denied liability. Held—That the congestion at the New York port was not such as would justify the Plaintiffs acting contrary to the Defendants' instruction. They had agents in Calcutta and there was nothing to prevent their enquiring to them or otherwise communicating with the Defendants for instruction. The Plaintiffs were bound to perform the condition "F. O. B. New York" before they could claim any indemnity. The clause was a condition going to the root of contract. That the fact that the Plaintiffs were commission merchants who were executing the Defendants' orders as their agents did not entitle them to indemnity from the Defendants, the Plaintiffs having failed in respect of a term which was a condition precedent to the Defendants' liability under the contract. *Ireland v. Levinstone, L. R. 5 E & L. A. C. 395 (1871)*, referred to and discussed. *DAYTON PRICE & CO. v. S. ROHOMOTOLOH & CO.* ... 429

Building contract—Stipulation to deduct commission on agreed rates of payment on completion—Alteration in the work substantially increasing it in size and dimensions—Stipulation, if applies to it. See Building Contract. *SAHU RAM KUMAR v. MUHAMMAD YAQUB* ... 461

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for the sale of goods—When property in them passes—Divisibility of a contract; In a contract for sale of 1,000 bales of jute, shipment to take place during August and/or September 1919, "to be delivered" at Buyer's Mill-ghat or Press-house by Rail or Steamer and/or Flat," where 500 bales of jute were shipped on board a flat which caught fire and the jute was destroyed, on a construction of the terms of the contract. Held—That the property in the goods did not pass until they reached their destination. *Tregelles v. Sewell*, 7 H. & N. (Exch. Rep.) 574 (1862) and *The Badische Anilin Und Soda Fabrik v. The Basle Chemical Works, Bindschedler*, [1898] App. Cas. 200 (1897), explained. Held further—That the contract was one and indivisible and was not performed until 1,000 bales of jute were delivered at their destination. *The Mercsey Steel & Iron Company, Ltd. v. Naylor, Benzon & Co.*, L. R. 9 A. C. 434 (1884), referred to. *SADASOOK KOTHARI v. CHAITRAM RAMBILASHI* ... 808

antenuptial agreement followed by marriage when ripens into contract. See Antenuptial agreement. *PRAN MOHAN DAS v. HARI MOHAN DAS* ... 889

CONTRACT ACT, INDIAN (IX of 1872), s. 23, ill. (b)—Agreement to drop prosecution for breach of trust on receipt of part of the embezzled money in cash and in the shape of a mortgage by accused and his brother—Prosecution dropped by Police upon representation by the complainant—Suit to enforce registration of mortgage—Consideration, if valid—Agreement, if to stifle prosecution—Public policy; The

Defendant No. 1 whilst undergoing trial for an offence of criminal breach of trust in respect of Rs. 30,000 belonging to the Plaintiff firm pressed the Plaintiff firm to drop the prosecution upon receipt of Rs. 15,000 in cash and a mortgage for Rs. 5,000 to be executed by Defendant No. 1 and his brother Defendant No. 2. The Plaintiff firm agreeing, laid all the facts before the Commissioner of Police and representing to him that they could not afford to lose the whole sum and that it would be to their advantage to get a portion, asked his permission to withdraw the case against Defendant No. 1, and it was with the permission of the Commissioner of Police that the case was withdrawn. In a suit to enforce the registration of the mortgage bond: Held—That the consideration and object of the agreement was not illegal within the meaning of sec. 23 of the Indian Contract Act. The Plaintiffs were not making "a trade of felony," nor did they take the administration of justice out of the hands of the authorities and themselves determine what should be done. *Per Mukerji, J.*—The withdrawal of the prosecution was the motive, but not the object or the consideration of the agreement, so as to render the agreement illegal under the section: Held—That the agreement was

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also not without valid consideration for the purpose of binding Defendant No. 2. *DWIJENDRA NATH MULLICK v. GOPIRAM GOBENDARAM* ... 855

s. 23—Agreement to stifle criminal prosecution—Elements necessary to be proved to vitiate contract—Bond executed in consideration of non-compoundable criminal case being withdrawn—Contract Act (IX of 1872), ss. 15 and 16—Coercion, what is—Undue influence, is necessarily to be inferred from the relation of creditor and debtor; Where in a suit for the recovery of money due on a bond the defence was the bond was not executed by the Defendant out of his own free will but was extorted from him by the pressure of a criminal case of criminal breach of trust which was withdrawn in consideration of the execution of the bond: Held—That in order to show that the object of the agreement was to stifle the criminal prosecution it was necessary to prove that there was an agreement between the parties, express or implied, the consideration for which was to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what was to be done in the particular case and that the contracting parties should enter into a bargain to that effect. That for the defence to prevail it was necessary to show that there was really a criminal case in respect of a non-compoundable offence pending at the time when the agreement was entered into and that one of the objects for which the agreement was entered into was to stifle the prosecution in that case. That so long as there was no agreement not to prosecute, there was nothing to prevent a creditor from taking a security for payment of his debt, even if the debtor was induced to give the security by a threat of criminal proceedings. That the finding that the Defendant was threatened by the Plaintiff's brother that the criminal case would not be withdrawn if the bond was not executed was not sufficient to bring the case within sec. 15 of the Contract Act which defines coercion. That as regards undue influence the relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. *RAMESWAR MAWARI v. UPENDRA NATH DAS SARKAR* ... 1029

ss. 69, 70—

Suit for contribution—Deposit made by Plaintiff to prevent execution sale of property in which he erroneously believed he had interest—Deposit by permission of Court—Right to reimbursement—Principles governing such cases; The Plaintiff sued for contribution in respect of payment made by him to save from sale in execution of a decree a property, in which the

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Plaintiff claimed he had an interest along with the Defendant. The payment had been made with the permission of the Court, which had expressly found that the Plaintiff had the right to make the payment. Held—That though the Plaintiff failed to prove that he had a share in the property, that did not dispose of the question as to the applicability of sec. 69 of the Contract Act. Where payment is made by a person who puts forward a bona fide claim to the property in dispute he is entitled to the protection afforded by sec. 69 of the Contract Act, even though it ultimately transpires as a result of litigation that he had not in fact or in law the interest for the protection whereof the payment was made. That in the circumstances of the case the Plaintiff should succeed on the provisions of sec. 69 of the Contract Act. That even assuming that sec. 69 did not apply the case came within sec. 70 of the Contract Act. Sec. 70 lays down three circumstances as necessary to found the right of demand, viz., 1st, that the act should be lawfully done for another, 2nd, that it should not be the doer's intention to do it gratuitously and, 3rd, that the other party should enjoy the benefit of it. The existence of an interest is generally a test as to the lawful character of a payment but even if an interest were not shown to exist payments on account of another, if lawfully made, would generally be provided for by sec. 70 of the Act. That all the circumstances required by sec. 70 existed in the case and the Plaintiff was entitled to be reimbursed. It is necessary to be every circumstance in the application of the general principle of justice, equity and good conscience, but the terms of sec. 70 are wide enough to afford ample room for the application of this principle in a fit case. **NAGENDRA NATH ROY v. JUGAL KISHORE ROY** ... 1052

COSTS—Civil Procedure Code (Act V of 1908),

s. 35—Costs, if payable by a party absent at the time of hearing—Discretion, how to be exercised. Plaintiffs instituted a suit for establishment of their title to the disputed lands and for recovery of possession of the same. There were two sets of Defendants, viz., co-sharer Defendants and the tenant Defendants. The co-sharer Defendants although supporting the tenant Defendants in their contention yet did not enter appearance during the trial to contest the Plaintiffs' case.

First Court gave effect to the tenant Defendants' case and made a decree on that basis. On appeal by the Plaintiffs in the High Court, the co-sharer Defendants were made parties but they did not enter appearance and were not represented at the hearing. The appeal was decreed with costs to the Plaintiffs and the decree for costs was made in terms which entitled the Plaintiffs to realise the costs from all the Defendants. The first two Defendants who did not appear at the hearing of the appeal moved the Court for

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amendment of the above order as to costs against them: Held—That there is no rule of law that because a suit or appeal is heard ex parte, the successful Plaintiff or Appellant is not entitled to costs against the absent Defendant or Respondent. Held further—The Court can exercise the largest discretion in the matter of costs, which, however, is to be exercised with special reference to all the circumstances of the case, including the conduct of the parties, during as well as antecedent to the suit. **Sheo Dyal Tewarree v. Bishonath Tewarree**, 9 W. R. 61 (63) (1868) and **Costock v. Ramsay Urban Council**, [1900] 1 Q. B. 357 (360), discussed and approved. **UPENDRA NARAIN ROY v. BISWESWAR ROY CHOWDHURY** ... 297

disallowed by Privy Council to successful Appellant on the ground that his defence was singularly devoid of merit. **WILLIAM GRAHAM v. KRISHNA CHANDRA DEY** ... 919

COUNSEL, authority of, to compromise a suite—Compromise, how far and when binding on his client—Civil Procedure Code (Act V of 1908), Or. 23, r. 3—Order, if must be final, to be followed by decree. The relation of a client to his counsel is of a nature different from that of a principal to an agent. His authority is not in any sense incidental to a contract into which he has entered with his client. The conduct and control of the cause are necessarily left to the counsel and his authority to compromise a case is derived from the very nature of the work he undertakes to do and is commensurate with his responsibility. Where therefore a counsel while acting in the cause in Court enters into a compromise, it is binding upon the party for whom he acts. But his unfettered authority to bind the client extends only while he is appearing in Court and consequently a compromise effected by counsel out of Court and not assented to by client is only binding upon him if it is expressly authorised or subsequently ratified by the client or by his agent authorised in that behalf. The rights, privileges and obligations of an advocate of the Calcutta High Court are the same as those of counsel entitled to practice in the High Court of Justice in England and they remain the same whether he is appearing in the High Court or in Courts subordinate thereto. In considering whether a settlement arrived at would justify the Court in passing a decree under Or. 23, r. 3, the question as to which the Court has to be satisfied is not whether the order was a final order or a perfected order but whether it was an agreed order. **Strauss v. Francis**, L. R. 1 Q. B. 379 (1866), **Mathews v. Munster**, 20 Q. B. D. 141 (1887), **Neale v. Gordon Lennox**, [1902] A. C. 465 at p. 469, **Colledge v. Horn**, 3 Bing. 119 at p. 121 (1825), **Swinfen v. Lord Chelmsford**, 5 Hurlstone and Norman's Rep. at p. 920 (1860). **Hutchinson v. Stephens**, 1 Keen.

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659 (1837), *Shepherd v. Robinson*, [1919] 1 K. B. 474, *Green v. Crockett*, 34 L. J. (N. S.) Eq. 606 (1865), *Richardson v. Eytor*, 3 DeG. Mac. & G. 79 (1852), *Turvirall v. Bogle*, 4 Russell 142 (1827), *Swinfen v. Swinfen*, 20 Bev. 549 (1855), *Thomas v. Hewes*, 2 C. & M. 519 (1834), *Holt v. Jesse*, 3 Ch. D. 177 (1876), *Harvey v. Croydon Union Sanitary Authority*, 26 Ch. D. 249 (1883), *Lewis v. Lewis*, 45 Ch. D. 281 (1890), *Jung Bahadur Singh v. Sankar Rao*, 1 L. R. 13, All. 272 (1890), *Hickman v. Berens*, [1895] 2 Ch. 638, *Wilding v. Sanderion*, [1897] 2 Ch. 537, *Nando Lal Bose's case*, [1910] 2 K. B. 638 and *Richardson v. Pato*, 1 M. & G. 896 (1846), referred to. **ASKARAN CHOOTMAL v. THE L. I. RY. CO.** ... 506

COUNSEL'S authority to compromise—English rule of practice, if applicable in this country, particularly in Mofussil—Civil Procedure Code (Act V of 1908), Or. 23, r. 3—Application to record adjustment—Lawful agreement—Compromise decree—Appeal—Civil Procedure Code, Or. 32, r. 7—Voidable" against all parties other than the minor, meaning of—Purdanashin lady—Agent's authority—Ratification. An agent authorised to do a certain act cannot be held to be authorised to do another act in connection with the same business. Any person seeking to bind a purdanashin woman by the act of her agent must give strict proof of such agency. *Azeemoonissa v. Baqur Khan*, 10 B. L. R. 205; 17 W. R. 393 (P. C.) (1872), and *Sarat Kumari v. Amulyadhan*, 27 C. W. N. 629; s. c. 37 C. L. J. 501 (P. C.) (1922), referred to. Principles by which the Courts are to be guided in dealing with transactions by purdanashin ladies, as applicable to the case of a compromise by a lady adverted to. *Tacoorden Tewary A. Syed Ali Hossein*, L. R. 1 L. A. 192; 13 B. L. R. 427; 21 W. R. 340 (1874), *Sudisht Lal v. Sheobarat Koer*, L. R. 8 L. A. 39; s. c. 1 L. R. 7 Cal. 245 (1881), *Annapa Mohini v. Bhuban Mohini*, L. R. 28 L. A. 71; s. c. 1 L. R. 28 Cal. 546 (1901) and *Shambati v. Jago Bibi*, L. R. 29 L. A. 131; s. c. 6 C. W. N. 682 (1902), referred to. A breach of the provision of sub-r. (1) of Or. 32, r. 7 of the C. P. C. does not render the compromise unlawful but only voidable at the option of the minor as provided in sub-r. (2) of the above rule. Sub-r. (2) of Or. 32, r. 7 of the C. P. C. contemplates the case of a minor on one side ranged against adults on the other as regards the matter of compromise, and it can have no reference to the effect of any compromise between adults although a minor may be a party to the suit. The question as between adults must be governed by the general law and not by this sub-rule. **Semble:**—The rule of practice in England regarding general authority of counsel to compromise a suit without reference to his client, which has its roots in different traditions and environments, should not be applied in this country.

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particularly in the Mofussil where people never hear of such practice. *Dictum of Lord Halsbury in Neale v. Gordon Lenthox*, [1902] A. C. 465, 469, approved. *Shepherd v. Robinson*, [1919] 1 K. B. 474, *Strauss v. Francis*, L. R. 1 Q. B. 379 (1866), and *Mathews v. Munster*, 20 Q. B. D. 141 (1888), referred to. **SM. TARUBALA DAS v. SOURENDRA NATH MITTER** ... 597

COURT FEES, payable on application for letters of administration to the estate of a deceased Hindu governed by the Mitakshara law. See under Letters of Administration IN THE GOODS OF BHU-RIANESWAR TRIGUNAIT ... 372

COURT FEES ACT (VII of 1870), s. 7—Civil Procedure Code (Act V of 1908); Or. VII, r. 11—S. 115—Revision of Court's order determining value of suit. The Court is empowered under the law to revise the valuation put by the Plaintiff and if, on such revision it is of opinion that the valuation is insufficient or arbitrarily low it has jurisdiction to fix the proper value; but when a Court determines the valuation according to its judgment or holds that Plaintiff's valuation is correct it does not commit such an error of law as to entitle the High Court to interfere under sec. 115, C. P. C. **G. M. PALKNER v. MIRZA MAHOMED SYED ALI** ... 627

Sch. II, Art. 6—Security furnished under the provisions of the Civil Procedure Code (Act V of 1908), e.g., under Or. 32, r. 6 (2), how to be stamped—Indian Stamp Act (II of 1899), Arts. 40 and 57, if and when applicable—Art. 15, effect of. Security bonds executed in pursuance of an order of the Court under Or. 32, r. 6 (2) or any other rule or section of the Civil Procedure Code must have a court-fee stamp as required by Art. 6 of Sch. II of the Court Fees Act, and they will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or Art. 57, but they will not be chargeable under the Stamp Act if they fall under the residuary Art. 15. *Dwarka Nath Dey v. Sailaja Kanta Mullick*, 21 C. W. N. 1150 (1916), dissented from. *Sarbo Musalmani v. Safar Mandal*, 1 L. R. 49 Cal. 997 (1922), referred to. **RE: REFERENCE FROM THE MUNSIF, 4TH COURT, HABIGANJ** ... 851

CRIMINAL PROSECUTION, agreement to stifle. See Contract Act, s. 23. **DWIJENDRA NATH MULLICK v. GOPIRAM GOBINDARAM** ... 855

Agreement to stifle Criminal prosecution. See Contract Act, s. 23. **RAMESWAR MARWARI v. UPENDRA NATH DAS SARKAR** ... 1029

CYPRES DOCTRINE—What it is—Application of. The income of a fund originally created for the higher education of the children of Indian soldiers who have fallen or been permanently disabled during the Great War having become greater than is necessary for the purpose originally named:

CYPRUS DOCTRINE—*contd.*

Held, on the author of the trust agreeing—that the Court, on the cypres principle, has power to apply the surplus for the education and assistance of children and dependants of the Indian officers and soldiers who rendered military services under the Crown during the late Great War or who have taken part or may hereafter take part in subsequent warlike operations. **ADVOCATE GENERAL OF BENGAL v. CAPT. S. WEBB-JOHNSON** 79

DARPATNI LEASE—Stipulation in *kalubiyat* hypothecating other properties to secure payment of rent and performance of obligations of lease—Stipulation, if ceases to be operative upon transfer of lease. See **Bengal Tenancy Act. KANAI LAL GHOSH v. BASANTA BEHARI SEN** 1020

DECRETE, purchase of, by pleader. See under pleader. **SM. NAGENDRA BALA DAS v. DINANATH MAHISH** 491

DEDICATION, proof of—Temple founded by Hindu, whether dedicated to public—Temple not taken under control of Board of Revenue, effect of—Founder holding temple out as public temple, proof of dedication—Sudra, if may be *pujari* in Hindu temple.] The question was whether a Hindu temple founded between 1811 and 1856 in the village of Kalipatta in the District of Salem in the Madras Presidency was dedicated by the founder to the public or not. There was no deed or document of dedication and it was not taken under the control of the Board of Revenue. *Held*—That it might be assumed that it would have been taken under the control of the Board if it had been dedicated to the public by a deed which was made public. The question whether the temple was ever dedicated to the public must therefore depend upon inferences which could legitimately be drawn from facts not in dispute and from unambiguous evidence on the record of the suit, regard being had to the principles of Hinduism which prevailed in the Presidency of Madras. It would be a legitimate inference to draw that the founder had dedicated the temple to the public, if it was found that he had held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship. "Apparently in the Presidency of Madras there are some public Hindu temples, the *pujaris* of which are Sudras." **PUJARI LAKSHMANA GOUNDAN v. SUBRAMANIA AYYAR** 112

DIARA PROCEEDINGS—Act IX of 1847, sec. 6—Alluvial accretions from non-navigable river-beds within permanently settled zamindary, liability to revenue—Assessments by and orders of Board of Revenue, when final—Ground on which orders of administrative body may be attacked in Civil Court—Fundamental irregularity, what is and what is not—Onus of proof—Objections which merely propound riddles, if sufficient to discharge onus—Superimposition of maps

DIARA PROCEEDINGS—*contd.*

to determine change in locality.] Government is entitled to public revenue under Act IX of 1847 from *chars* formed in a non-navigable river, even when it flows through a permanently settled Zamindary, as well as up to the middle line of the river where that is the boundary of the Zamindary and thus even where it appears that the river bed was part of the permanently settled Zamindary. The Secretary of State for India v. The Mahorajah of Burdwan, L. R. 38 I. A. 565; s. c. I. L. R. 39 Cal. 103; 26 C. W. N. 619 (1921), followed. The finality imposed by sec. 6 of the Act on the orders of the Board of Revenue regarding assessment of Diara lands is subject to two conditions, viz., first, that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure for assessment would still give ground for questioning the proceedings in a Court of law; and secondly, that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. It follows that objections affecting measurements, surveys and maps of localities and other details of investigation which should have been raised before the administrative authority and could properly have been set at rest by such authority—are not sufficient grounds for review by the Civil Court of the orders of that authority. The objection that the area of the alluviated land was arrived at by the superimposition of maps of the locality prepared on successive dates—a proceeding not illegal in itself and natural in the circumstances—was one for consideration by the officials acting in the revenue proceedings and eminently fit for settlement and decision by the Board of Revenue. Such belated objections amounting merely to propounding of riddles are not sufficient to throw doubts upon investigations made by persons authorised by law to make them. **Rajcoomar Roy v. Gobinda Chunder Roy**, L. R. 19 I. A. 140 (1892) and **Kumar Basanta Kumar Roy v. Secretary of State for India**, L. R. 44 I. A. 105; s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917), referred to. **SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAY JATINDRA NATH CHOWDHURY** 1

SETTLEMENT—Permanently settled estate—Lands reformed, if could be separately assessed with revenue—Notification of sale of *khas mehal*—Purchaser, if acquires the entire estate or only the area mentioned—Construction of notification—Evidence of conduct.] Government by a notification put up to sale its zamindary right to a certain *khas mehal* which was purchased by the Plaintiff. The notification stated the name of the mehal, its area and the jama payable in respect thereof. Subsequently a considerable quantity of land appeared as reformation of the lands of the aforesaid permanently settled estate and was formed into a Diara estate with a

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DIARA SETTLEMENT — <i>concl.</i> revenue assessed on it which the Plaintiff took settlement of under protest: Held, upon a construction of the notification and having regard to the evidence of conduct afforded by various diara proceedings—That it was the entire estate which was sold and not merely the quantity of land mentioned in the notification and the lands which reformed could not be again assessed with revenue. <i>Gunga Narain Chowdhury v. Radhika Mohun Roy</i> , 21 W. R. 115 (1873), <i>Gholam Ali Chaudhury v. The Collector of Backergunge</i> , 2 C. L. R. 39 (1878), <i>Jogubandhoo Bose v. Koomcodir-ee Kant Banerjee</i> , 13 W. R. 89 (1873), <i>Kristo Mohan Bysack v. Collector of Dacca</i> , 21 W. R. 91 (1875), and <i>The Secretary of State for India in Council v. Narendra Nath</i> , 32 C. L. J. 402 (1920), referred to <i>KUMAR SANKAR ROY CHOWDHURY v. THE SECRETARY OF STATE FOR INDIA</i> ... 166		ESTATES PARTITION ACT — <i>concl.</i> order passed under that section, though unopposed in fact, is not a nullity. Such an order cannot be challenged by way of defence to a suit for rent in the absence of other parties to the partition. <i>Per Rankin, J.</i> —If a person has a right to challenge an order under sec. 81 by a suit or by any other means, sec. 119 leaves him that right. On ordinary principles a suit in the Civil Court properly constituted and brought within whatever period of limitation may be applicable to set aside an order under sec. 81 would be necessary. <i>Per Page, J.</i> — <i>Quære</i> , whether a tenant or other person aggrieved by an order under sec. 81 is entitled to challenge that decision otherwise than by the methods provided in the Estates Partition Act. <i>SATISH CHANDRA CHATTERJI v. KALI CHARAN CHOWDHURY</i> ... 221	
DISQUALIFICATION as heir by physical infirmity under Hindu law. See under <i>Hindu Law. RAMABAI v. HARNABAI</i> ... 129		secs. 119, 94— Partition of mouzabs jointly held —Order of Collector refusing to make over possession to one party of chuck regarding which dispute arose subsequent to partition—Suit for declaration of title and recovery of possession, if barred—Limitation Act (IX of 1908), Art. 14, if applied to the case.] After a partition under the Estates Partition Act of certain mouzabs held by the Plaintiffs and the Defendant jointly the Defendant secured a rent decree against the tenants of a certain chuck in spite of the Plaintiffs' objection and the Plaintiffs applied to the Collector to give effect to the partition and to give them possession of the disputed chuck. This was refused and the Plaintiffs then sued for declaration of title and recovery of possession more than one year after the Collector's order: Held—That the order of the Collector on the Plaintiffs' application was not one under sec. 94 of the Estates Partition Act and the suit was not barred under sec. 119 of the Act nor was it barred under Art. 14 of the Limitation Act, for an order under Art. 14 must be such an order as the officer is empowered under the law to pass and would be effective unless set aside. The order in the present case was one for which there was no provision of the law. <i>SIR WASIF ALI MIRZA v. SARADINDU NARAIN RAI</i> ... 839	
DIVORCE ACT, INDIAN (IV of 1869), sec. 2.— <i>Dissolution of marriage</i> —Petitioner, a Christian and a resident of India—Remand for finding—Damages, on what principles to be assessed. See under marriage W.		ESTOPPEL —See <i>C. P. C. NRIPENDRA NATH BHOWMIK v. BASANTA KUMAR LAHIRI</i> ... 861	
<i>H. THOMAS v. MRS. THOMAS</i> ... 350		EVIDENCE —Admissibility of contemporaneous oral evidence not to be decided on an application to strike out. See <i>C. P. C., Or. 6, r. 16. ANDERSON KIRKWOOD, TEN-NENT v. WALTER MITCHEL</i> ... 670	
ENHANCEMENT OF RENT , suit for— <i>Plea</i> of <i>mourashi mokarari tenancy</i> in defence—Finding that holding was created after the Permanent Settlement and therefore the presumption under sec. 50, Bengal Tenancy Act (VIII of 1885), did not arise, it sufficient to dispose of the case—Court bound to consider if there was a contract as to fixity of rent.] The landlord having sued for enhancement of rent, the tenant pleaded that the <i>jama</i> was <i>mourashi mokarari</i> and therefore there could be no enhancement. It was found that the <i>jama</i> was created after the Permanent Settlement: Held—That the fact that the <i>jama</i> was created after the Permanent Settlement and therefore no presumption arose under sec. 50 of the Bengal Tenancy Act did not dispose of the case for it was open to the tenant to establish by evidence that there was a contract that the right of the tenure should not be enhanced and there must be a finding by the lower Appellate Court on this point on the evidence. <i>GOPI MOHAN MAJUMDAR v. NAWAB BAHADUR OF MURSHIDABAD</i> ... 723		Entries in village papers and joint payment of taxes and banking account, evidentiary value of as to jointness or otherwise of <i>Mitakhara</i> family. See Hindu Law. <i>JAG PRASAD RAI v. MUSAMMAT SINGARI</i> ... 941	
EQUITABLE MORTGAGE . "See under partnership business" ... 1		EVIDENCE ACT, INDIAN (I of 1872), ss. 11, 13, 21, 32—"Transaction," "Claim" and	
ESTATES PARTITION ACT (V of 1897), ss. 81, 119, <i>scope and effect of</i> — <i>Partition</i> — <i>Splitting up of tenure and apportionment of rent</i> by Deputy Collector under sec. 81—Order under sec. 81, if may be challenged by tenant by way of defence to rent suit.] A Deputy Collector while acting under sec. 81 of the Estates Partition Act exercises the powers of a quasi judicial officer. An			

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"assertion" in sec. 13, meaning of—"fact" in sec. 11, meaning of—Statement in pottah relating to adjoining land about land in suit belonging to Plaintiff, if can be proved on his behalf and if admissible.] The Plaintiffs as lessees sued for establishment of title to and recovery of possession of a plot of land. It appeared that a pottah executed by one of the Plaintiffs' lessors, a year after their lease in respect of an adjoining plot of land contained a statement that the land in suit belonged to the Plaintiffs' lessors. Held—That the pottah not relating to the land in suit, was not a transaction within the meaning of cl. (a) to sec. 13 of the Evidence Act and the statement in the pottah was a mere recital and did not amount to an assertion of right or a claim within the meaning of cl. (b) to sec. 13 of the Evidence Act and could not be proved on behalf of the Plaintiffs and hence that document was inadmissible in evidence. It was an admission in favour of the person making it which was not admissible under any clause of sec. 32 and could not be said to be a "fact" within the meaning of sec. 11 of the Evidence Act. RADHA KRISHNA MARWARI v. SARBESWAR NAG 469

s. 65 (c) Promissory note, suit on—Note attached to plaint, found missing—Right of Plaintiff to give secondary evidence—Onus of proof, nature and extent of—Negotiable Instruments Act (XXVI of 1881), s. 87.] Where the original promissory note on which the suit was brought was found missing and a photograph alleged to have been taken some little time before was put in as secondary evidence and the question was whether the Plaintiff had made out grounds for the admission of secondary evidence: Held—That where the original document had been placed in the custody of the law, the onus of proof did not require the Plaintiff to show how it was afterwards made away with or to satisfy the Court that the Defendant was more likely to have been guilty than himself. Where the note as originally drawn up showed that it was intended that interest should be paid and the rate was also sufficiently expressed, the interpolation of the words "with interest" did not amount to a material alteration avoiding the note within sec. 87 of the Negotiable Instruments Act. LALA TULSI RAM v. RAM SARAN DAS 965

s. 115—Estoppel—Taking of rent from person not entitled to possess as tenant—Estoppel, how far operative—Recovery of possession, if barred—Mesne profits, claim to, if barred—Onus to establish estoppel.] Under a compromise made in 1878, the widow of the late owner D was to remain in possession of certain villages as under-proprietor for her life-time without power of alienation and after her death the wife of her son

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was similarly to remain in possession for her life without power of alienation. The two ladies died in 1901 and 1903 respectively. At that time the son had no other wife but he married again a second wife J in 1906, having previously sold the reversion which belonged to him as the son and heir of D to the Court of Wards. J entered into possession of the villages and got her name recorded in the under-proprietary registry as a pukhtadar without any title and the Court of Wards without enquiry into the facts went on taking rent from her but later on discovering their mistake brought a suit for recovery with mesne profits: Held—That the taking of rent from J estopped the Court of Wards from claiming mesne profits during the particular years for which rent was received, but it did not estop the Court of Wards from claiming recovery of possession, sec. 115 of the Evidence Act having no application to the matter. The onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. MITRA SEN SINGH v. MUSAMMAT JANKI KUAR 53

EXECUTING COURT, power of, to question validity of decree—Limits of its competence—Apparent want of jurisdiction of trial Court, only ground.] Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing Court is authorised to question the validity of the decree. GORA CHAND HALDER v. PROFULLA KUMAR ROY 94

EXECUTION PROCEEDINGS, arbitration in.] See Civil Procedure Code. T. WANG v. SONA WANGDI 581

FOREST tracts in South Canara, Government's rights therein—Kumri cultivation, nature of—Cultivator's possession permissive—Licensees, not tenants—Sirkar kumri and wargdar kumri, incidents of, if different—Mulwargis, if hold kumri lands in ryotwari tenure—Suit to set aside order of Government granting rough potta for kumri cultivation excluding lands claimed—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 120.] Government had absolute title to all forest tracts in the District of South Canara, which belonged absolutely to the Crown. Kumri cultivation in these tracts described. Wherever kumri cultivation was allowed in this District it was permissive. Government's rights as regards the wargdar kumries were the same as in the case of Government kumries, and the possession of the cultivators, even when they were wargdars, was permissive. The incidents which attached to wargdar kumries did not stand on the same footing as ryotwari holdings. In 1903 Govern-

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ment otherwise granted to the Plaintiff a rough patch of lands which they would be allowed to cultivate in kumri, and excluded therefrom the lands in suit: Held—That the Plaintiff's suit to set aside that order and to obtain a declaration of his right brought in 1913 was barred by Art. 120 of Sch. 1 of the Limitation Act. KODOTH AMBU NAIR v. SECRETARY OF STATE 365

FRAUD—Suit for setting aside ex parte fraudulent decree, if lies, when summonses were served—Falsity of claim and adducing of perjured evidence, if constitute sufficient fraud for vacating the previous decree—Civil Procedure Code (Act V of 1908), Or. 9, r. 13, proceeding under, if operates as res judicata in the subsequent suit on the point of service of summons; N. brought a suit in the Small Cause Court against H. on a handnote and obtained an ex parte decree. H. unsuccessfully applied under Or. IX, r. 13, C. P. C., to set aside the ex parte decree contending that summonses had been suppressed, and eventually instituted a suit in the Munsif's Court to set aside the ex parte decree on the grounds that the claim was a false one and the decree was obtained by perjured evidence. The suit was decreed by the lower Appellate Court on the grounds, firstly, that H. knew nothing about the ex parte case, and secondly, that the claim was fraudulent as the hatchitta upon which the original suit was based was made out in the absence of H. and was an untrue document: Held—That so far as the second ground of the decision is concerned, the balance of authority is that no suit lies and it is not open to raise pleas of this nature, if the suit has been decreed after contest, or if the suit has been decreed ex parte and it is established that summonses were served on the Defendants. Mahomed Gulab v. Md. Sullivan, I. L. R. 21 Cal. 612 (1894), followed. As to the first ground about non-service of summons, the decision of the Small Cause Court under Or. IX, r. 13, C. P. C., did not operate as res judicata in the present case on the point of service of summons, there being matters in the present suit which could not have been brought to the Small Cause Court. Khagendra Nath v. Prannath, L. R. 29 I. A. 99; s. c. I. L. R. 29 Cal. 395; 6 C. W. N. 473 (1902), relied on. NAJINI KANTO MUKHERJEE v. HARI NIKARI ... 335

HANDWRITING, comparison of, as mode of proof—Judgment of trial Court granting probate of Will, set aside in appeal merely on comparison of signatures—Propriety of procedure adopted; The Appellant propounded a Will in the Court of the Munsif who granted probate on a consideration of the evidence and the circumstances of the case. The District Judge set aside the judgment of the Munsif simply on a comparison of signatures without considering the oral evidence or the probabilities of the case: Held—That

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the case was not properly tried by the District Judge and his judgment was liable to be set aside. Value of comparison of handwriting as mode of proof discussed. AMBIKA CHARAN BARUA v. NARESWARI DASI ... 75

HIGH COURT RULES, Original Side, Chap. XVI, r. 27—Limitation Act (IX of 1908), sec.

5—Extension of time for filing an appeal, condition of.] The principle enunciated in Pramatha Nath Roy v. Lee, I. L. R. 49 Cal. 999; s. c. 27 C. W. N. 156 (P. C.) (1902) applies equally well to the filing of a requisition to draw up a decree or order under r. 27, Chap. XVI of the High Court Rules. An applicant who or his attorney did not make any application to the Registrar's office to ascertain whether the Plaintiff had in fact sent in a requisition to have the decree drawn up, cannot, in the absence of any proof of sufficient cause under sec. 5 of the Limitation Act, get an extension of time to file his appeal. GOBIND LAL DUTT v. OFFICIAL ASSIGNEE ... 163

HINDU LAW—Family custom, proof and

validity of—Kashmiri Brahmins, settled at Amritsar, adoption amongst, governed by custom—Adoption of boy or 17 years already invested with sacred thread and according to custom; Held—That the parties who were Kashmiri Brahmins settled at Amritsar in the Punjab were governed in matters of adoption by custom and not by the principles of the Mitakshara form of Hindu law; and that the Plaintiff was validly adopted according to custom, though at the time he was 17 years of age and had already been invested with the sacred thread. Custom binding inheritance in a particular family has long been recognised in India though such a custom is unknown to the law of England and foreign to its spirit. Abdul Hussein Khan v. Bibi Sona Dero, L. R. 45 I. A. 10; s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917), followed. MUSST. DURGA DEVI v. SHAMEHU NATH ... 166

Coparcener, disqualification of, to share inheritance and adopt—Leprosy, when disqualifies; A Hindu who was suffering from a type of leprosy which did not unfit him for performing both social and religious duties in company with others was not disqualified from holding and enjoying property and making an adoption. "Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both texts and decisions as the most satisfactory test." Kayachhana Pathan v. Subbaraya Thevan, I. L. R. 38 Mad. 250 (1913), approved. Mohunt Bhagaban Ramanui Das v. Mohunt Roghunundun Ramanui Das, I. L. R. 22 I. A. 94; s. c. I. L. R. 22 Cal. 843 (1895), and Janardhan Panduranga v. Gopal, 5 Bom. H. C. R. (A. C. J.) 145 (1866), referred to. RAMABAI v. HAENABAI ... 129

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Murderer, if may succeed to estate of murdered—Disqualification, if in respect of beneficial ownership only or of both legal or beneficial estate—Disqualification, if personal or bars disqualified heir's heirs—Bandhus, succession of—Males, if preferred to females, when all pitri-bandhus and when former matri-bandhus and latter pitri-bandhus—Law in Bombay Presidency—Principles of justice, equity and good conscience—Statutes of succession, if to be read as superseding such principles.] Amongst Hindus, a murderer is excluded from succession to the estate of the murdered by the principles of equity, justice and good conscience, if not by the principles of Hindu law. He is disqualified from succeeding wholly and not merely to the beneficial interest, the theory of legal and equitable estates being no part of Hindu law. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. *Vedanayaga Mudaliar v. Vedammal*, I. L. R. 27 Mad. 591 (1904), and *Gangu v. Chandrabhagabai*, I. L. R. 32 Bom. 275 (1907), referred to. As between bandhus of an equal degree, and both related on the father's side. Held, in a case from Bombay—That the male is to be preferred to the female. **Quare:—Whether, in the Bombay Presidency, the male bandhu is to be preferred to the female bandhu even when the latter is related through the father and the former through the mother.** *Narasimma v. Mangammal*, I. L. R. 13 Mad. 10 (1889). *Vedachela Mudaliar v. Subramania Mudaliar*, I. L. R. 48 I. A. 349; s. c. 26 C. W. N. 159 (1921). *Saguna v. Sadashiv*, I. L. R. 26 Bom. 710 (1902). *Rajah Venkata Narasimma v. Rajah Surinani*, I. L. R. 31 Mad. 321 (1908), and *Balkrishna v. Ramkrishna*, I. L. R. 45 Bom. 353 (1920), referred to. **Semble:—Statutes regulating heirship or descent, or giving force to Wills and to devices contained in Wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence.** In *Re: Houghton*, [1915] 2 Ch. 173, referred to. **KENCHAVA KOM SANYELIAPPA HOSMANI v. GIRI-MALLAPPA CHANNAPPA SOMASAGAR** 271

Allienation by widow—Suit by presumptive reversioner for declaration that alienation invalid—Decree, if binds actual reversioner—Suit in a representative capacity—Civil Procedure Code (Act V of 1908), sec. 11, Expl. VI.] A Hindu reversioner expectant on the death of a widow living in the latter's life-time for a declaration that an alienation by the widow did not bind the reversion does so in a representative capacity. A decree passed in his favour enures for the benefit of the person who actually succeeds as reversionary heir on the widow's death. A judgment adverse to the Plaintiff is equally binding on the actual successor provided the decree has not been obtained by fraud

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or collusion. **KESHO PRASAD SINGH v. SHEO PARAGASH OJHA** ... 606

Mitakshara—Joint family—Partners or coparceners—Joint or separate—Union after separation—Effect of separation amongst brothers or sons of brothers—Entries in village papers and joint payment of taxes and banking account, evidentiary value of.] There was separation of a joint Mitakshara family, when the coparceners came to an agreement that the oldest of them should divide the property into shares. When coparceners in a Mitakshara family have separated, an agreement to reunite must be proved like any other fact and if not proved they remain separate. The separation of the brothers does not necessarily involve the separation inter se of the sons of one such brother. *Balekux Ladhuram v. Rukhmabai*, L. R. 30 J. A. 130; s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 612 (1903) and *Hari Bakhsh v. Babu Lal*, I. L. R. 54 I. A. 153; s. c. 28 C. W. N. 953 (1924), referred to. Entries in khewats and other village papers showing that the shares of the co-owners have been specified afford by themselves no proof that the owners were members of a joint Mitakshara family or had separated. *Rewa Prasad Sukal v. Deo Dutt Ram Sukal*, I. L. R. 27 I. A. 39 (1899), and *Nageshar Bakhsh Singh v. Ganasha*, I. L. R. 47 I. A. 57 (1919), referred to. Payments jointly of Government revenue, taxes, income-tax and such like payments do not by themselves indicate that the parties making such payments are joint or separate, are partners or coparceners. The fact that money had been lent on mortgages or had been applied in the purchase of property does not by itself indicate that the money was or was not the separate money of Hindu coparceners. The fact that two or more Hindus had a banking account does not by itself prove that the money received by the bank were monies of a joint Hindu family or of Hindus who were partners in farming or other business. **JAG PRASAD RAI v. MUSAMMAT SINGARI** ... 94

Mitakshara joint family—Presumption of jointness—Separation to be proved—Entries in village and revenue papers defining shares, effect of—Act XIX, N.-W. P., of 1873, effect of—Widow of coparcener allowed to hold property by way of maintenance, if—Proves separation—Dealing by her contrary to agreement, if creates title by prescription.] It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. The presumption until the contrary is proved is that the family continues joint. A mere definition of shares in revenue and village papers, unless it was proved that such definition of shares was with a view to a then partition, would not, by itself, be conclusive evidence even that an actual partition was then intended. It by itself affords a very slight indication

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of an actual separation and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated. The North-Western Provinces Land Revenue Act, XIX, of 1873, did not make the deduction of shares of coparceners in the settlement khewat prepared in 1813 conclusive of a separation. **Nageswar Baksh Singh v. Ganesha**, L. R. 47 I. A. 57 (1919), **Bhagoji v. Bapuji**, L. R. 13 Bom. 75 (1889), and **Gajendar Singh v. Sardar Singh**, L. R. 18 All. 176, (1896), referred to. The presumption was not rebutted in this case by proof of an agreement or compromise by which the widow of a prominent member of the joint family was allowed to possess and enjoy joint family properties for her life by way of maintenance. The widow could not acquire title to the properties by prescription, whether she acted in accordance with the compromise or contrary to it. **MUST.**

BIJAGWANT KUNWAR v. MOHAN SINGH ... 1037

—Succession to stridhan property of degraded woman—Point rebuttable by evidence not taken in the trial, it can be raised in second appeal.] Succession to stridhan property of a degraded Hindu woman is to be governed by the ordinary Hindu law of inheritance and a daughter is not to be preferred to the son in the line of succession. Under the Dayabhaga School, the son succeeds in preference to married daughter. **Hira Lal Singha v. Tripura Charan Roy**, L. R. 40 Cal. 650: s. c. 17 C. W. N. 679 (F. B.) (1913), followed. The presumption that a Hindu migrating from one place to another carries with him his personal law is a rebuttable one and where the Defendants did not attack the Plaintiffs' title on the ground of applicability of the Mitakshara law and the Plaintiffs were unable to adduce any evidence on the point the Defendants were not allowed to raise the point in second appeal. **SHAIKH TALEB ALI v. SHAIKH ABDUL REZACK** ... 624

—Mitakshara—Partition amongst brothers, effect on coparcener and his sons —Whether they become separated or continue joint.] When a Hindu governed by the law of the Mitakshara, who had sons living, separated from his brothers, there was no presumption of law that he had separated from his sons and that he and his descendants ceased to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family. **Belabux Ladhuram v. Rukhmabai**, L. R. 30 I. A. 139: s. c. L. R. 30 Cal. 725: 7 C. W. N. 642 (1903), and **Hari Baksh v. Babu Lal**, L. R. 5 Lah. 92: s. c. 28 C. W. N. 953 (F. C.) (1924), referred to. **DATA JAI NARAIN v. LALA UJAGAR LAL** ... 775

—Mitakshara—Partition, how effected—Suit instituted but withdrawn or abandoned, effect of—Mere ascertainment of share, if sufficient—Parties in

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partition suit—Decree in such a suit—Document, construction of—Intention of parties to it, a question of fact—Primo-geniture, if may be established in modern family.] A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. The coparceners of a joint family can by agreement amongst themselves separate and cease to be a joint family and on separation are entitled to partition the joint family property amongst themselves. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated, for there may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. A member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him; and the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. Also, if a joint Hindu family separates, the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact, as proved. The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed, the date of his severance from the joint family will if nothing else is proved, be treated as the date when the suit was instituted. But no severance of the joint family results when a member of the joint Hindu family having filed a plaint claiming a partition afterwards withdraws it, though such withdrawal, unless explained, affords evidence that an intention to separate had been entertained. In a suit for partition which proceeds to a decree, the decree for a partition is the evidence to show whether the separation is only a separation of the Plaintiff from his coparceners or a separation of all the members of the joint family from each other. In a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit and it is the decree alone which can be evidence of what was decreed. In construing documents according to their legal effects, the Courts are entitled to draw all legitimate inferences as to the intentions of the

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parties to them, and the inferences so drawn are findings of fact. A joint family with an impartible estate descending according to a rule of lineal primogeniture with rights of maintenance and other privileges for the junior members cannot be established in modern times. **PALANI AMMAL v. MUTHUVENKATACHALA MONIAGAL** ... 846

Woman's estate—Mortgage at high rate of interest, suit to enforce—Defence pleading no necessity—Plea in general terms, if permits defence to challenge rate of interest only—Onus—Shifting of onus—Evidence that widow borrowed at high rate on another occasion, value of. A pleading in defence in general terms that a bond executed by a Hindu woman possessing a limited estate was without legal necessity, leaves it open to the Defendant to urge that there was no necessity to borrow at the high rate of interest stipulated in the bond. The onus of showing there was necessity to borrow at that rate of interest lies on the lender. It would suffice to shift the onus, on the lender adducing evidence showing that the money could not in the circumstances have been raised at less interest. Evidence that the widow had borrowed at high interest on one other occasion is not conclusive as to what she might have done on the occasion in question. **RAI RADHA KISHUN v. JAG SAHU** ... 293

HINDU WILL—Construction—Bequest to designated person and his "heirs and representatives"—Words of limitation and not purchase—Absolute grant, not limited by attempt to limit his power of disposition—Estate governed by primogeniture—Gift to son—Property, if self-acquired property of donee, when same was self-acquired property of donor—Mitakshara law what, and if applied—Oudh Estates Act (I of 1869, before amendment by Act III of 1910), s. 15—Gift to son, not immediate successor, effect of. H. an Oudh Taluadar, whose estate, being in list 2 as defined by the Oudh Estates Act I of 1869, devolved according to the custom of the family on or before the 13th February 1856 upon a single heir, made prior to the passing of the amending Act III of 1910, a settlement of the estate under which in the events which happened, his second son who was not his immediate successor and his heirs and representatives were to succeed to the estate, without power to interfere in any way with all except 6 villages during the life-times of persons named. **Held—** That the disposition in question operated under sec 15 of the Act of 1869 to take the estate out of the special limitations of descent provided by sec. 22 of the Act, notwithstanding that the donee was a person in the line of succession. **Ghulam Abbas Khan v. Amatul Fatima**, J. R. 48 I. A. 135; s. c. I. L. J. 43 All. 297 (1921), followed. That the disposition should be construed *ut res magis valeat quam pereat*: the words "heirs and representa-

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tives" were words of limitation and not purchase, and the donee got an absolute estate in reversion, the last clause being inoperative as an attempt to derogate from the grant previously made of an absolute estate or as a mistaken description by the donor of the legal consequences of the grant. **Quere:—** Whether, in a Mitakshara family, property which in the father's hands is self-acquired is, when bequeathed to the son, ancestral or self-acquired property in the son's hands. Conflict of opinion in the High Courts in India adverted to. **Held—** That the donee under the settlement took the property as self-acquired property which he could dispose of by Will, inasmuch as at the date of the settlement the property was subject to the Oudh Estates Act of 1869 and would have descended to a single heir in accordance with that Act and not according to Mitakshara law or to those whom that law would designate as heirs. **LAL RAM SINGH v. THE DEPUTY COMMISSIONER OF PARTHAGARH** ... 86

HOMESTEAD LAND within Municipal area—Suit for ejectment. See under Tenancy.

ABDUL HAKIM KHAN CHAUDHURI v. ELAH BAKSHI SHAH ... 138

INCOME TAX ACT (XI of 1922), s. 2 (1) (a) and s. 4 (3) (viii)—Selami or mutation nazar, if agricultural income within the meaning of s. 2 (1) (a) of the Indian Income Tax Act and as such, if exempt from assessment to income-tax. Per Curiam (Wainman, J., dissentiente)—Selami or nazar paid by a tenant to a landlord for the recognition of a non-transferable holding as rent or revenue within the meaning of sec. 2 (1) (a) of the Indian Income Tax Act and, as such, is exempt from income-tax by virtue of sec. 4 (3) (viii) of the same Act. **Maharaja Birendra Manikya v. Secretary of State for India**, I. L. R. 18 Cal. 766 s. c. 25 C. W. N. 80 (1920), dissented from. **NAWABZADI MEHER BANO KHANUM v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL** ... 969

Income Tax Act, s. 10 (2) (viii)—Road and public works cess, if should be deducted from profits of colliery for assessment of income-tax—Colliery, if a premises—Cess, if a "local rate." In determining the assessable income of a colliery under the Indian Income Tax Act, cess paid on account of the colliery shall be deducted as "local rate" as it is paid for the use of the colliery, which is a premises within the meaning of sec. 10 (2) (viii) of the said Act. **ISABELLA COAL COMPANY v. THE COMMISSIONER OF INCOME-TAX, BENGAL** ... 923

Income Tax Act, ss. 22, 23 (2), 65 (2), 66 (3)—Non-compliance with sec. 23 (2)—Question not raised at the time of assessment, if may be referred. Where the Income Tax Officer, disbelieving the return filed by the petitioner under sec. 22 of the Income Tax Act, forthwith assessed the tax payable by him, without serving upon him a notice as provided by sec. 23 (1).

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(2) of the Act giving him an opportunity to produce evidence in support of his case, and Petitioner's application to the Commissioner to refer the question to the High Court was refused. Held, on application to the High Court under sec. 66 (3) of the Act—That the question which challenged the very foundation of the assessment "arose out of the order" for assessment as contemplated by sec. 66 (2) although it was not referred to in the judgment of the Income Tax Officer assessing the Petitioner to the tax complained of. **NIRMAL KUMAR SINGH NOWLAKSHA v. THE COMMISSIONER OF INCOME TAX, BENGAL** ... 28

s. 22; 23 (2)—Income Tax Officer not satisfied with return and documents produced by assessee, if found to give notice to him to adduce further evidence—Provision, if mandatory or directory—Notice, if should specify points. If the Income Tax Officer is not satisfied with the return submitted under sec. 22 he is bound under sec. 23 (2) of the Income Tax Act to serve upon the person who made the return a notice requiring him on a day to be specified to produce evidence to support the return. Per Greaves, J.—Such notice may be waived. Per Mukerji, J.—The provisions of sub-sec. (2) to sec. 23 of the Act are mandatory. Secs. 22 and 23 of the Act read together appear to be intended to give to the assessee two opportunities of supporting the return he has submitted. Per Greaves, J.—Sec. 23 (2) does not impose upon the Income Tax Officer any obligation to directly specify the points upon which evidence is to be given. It is a sufficient compliance with the provisions of the section if he gives notice to attend or notice to produce evidence in general terms. Per Mukerji, J.—The notice under sec. 23 (2) should, if possible, specify the points upon which the assessee has to produce evidence. **NIRMAL KUMAR SINGH NOWLAKSHA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL** ... 591

s. 66 (2)—Judgment of High Court on reference under section, if appealable under sec. 15 of the Letters Patent of the High Court. The judgment of the High Court given on a reference under sec. 66 (2) of the Income Tax Act made by the Commissioner of Income Tax is not a judgment within the meaning of sec. 15 of the Letters Patent and is not appealable under the provisions of that section. Such a judgment is merely advisory and made by the Court in exercise of its consultative jurisdiction. **PROBHAT CHANDRA BARMA v. THE KING-EMPEROR** ... 598

INSOLVENCY ACT, PRESIDENCY-TOWNS

(111 of 1900) sect. 2 17. [2—Mitakshara joint family—Father adjudicated insolvent—Son's interest in joint property, if vests in official assignee.—"Property over which a person has disposing power" meaning of—Civil Procedure Code (Act V of 1908), sec.

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60, bearing of, upon the question—Mitakshara son's share of joint family property, saleability of, in execution or decree against father—Father's power of sale, not, unconditional. According to the true construction of the provisions of the Presidency-towns Insolvency Act, which alone have to be considered for the purpose, an order of adjudication as an insolvent passed against a Mitakshara father under the Presidency-towns Insolvency Act does not of itself vest his undivided son's interest in the joint family property in the official receiver or assignee. **Fakirchand Motchand v. Motchand Hurruckchand**, I. L. R. 7 Bom. 438 (1933), **Rangayya Chetti v. Thanikachalla Mudali**, I. L. R. 19 Mad. 74 (1895), **Nunna Brammayya Setti v. Unparaboytha Venkiaswamy**, I. L. R. 26 Mad. 211 (1902), **Sanyasi Charan Mandal v. Asutosh Ghose**, I. L. R. 42 Cal. 225 (1914) and **Harmukh Rai Munna Lal v. Radha Mohan**, 1919; P. R. No. 158, distinguished **Fakirchand Motchand v. Motchand Hurruckchand**, I. L. R. 7 Bom. 438 (1933), doubted. The property of an insolvent which by sec. 17 vests in the official assignee must mean only the property which by that section and sec. 52 is divisible amongst his creditors. The definition of "property" in sec. 2 of the Act seems to contemplate an absolute and unconditional power of disposal, and not such power as the Mitakshara father has to dispose of joint property, which is not absolute but conditional on his having debts which are liable to be satisfied out of that property. **SATNARAYAN v. BEHARI LAL** ... 797

s. 55—Meaning of the phrase "in good faith"—Transfer of all available property by an insolvent, validity of—Appellate Court dealing with the finding of fact of the trial Court on affidavits. On 14th July 1920 M. and Co. executed an assignment for past advances, in favour of Y, of all their property available at the time without anything left for other creditors of M. and Co. There was no contemporaneous advance nor was there any undertaking by Y. to make any advances in future for assisting M. and Co. to carry on their business. M. and Co. were adjudicated insolvents on 10th February 1921. Held—On the finding that Y had knowledge of the state of affairs of M & Co. at the time of the assignment, that the transfer was not in good faith within the meaning of sec. 55 of the Presidency Towns Insolvency Act, 1909. Per Buckland, J.—In considering the effect of a transaction of this nature, the fact must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors. A transaction which may in other circumstances be free from all taint becomes an offence when it is established that it contravenes the law of bankruptcy. **Khoos Kwat Siaw v. Wool Taih Hwat**, I. L. R. 19 Cal. 223 (P. C.) (1891), *Ex parte Chaplin*,

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L. R. 20 Ch. Div. 319 (1884) and *Tomkins v. Saffery*, L. R. 8 A. C. 213 (1877) referred to. Per Sanderson, C. J.—Where the evidence is contained in affidavits the Appellate Court is in as good a position to judge of the facts as the Court of first instance. **THE OFFICIAL ASSIGNEE OF BENGAL v. THE YOKOHAMA SPECIE BANK LTD** 374

Sch. 11, r. 71—Original Side Insolvency Rules, r. 128—Admission of a debt in the composition deed, if sufficient proof.] The mere fact that a sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof of the debt required by r. 128 of the Insolvency Rules. **IN THE MATTER OF KANHYA LAL SEWBUX** ... 1019

INSOLVENCY ACT, PROVINCIAL (III of 1907), sec. 16, sub-sec. (2), cl. (a) and sub-sec. (5)—Receiver appointed under the Act, vesting of property in—Secured creditor, right of—Fresh suit to set aside a decree on the ground of its being erroneous, if maintainable.]

On the making of an order of adjudication under sec. 16, sub-sec. (2) of the Provincial Insolvency Act, III of 1907, the whole of the insolvent's property becomes vested in the Receiver under cl. (a) sub-sec. (2), sec. 16 of the said Act for distribution amongst his creditors, subject to the right of the secured creditor (mortgagee) to realise his dues by enforcement of his security in the ordinary way just in the same manner as if there was no vesting order. Per (Ghose, J.)—The title of the mortgagor insolvent to the property mortgaged remains with him, notwithstanding the vesting of the insolvent's property in the Receiver under cl. (a), sub-sec. (2), sec. 16 of the Provincial Insolvency Act, for the purpose of the proceeding to enforce the mortgage. Per (Ghose, J.)—It is now well settled that a decree cannot be challenged on the ground of its being erroneous by a fresh suit. **JAGANNATH MARWARI v. KALA CHAND BANERJEE** ... 771

INTEREST at contract rate—pendente lite, mortgagee's right to get—Usurious Loans Act (X of 1918), sec. 3, Court's power to interfere with the contract rate of interest without finding the rate of interest to be excessive or the transaction unfair.]

Where the Court does not find the rate of interest excessive or the transaction substantially unfair, a mortgagee is entitled to have interest at the contract rate during the period the suit has been pending and up to the date fixed for payment. **JOGENDRA NATH ROY v. NAWAB MURTAZA BEGUM** ... 118

INTERLOCUTORY ORDERS, appeal from, preferred after the passing of the final decree if maintainable.] See C. F. C.

JOGENDRA NARAYAN DAS v. SATYENDRA CHANDRA GHOSH MOULIK ... 640

JOINT POSSESSION—Co-sharer, if can change the state of possession of the co-tenant—Remedy when co-tenant unreasonably obstructs beneficial use of joint property—Suit for infringement of rights of co-owner as distinguished from suit on ground of**JOINT POSSESSION—concl.**

actionable nuisance—Discretion of Court, how to be exercised—Interference by Municipal Court.] The Plaintiff and the Defendant Municipality were in joint possession of a certain piece of land. In spite of the protest of the Plaintiff the Municipality proceeded to construct on a portion of the land some houses and latrines for the use of sweepers and Methons. The Plaintiff sued for declaration of his right and for permanent injunction. The houses and latrines were constructed during the pendency of the suit. The Plaintiff's title as also possession was found but injunction was granted limited to the removal of the latrines only. Held—That one co-sharer has no justification to change without the consent of his co-tenants the state of the possession as enjoyed by the co-tenants. In case a co-sharer is unreasonable and obstructs his co-tenant in making beneficial use of the joint property the remedy of the tenant-in-common is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharer. That the Court below was wrong in thinking that the Plaintiff was seeking an injunction on the ground of actionable nuisance whereas in fact the case was based on the ground of infringement of the rights of a co-owner by another co-owner, and the Plaintiff's remedy should not have been limited but should have included the whole subject-matter of the suit. The discretion of the Court must be exercised on recognised principles and should not be arbitrary. Where the circumstances of a case demand it the High Court has frequently interfered with the exercise by lower Courts of their discretionary power, if such exercise has been inconsistent with sound principles. **ASUTOSH ROY v. RAMPUR BOALIA MUNICIPALITY** ... 643

KABULIYAT, interpretation of—Stipulation as to non-maintainability of claim for abatement on grounds specified and on any account whatsoever—Principle of ejusdem generis—Abatement, claim of, on ground of acquisition by Government—Bengal Tenancy Act (VIII of 1883), ss. 52, 58, effect of—Tenant, if can set up claim for abatement in rent suit—Separate suit for the purpose, if necessary—Set-off in rent suit of payments previously made and wrongly debited against tenant.] In a kabuliyat relating to an occupancy holding it was stipulated that the tenant was to suffer any loss arising from the lands being left fallow or from floods or drought and he would not be entitled to claim abatement of the stipulated rent on any account whatsoever. A portion of the land comprised in the holding was acquired under the Land Acquisition Act and in a suit for rent the tenant claimed abatement and also pleaded certain payments. Held—That the kabuliyat meant that abatement would not be claimable in the case of loss by reason of causes ejusdem generis with those specified. It could not be taken to include a case where deficiency was due to compulsory acquisition under the law of a portion of the land. That is

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answer to a rent suit the tenant could set up a claim for abatement. By sec 52 of the Bengal Tenancy Act a right is conferred upon the tenant to claim abatement for deficiency in area and, sec 38 does not limit the assertion of that right to the case of a tenant coming forward as Plaintiff in a suit instituted specifically for the purpose. That the lower Court acted properly in going into the character of the payments alleged by the tenant and in directing that credit should be given to the tenant for the amount wrongly debited against him under the guise of interest. **GOSTA BEHARI PRAMANIK v. HEM CHANDRA DAS DE** ... 121

LAND ACQUISITION ACT (1 of 1894), secs. 18, 21, 30—A claimant, if and when has locus standi at the hearing of reference under sec. 18, though himself not an applicant for such reference—Civil Procedure Code (Act V of 1908), sec 215, revision under. Upon a reference under sec. 18 of the Land Acquisition Act made at the instance of some claimants another person who was one of the claimants, before the Collector and the nature of whose claim was set out in the reference is a person who is entitled to be present at the hearing of the reference. **Semble:—**Mention of his claim in the Collector's reference under sec. 18, amounted to a reference under sec. 30. **SURENDRA NATH TAGORE v. K. S. BONNERIE** ... 340

sec. 26 (2)—Reference as to valuation.—Appeal from award to High Court.—Decision of High Court.—Appeal to the Privy Council, if lies.—Grounds on which Privy Council will interfere.—Principle of valuation.] An appeal lies under the law as amended to the Privy Council from a decree of the High Court passed on appeal from a reference under the Land Acquisition Act as from a decree in an ordinary suit. But the Privy Council in such cases will not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied. Principle of valuation as laid down in **Fraser v. City of Fraserburgh**, [1917] A. C. 194, referred to. **RAI BAHADUR LALA NARSINGH DAS v. THE SECRETARY OF STATE FOR INDIA**

LAND REVENUE, assessment of—Asli lands assessed at the Permanent Settlement—Subsequent submergence and re-emergence—Government, if can resume and assess as diara—Possession by trespasser, if justifies re-assessment.] Revenue cannot be assessed by Government on lands which were asli at the Permanent Settlement and assessed as such, on their re-emergence after sub-

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mergence subsequent to the Permanent Settlement. If the person in possession is not the rightful owner, that does not authorize the Government to resume and assess the land with revenue upon such re-emergence. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KALI NARAYAN ROY CHOWDHURY** ... 119

LETTERS OF ADMINISTRATION, application for, to the estate of a deceased Hindu governed by the Mitakshara law, court-fee payable on.] The applicant for letters of administration to the estate of a deceased Hindu governed by the Mitakshara law must comply with sec. 19 (1) of the Court Fees Act and pay ad valorem duty. **IN THE GOODS OF BHUBANESHWAR TRIGUNAIT** ... 372

... duty on, on the Original Side.—Court Fees Act (VII of 1870), secs. 5, 15 (1) and 19 (1)—Item No. 4 in Annexure B, Sch. III—Exemption from ad valorem duty of the estate of a deceased Hindu governed by the Mitakshara law—Taxing Officer's decision when final.] A Hindu father and his brother and two sons lived together in a joint Mitakshara family. The father died intestate leaving certain money in a Bank. The brother and the two sons, applied for Letters of Administration with a certificate from the Registrar who as the Taxing Officer (under r. 1 of Chap. XXXV of the Rules and Orders of the Calcutta High Court) certified the exemption of the court-fees as "the property was held in trust not beneficially or with general power to confer a beneficial interest." On reference to **Ghose J.**, exemption was refused, but on appeal: **Held:—**That the decision of the Taxing Officer under r. 4 of Chap. XXXV is final by virtue of sec. 5 of the Court Fees Act. It cannot be reviewed under sec. 19 (1). The jurisdiction of the Taxing Officer does not arise upon a difference of opinion between an Office clerk and a suitor and upon some sort of a formal reference to decide that dispute. It is enough that the Taxing Officer has brought his mind to bear on the question and has decided it. **In the goods of Omda Bibee**, 1 L. R. 26 Cal. 407 (1899). **Kasturji Chetti v. Deputy Collector, Bellary**, 1 L. R. 21 Mad. 269 (1898) and **In the goods of Pokurmul Augurwallah**, 1 L. R. 23 Cal. 980 (1896) referred to. **IN THE GOODS OF BHUBANESHWAR TRIGUNAIT** ... 879

LICENSEE, when acquires title by adverse possession. A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor to his knowledge and with his acquiescence. KODOTH AMRUNAIR v. SECRETARY OF STATE FOR INDIA ... 345

LIMITATION—Suspension of time—Suit for declaration of putni right modifiedly decreed on second appeal in High Court pending second suit instituted for same relief in respect of other lands in same mouza—Amendment of plaint after decision of

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second appeal according to the view taken therein—Period between date of institution of suit and decree of High Court, if to be excluded in deciding if amended claim barred by limitation—**Estates Partition Act (V, B. C., of 1897), sec. 99**—"Portion of a share," meaning of—*Res judicata*] The proprietors of a share of 1000 Toazi granted a putni of their share in 19 villages only to the Plaintiffs who subsequently obtained a *sadar putni* of one-fourth of the said proprietors' share in all the villages of the mouza including the villages already settled. By an *ekrannama* the Plaintiffs were given exclusive possession of the share in 20 villages and the lessors of the others. A portion of the proprietors' share was purchased at auction by a person who granted a *sadar jama* of it to the Defendants. The Toazi was partitioned under the *Estates Partition Act* and the aforesaid share which passed by sale was formed into a separate estate of 4 villages. The Defendants settled certain lands of that estate with two persons who were recorded in the settlement proceedings in respect of those lands. The Plaintiffs relying on the *ekrannama* then sued for a declaration of their putni and *sadar putni* rights to the said lands and obtained a decree which was affirmed on appeal. While the matter was pending in second appeal in the High Court the Plaintiffs brought the present suit in respect of other lands claiming similar reliefs and alleging the same title. The second appeal before the High Court terminated in a declaration that any contract between the parties was extinguished by sec. 99 of the *Estates Partition Act* and that the Plaintiffs were entitled to the undivided share of the lands in the 4 villages. The Plaintiffs then applied for amendment of their plaint in the present suit claiming an undivided share in 3 villages which was allowed. The court below ultimately held that the claim in excess of the area originally claimed in the suit was time-barred. **Held**—That the period between the date of the institution of the first suit and the date of the decree of the High Court in second appeal should be deducted, so that the amended claim was in time. That the words "portion of an estate" in sec. 99 of the *Estates Partition Act* are wide enough to include a case where a co-owner's share in any definite plots of land included in a joint estate is let out such share being as much a portion of a share as an aliquot part of a share. The principle enunciated in the section follows the well-recognised principle that an encumbrance of an undivided share of an estate is transferred to the lands allotted to the share of the person who created the encumbrance on a partition with his co-sharers. *Joy Sankari Gupta v. Bharat Chandra Burdhan*, 1 L. R. 26 Cal. 434; s. c. 3 C. W. N. 200 (1899). *Brish Nath Saha v. Dinesh Chandra Neogi*, 21 C. L. J. 599 (1910). *Hriday Nath Saha v. Mohobutnessa*, 1 L. R. 20 Cal. 285 (1892). *Syed Abdul Latif v. Amanuddi*, 15 C. W. N. 426 (1909). *Nagendra Mohan Roy v.*

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Pyari Mohan Saha, 1 L. R. 43 Cal. 103; s. c. 20 C. W. N. 319 (1915) and *Talik Singh v. Jalal Singh*, 11 C. L. J. 196 (1909), considered. That the question whether sec. 99 was applicable to the present case was *res judicata* between the parties by reason of the decision in the first suit. **UNA** *NATH SAHA v. JADU NATH BISWAS* 202

Symbolical possession, delivery of, effect on limitation—Symbolical possession. *THE MIDNAPUR ZAMINDARY CO. LD. v. NARESH NARAYAN ROY* 34

Summary suits under Or. 37 of Civil Procedure Code (Act V of 1908)—**Limitation Act (IX of 1908), Art. 52**. Such suits, if they be admitted after 6 months from the cause of action—**Civil Procedure Code, sec. 128 (2) (f)**. On an application for the admission under Or. 37 of the Civil Procedure Code of a plaint in a suit on a promissory note, the Master refused to admit the plaint as the suit was not brought within 6 months from the date when the debt became payable.

Ordered—That the plaint be admitted, as suits under Or. 37 are not governed by Art. 5 of the Limitation Act. *ROBINDRO NATH DUTT v. ABDUL AHAD & Co.*, 589

suspension of, apart from provisions of Limitation Act (IX of 1908), if allowable on grounds of equity—**Limitation Act (IX of 1908), Art. 109**—Profits received after execution sale but before confirmation thereof—**Limitation**, if begins running after confirmation—Cause of action, accrual of, it necessarily starting point of limitation—**Limitation Act (IX of 1908), ss. 3 and 9**.] A mortgage sale held on 6th May 1913 was not, owing to an infructuous application to set aside the sale, confirmed till 28th January 1914. In a suit by the auction-purchaser to recover sums realised by the Defendant as rents from the tenants of the land, instituted on 16th September 1916. **Held**—That the limitation in respect of rents realised between the date of the sale and the date of its confirmation, which began running under Art. 109 of Act IX of 1908 from the dates of the receipt of the profits, did not remain suspended till the date of confirmation of the sale, having regard to the clear language of that article and the absence of any provision of the Act modifying its operation.

Per Wainman, J.—The principle laid down in *Ranee Surnomoyee v. Shoshee Mookhee*, 12 M. L. A. 211 (1868), which were enunciated for very different circumstances, could not be extended to this case without subjecting the provisions of Arts. 109 to considerable modification. *Per Mukerji, J.*—Apart from the provisions of the Limitation Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions. Having regard to the fact that the starting point of limitation for suits as provided by the third column of the Schedule to the Limitation Act does not always synchronise with the accrual of the cause of action and to the mandatory provision of sec. 3 and the provision of sec. 9

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that when once time has begun running no subsequent disability or inability to sue stops it except in cases to which the proviso to the Act applies, a saving or exception not found in the Act should not be implied, however much it may be within the reason of those that are recognised by the Act or however much the ends of justice in a particular case may demand. The decision of the Judicial Committee in *Ranea Surnomoyee's case*, 12 M. I. A. 244 (1868), does not create an exception beyond what is provided for by the statutes of limitation of this country. Except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversights there is no scope for the application of any principles of equity in the administering of the statutes of limitation, and the Judicial Committee has not laid down any such principle as being of universal applicability, and all the decisions of the Judicial Committee as well as most of the cases decided in this country are supportable on grounds which are not founded on any general equitable principle extraneous to or unauthorised by the statute. In cases in which the question arises as to the starting point of time for the purposes of limitation these decisions are mostly reconcilable with a proper appreciation of what the cause of action means when the starting point is the cause of action, or with a proper interpretation of the words used in the third column of the articles in other cases; and in cases where the question of suspension arises, if time has once begun to run it never again ceases to run, but there may be satisfaction of a claim or the cancellation of a cause of action, operating to suspend the right of the Plaintiff who may on the removal of the satisfaction or cancellation avail of a fresh cause of action which arises by reason thereof. The substitution of a new legal right on principles of equity is hardly permissible under the statute law as it stands, and a revival of the old cause of action once satisfied or cancelled is foreign to its conception. Art. 109 of the Limitation Act does not admit of any consideration as to when the cause of action may have accrued to the Plaintiff, and claims of profits wrongfully received beyond three years before the suit cannot be recovered. *SM. SARAT KAMINI DOSSI v. NAGENDRA NATH PAI* ... 973

LIMITATION ACT (IX of 1908), Sch. 1, Art. 123—Will, disposing of property under litigation and out of possession of testator—Suit against administrator to recover legacy—Limitation—Point of time from which it runs—"Payable," meaning of—Will, interpretation of.] A similar interpretation must be given to the words "payable" and "deliverable" as used in Art. 123 of the Limitation Act. As a share in the property of an intestate would not be "deliverable" until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, as a legacy or

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share in a legacy does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid. *VENKATADEI APPA RAO v. MAHBOOB SIFRAZ PARSATHASARATHI APPA RAO* ... 989

... s. 6, 7, 8, Sch. I, Art. 126—Suit by Mitakshara sons to set aside father's alienation—One of sons born subsequent to alienation—Suit whether may be brought within three years of such son attaining majority.] A suit to set aside an alienation by a Mitakshara father was instituted by his sons on 23rd June 1920, the cause of action having arisen on the 23rd June 1893. Plaintiffs relied on sec. 7 read with secs. 6 and 8 of the Limitation Act to save limitation on the ground that one of them who was born on 30th November 1900, had attained majority within 3 years of the institution of the suit: Held—That this Plaintiff's birth subsequent to the accrual of the cause of action did not create a fresh cause of action or a new starting point from which limitation should be reckoned. The extension under the sections mentioned can be claimed only by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. *RANODIP SINGH v. PARMESHWAR PERSHAD* ... 666

... s. 20—Payment by cheque—Mode of computation of the fresh period of limitation—Liability, after dissolution, of partners in respect of goods sent during partnership on inspection.] Under sec. 20 of the Limitation Act, the fresh period of limitation in cases of part payment by cheque is to be computed from the date when the cheque is actually handed over and not from the date when cheque is cashed. *Kedarnath Mitter v. Dinabandhu Saha*, 1 L. R. 42 Cal. 1043; s. c. 19 C. W. N. 742 (1915), followed. *Carden v. Bruce*, L. R. 8 P. C. 390 (1868), distinguished. Subsequent dissolution of a partnership does not absolve persons who were members of the firm at the time the goods were sent to the firm, from liability though the cause of action might not have accrued until the return, after dissolution, of such of the goods as were not recovered. *MAURICE MAYAHAS v. W. MORTFITT* ... 496

... Art. 31 or Art. 115, whether applicable to suit by consignee against carrier for compensation for non-delivery or delay in delivery of goods.] Art. 31 of the Limitation Act (Act IX of 1908), applies whether the claims in such suits arise ex contractu or ex delicto and is not limited to suits by the consignee. *Radha Shyam Basak v. The Secretary of State for India*, 1 L. R. 44 Cal. 18; s. c. 20 C. W. N. 790 (1916), discented from. *The British India Steam Navigation Co. v. Haji Mahommed Essack & Co.*, 1 L. R. 3 Mad. 107, 110 (1881), *Banmuli v. British India Steam Navigation Co.*, 1 L. R. 19 Cal. 477 (1883).

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Great Indian Peninsula Railway v. Ralsett Chandmuli, I. L. R. 19 Bom. 165, 188 (1895), and Venkata Subba Rao v. The Asiatic Steam Navigation Co., I. L. R. 38 Mad. 1, 5 (k B.) (1915), dissented from. Haji Ajam Goolam Hussain v. Bombay and Persia S. N. Co. I. L. R. 26 Bom. 562 (1902), India General Navigation and Railway Co. v. Nandalal Banik, 13 C. W. N. 851 (1909), Great Indian Peninsula Ry. Co. v. Gunpat Rai, I. L. R. 33 All. 544 (1911), and Mutsaddi Lal v. B. B. & C. I. Ry. Co., I. L. R. 12 All. 340 (1920), referred to. CHIRANJILAL RAMLAL v. B. N. Ry. Co. Id. ... 277

Sch. 1, Arts. 120, 142—Co-sharer's decree for joint possession—Delivery of symbolical possession in execution—Failure to obtain actual possession—Suit for partition and separate possession with mesne profits—Limitation.] Where a co-sharer in execution of a decree for recovery of joint possession was given symbolical possession under sec. 256 of the Code of Civil Procedure of 1882, on 20th June 1903, but having failed to obtain actual possession sued for partition and separate possession and for mesne profits on the 8th August 1912: Held—That the claim for recovery of possession was governed by Art. 142 of the Limitation Act and was within time. That the claim for mesne profits was governed by Art. 120, and Plaintiff was entitled to recover mesne profits from the 8th August 1903 until partition was effected and possession of lands falling to Plaintiff's share was delivered to him. THE MIDNAPUR ZEMINDARY CO., LD. v. NARESH NARAYAN ROY ... 270

s. 5 and Sch. 1, Art. 177 (as amended by Act XXVI of 1920)—Application for substitution out of time—Ignorance of law, if sufficient cause within the provisions of sec. 5 of the Limitation Act.] Where a Respondent died on the 13th December 1925, and the Appellant filed an application on the 9th June 1924 for setting aside the abatement of the appeal as against that Respondent and for substituting his heir, and the Appellant stated in his affidavit that although he was aware of the death of the Respondent he did not know that substitution of his legal representative was necessary or that it was his duty to bring in the said legal representative on the record: Held—That under the circumstances of the case the delay was bona fide and sufficient cause had been shewn within the provisions of sec. 5 of the Limitation Act KRISHNA MOHAN GHOSH v. SURAPATI BANERJI ... 472

Sch. 1, Arts. 181 and 183—Civil Procedure Code (Act V of 1908), Or. 34, r. 8, application for a personal decree under Limitation governing—Mortgage suit—Personal covenant—Execution of decree.] An application under Or. 34, r. 8, for a personal decree for the balance of

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the mortgage money not recovered by sale of the mortgaged properties is an application for a new decree in the suit and cannot be said to be an application for enforcing a judgment or decree within the meaning of Art. 183 and consequently is not governed by that article. Art. 181 of the Limitation Act does apply to such an application and the case of Biswambhar Shaha v. Ram Sundar Kaibarta, I. L. R. 42 Cal. 294 (1914), in so far as it decided that Art. 181 does not apply to such an application was not rightly decided. Mahammad Itifât Hossain v. Alimunnissa Bibi, I. L. R. 10 All. 551 (1918), followed. FRANCIS HIGGINS PELL v. MINNIE GREGORY ... 678

LIS PENDENS—Lease of mortgaged property by mortgagor after institution of mortgage suit, if binds mortgagee—Mortgagee, if entitled to recover rent from lessee even if he had paid rent in advance to lessor—Power of mortgagor to grant leases—Lis pendens—Transfer of Property Act (V of 1882), sec. 52.] N mortgaged premises No. 5, Schuch Street to G. G. instituted a mortgage suit to enforce the mortgage. On the 31st September 1921 Plaintiff was appointed Receiver of the mortgaged premises but was directed not to take possession till the end of November 1921. On the 7th December 1921 N granted a lease of the mortgaged premises to the Defendant for 5 years and as a condition precedent for the execution of the lease took 17 months' rent in advance. On the 16th May 1922 the Plaintiff gave notice of his appointment asking the Defendant firm to pay rent to him. On the 24th September 1922 the Plaintiff served a further notice of demand on the Defendant firm. The Plaintiff instituted the suit for the recovery of Rs. 3,150 as rent of the premises from Jaistha 1329 B. S. (15th May 1922) to the end of Kartick 1330 B. S. (10th November 1923). The Defendant firm contended that they had no notice of the appointment of the Plaintiff as Receiver till the 24th September 1922 and that they had paid in advance 17 months' rent of the premises, viz., Rs. 2,975 to the mortgagor and two further sums of Rs. 816-14 and Rs. 198 on account of the mortgagor, and claimed deduction of the said several sums and deposited the balance of Rs. 210-3 in Court: Held—That the lease is affected by the doctrine of lis pendens embodied in sec. 52 of the Transfer of Property Act. Held further—That payment of rent in advance after the institution of the suit on the mortgage and by virtue of a lease granted by the mortgagor after the execution of mortgage is not binding upon the mortgagee or on the Plaintiff as Receiver of the mortgaged properties. Payments made by tenants to a mortgagor after a mortgage but before notice of suit, must in order to be valid against the mortgagee, have been made in respect of rent which

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was due at the time of payment or became due before notice of the mortgage; but where a lessee has prepaid to his lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee who neglects to make proper enquiry of the lessee who is in possession, the mortgagee cannot recover any part of the rent reserved by the lease. *De Nicholls v. Saunders*, L. R. 5 C. P. 589 (1870), *Cook v. Guerra*, L. R. 7 C. P. 132 (1872), *Green v. Rheinberg*, 101 L. T. 140 (1911), *Daniels v. Davison*, 16 Ves. 249 (1803) and *Lord Ashburton v. Norton*, [1915] 1 Ch. 274 at pp. 290, 291 (1914), referred to. Held also—That a mortgagor has very limited power of granting leases after the execution of a mortgage. *Doe v. Maisey*, 2 B. & C. 767 (1828) and *Gibbs v. Cruikshank*, L. R. 8 C. P. 451 (1873), referred to. **KIRAN CHANDRA BOSE v. DUTT & CO**

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MAHOMEDAN LAW Pre-emption—Mowasibat

(immediate assertion of the claim of pre-emption), observance of—Delay, it and when fatal.] In a suit for pre-emption by the pre-emptor (shafee) against the vendees and the vendors (the latter being Plaintiff's co-sharers) in which the parties were all governed by the Mahomedan law of pre-emption, the final Court of fact found that the pre-emptor believed the information he received about the sale to be correct and that the information he received required no corroboration. Held—That the suit was liable to dismissal in consequence of the very short delay which the pre-emptor made in his observance of the ceremony of *talab-i-mowasibat* (demand of purchase immediately on hearing of the sale), by running to the house of his co-sharer instead of performing it at once and immediately on the spot where he got the information about the sale, which he did not doubt nor disbelieve at all. *Jadu Lal Sahu v. Janki Koor*, 1 L. R. 35 Cal. 575 (1908) and *Lalia Prosad v. Debi Prosad*, 1 L. R. 3 All. 236 (1880), referred to. **LAL MAHAMMED SARKAR v. HUSAIN MAHAMMAD SAHA**

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MARKS ON BALES OF CLOTH, if a warranty of quality or description—True significance. The first purchaser of bales of cloth from mills can get any number put upon them he pleases, and the numbers indicate really nothing except the fact that the purchaser has purchased the goods. The numbers do not give any warranty or indication of the quality or description. **MARWADI RAMSIVAN NEVATIA v. H. BHIKAJI & CO**

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MARRIAGE, dissolution of—Indian Divorce Act (IV of 1869), s. 2—Petitioner, a Christian and a resident of India—Remand for finding—Damaggs. on what principles to be assessed. In a divorce case, in order to grant any relief under the Indian Divorce Act, the judgment must show that the case comes within the provisions of sec. 2 of

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that Act, that the Petitioner is a Christian and a resident of India at the time of presenting the petition. **Singrai Santhal v. Puraigi Santhalai**, 31 C. L. J. 340* (1920), referred to. In order to assess damage the Court should direct its inquiry towards ascertaining what damage the Petitioner has sustained owing to the action of the co-Respondent, and the damage he has sustained would be the same whether the co-Respondent is a rich man or a poor man. **Keyse v. Keyse and Maxwell**, L. R. 11 P. D. 100 (1886), referred to and distinguished. **W. H. THOMAS v. MRS. THOMAS**

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MASTER'S liability for accident caused by cleaner of a motor car driving it during chauffeur's temporary absence from the car—Chauffeur, if guilty of negligence in leaving car in charge of cleaner.] A chauffeur left the car in the street in charge of the cleaner, who was forbidden to drive, and went to a neighbouring workshop, while the cleaner started the car and drove it against a Corporation lamp post breaking it to pieces. Held—That the master was not liable merely on the ground that the cleaner was his servant, for the reason that driving the car lay outside the scope of the cleaner's employment. A motor car with the engine at rest is a very different thing from a horse-drawn van with the reins attached to a hook, and a much larger measure of interference is needed to put it in motion. Unless it could be said that the chauffeur ought to have anticipated that the cleaner would try to drive the car he could not be held guilty of negligence. So the chauffeur could not be regarded as negligent and it followed that the master was not liable. **Engelhart v. Farrant**, [1897] 1 Q. B. 210, distinguished. **NALINI RANJAN SEN GUPTA v. THE CORPORATION OF CALCUTTA**

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MISNE PROFITS—Suit properly brought in Munsif's Court—Misne profits, when assessed exceed Munsif's pecuniary jurisdiction—Forum of appeal. See Civil Courts Act, s. 19. **BIDYADHAR BECHAR v. MANINDRA NATH DAS**

869

MINERALS, right to—Putni lease—"Adha" and "urdha," if include minerals—Words, if of common style and surplusage—Putni lease, as such, if conveys minerals to putnidar—Question, if decided by the Privy Council—Transfer of Property Act (IV of 1922), s. 108 (a). Held, upon the construction of a putni lease—That looking to the anxious expression of the generality of the grant as evidenced by the long category of things conveyed, the words "adha" and "urdha" (above and below the surface) used in the lease made it plain that there was every intention to convey all below the surface as well as all on it or above it. Common words of style used in conveyances of any sort may be, and often are, words of surplusage. But when they are not words of surplusage, they

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must be given the proper effect of their own meaning. Where the grantee of minerals is also the grantee of the surface, the grant, in a question with the grantor, includes the right to work the minerals. Sec. 108 (c) of the Transfer of Property Act deals with the ordinary rights of a lessee in an ordinary lease. Its terms do not cut down the right to work minerals expressly conveyed. The question whether or not a putni lease as such conveys the minerals to the putnidar is, so far as the Judicial Committee is concerned, still open. The judgment of Prinsep and Hill, JJ., in *Nawab Sir Ali Quader Syed Hossein Ally Mirza Bahadur v. Rai Jogendra Narain Roy*, 16 C. L. J. 7 (1889), has not been overruled by the decision of the Board in *Girdhari Singh v. Megh Lal Pande*, I. R. 44, I. A. 246, 249; s. c. I. L. R. 45 Cal. 87; 22 C. W. N. 201 (1917), which was a case of a mokurari and not a putni lease. *SATYA NIVANTAN CHAKRAVARTI v. RAMLAL KAVTRAJ* ... 725

MITAKSHARA HINDU—Exemption from ad valorem duty in the estate of such a person. See Letters of Administration. IN THE GOODS OF BHUBANESHWAR TRIGUNAIT ... 879

JOINT FAMILY—Father adjudicated insolvent—Son's interest in joint property if vests in Official Assignee. See Insolvency Act, Presidency Towns. *SAT NARAIN v. BEHARI LAL* ... 797

MORTGAGE—Stipulation to pay interest—Interest, if a charge on the property.] The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate. *Alia Khan v. Kanshi Ram*, [1913] P. R. 176, referred to. *GANGA RAM v. NATHA SINGH* ... 557

executed before the Transfer of Property Act (IV of 1882)—Mortgage by conditional sale with possession—Liability of mortgagee to pay revenue and public charges imposed during the term—Mortgagee if may charge such payments in the accounts.] In British India, a mortgagee in possession of immoveable property under a mortgage made before the Transfer of Property Act of 1882 came into force was, under the ordinary law then in force, bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and was not entitled to charge such payments against his mortgagor in the accounts. *MIRZA ABID HUSAIN KHAN v. MU-SAMMAT KANIZ FATMA* ... 214

SUIT—Omission of a debtor from suit—Decree for proportionate share. See under Civil Procedure Code. *KHE-RODAMOYI DASI v. HABIB SHAHA* ... 51

MORTGAGED PROPERTY, lease of, by mortgagor after institution of mortgage suit if binds mortgagee—Mortgagee if entitled to recover rent from lessee even if he had paid rent in advance to lessor—Power of mortgagor to grant leases. See under *Lis pendens*. *KIRAN CHANDRA BOSE v. DUTT & CO.* ... 94

MUTH, a mourashi—Office of mohant and property of muth, it can be partitioned—Revocation of Will by subsequent Will—Subsequent Will invalid—Dependent relative revocation—Animus revocandi should be unqualified.] Where the mohant of a muth of the mourashi class made a Will whereby he appointed the Plaintiff his successor and subsequently executed two documents also intended to operate as a Will by one of which he appointed the Plaintiff as the paricharak mohant and by the other appointed another chela as the gadinashin mohant and cut away a portion of the properties from the parent foundation and gave it to the former: Held—That the animus revocandi was not unqualified and the testator's intention was that the previous Will would be revoked only if it could be replaced by the provisions of the later Will. That the two documents subsequently executed together purported to effect a partition of the office of the mohant and the property of the muth, which was contrary to Hindu law and consequently invalid. There was therefore no revocation. On the question whether by accepting and acquiescing in the arrangement made by the later documents, the Plaintiff was estopped from questioning its validity. Held—That the arrangement made by the later documents being ultra vires, no amount of acquiescence would validate it, and there being nothing to show that the other party to the arrangement was induced thereby to alter his position for the worse, there was no estoppel. *GOBINDA RAMANUJ DAS MAHANTA v. RAM CHARAN DAS* ... 931

NOTICE to quit addressed to and served on one of joint tenants, if binds others. See Transfer of Property Act, sec. 106. *REJOY CHAND MAHATAB v. KALI PRASANNA SEAL* ... 629

OCCUPANCY RIGHT, if may be acquired by co-sharer or ijaradar or tenants under them—Purchase of pre-existing occupancy holding by co-sharer, effect of—Extinguishment of occupancy right—Exclusive user of joint land by co-sharer, if quoter of other co-sharers—Right of latter, to compensation—Compensation for mesne profits—Partition, ultimate remedy.] Where lands in India are held in common by co-sharers in proprietary right, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not

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being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them.

Robert Watson and Co. v. Ram Chand Dutt, L. R. 17 I. A. 116, s. c. I. L. R. 18 Cal 10 (1890) referred to. If a co-sharer purchases any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished. In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have and in Bengal a middleman cannot obtain as a middleman a right of occupancy himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. **Midnapur Zamindary Company v. Naresh Narayan Roy**, L. R. 48 I. A. 55, s. c. I. L. R. 48 Cal. 460 (1920), referred to. In the decree made in this suit the direction of the trial Court for recovery from the Defendants of mesne profits for three years prior to the suit to date of delivery of possession, etc., was varied by substituting for it an order that the Defendants should pay compensation to the Plaintiff for the exclusive use by them or their tenants of the lands in suit from the date possession was delivered to the Plaintiff under the previous decree until partition was effected and possession of lands falling to Plaintiff's share was delivered to Plaintiff. **THE MIDNAPUR ZAMINDARY CO. v. NARESH NARAYAN ROY**.

OFFICIAL ASSIGNEE, notice on, in appeal against adjudication order. See adjudication order. **KHEMKARANDAS KHEMKAR v. PURIBUX FATEHPUNIA**.

PAGWAND RULE, effect on, of division amongst sons by different wives—Division amongst sons by different wives, if abrogated pagwand rule in favour of chundawand—Full-blood and half-blood relations—Preference of former.] When a separate entity created by division or partition comes into being, the full range of succession to that entity is determined by, whatever system is in fact proved to be in operation in that simple family and it may quite well be assumed that within that family the

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generally prevailing system of pagwand was not abandoned. Properties having been partitioned between the sons by one wife of the owner on the one hand and those by his other wife on the other: Held, on the death of a descendant of one of these sons, that his cousin descended from his uterine brother succeeded in preference to the descendants in the same degree from the sons by the other wife and it was not necessary, in order to hold this, that the pagwand rule had been abandoned for the chundawand rule. Inclusion by the Appellant of unnecessary matter in the paper-book was characterised as an abuse, and the Judicial Committee indicated that they would have disallowed the entire sheet of the superfluous printed matter if the judgment had been favourable to the Appellants. **NABI BAKSH v. AHMAD KHAN**.

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PARTITION SUIT—Value of entire property and not of the share claimed determines jurisdiction of Court—Partition suit, valuation of, for purposes of jurisdiction and court-fee—Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1887), s. 7, para. v, and Sch. II, Art. 17, cl. vi—Partition suit, frame of—Determination of title in partition suit—Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order—Revision—Refusal of jurisdiction upon erroneous interpretation of statutory provisions.] A plaint was filed in the Court of a Subordinate Judge in which the Plaintiff alleged that he was entitled to a four annas share of certain joint family properties and was in possession of the same but a cloud having been cast upon his title he prayed, on establishment of his title, for partition of the properties which he valued at Rs. 2,500 and paid a court-fee of Rs. 50 for partition and ad valorem court-fee upon the four annas share of the properties under partition. The Defendants objected to the trial of the suit on the ground that the value of the suit both for jurisdiction and court-fee was, under sec. 8 of the Suits Valuation Act, triable by a Munsif. The Subordinate Judge gave effect to the Defendants' contention and returned the plaint to be filed in the proper Court. On appeal by the Plaintiff, the District Judge upheld the order of the Subordinate Judge. Against the order of the District Judge, Plaintiff moved the High Court under sec. 115 of the Civil Procedure Code and obtained the present Rule: Held—That sec. 8 of the Suits Valuation Act had no application, but Art. 17, cl. vi of the Court Fees Act was applicable, and that the suit was triable by the Subordinate Judge and he erroneously refused jurisdiction to try the suit. The order of the Subordinate Judge as affirmed by the District Judge was set aside, and the suit was directed to be tried by the Subordinate Judge. In a suit for partition it is the entire value of the pro-

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erty which determines jurisdiction and not of the share which the Plaintiff claims in the property. *Bidhara Ram v. Ram Charitar Mai*, 12 C. W. N. 37 (1907), *Kirty Charan Mitter v. Anath Nath Deb*, I. L. R. 8 Cal. 757 (1882) and *Lala Bhugwat Sahay v. Pashupati Nath Bose*, 10 C. W. N. 564 (1906), referred to. The mere fact that in a suit for partition a question as to the title of the Plaintiff is raised and it is necessary to determine such a question before a partition can be directed would make no difference to its being a partition suit. *Mohendra Chandra Ganguly v. Ashutosh Ganguly*, I. L. R. 20 Cal. 162 (1903) referred to. A Plaintiff can in a partition suit if necessary establish his title and his right to joint possession and then if his title is good, demand in the same suit possession, not joint possession, but possession by partition: Held—That the suit as framed in the present case being one in which the Plaintiff asserted that he was in possession, it was clearly a suit for partition. Where an *ad valorem* court-fee is paid under sec. 7, para. v of the Court Fees Act the jurisdiction of the Court according to sec. 8 of the Suits Valuation Act would be the same as the valuation for the court-fees. That would be so where the suit is of a simple character and of the character contemplated by that section of the Court Fees Act but where the suit is not a simple suit contemplated by that section but is a suit for partition then the article applicable is Art. 17, cl. vi of the Court Fees Act. Ordinarily the High Court in revision does not interfere with interlocutory orders in a suit out would interfere in a fit case. *Yashwara Nath Chowdhury v. Hari Charan Chowdhury*, 20 C. L. J. 426 (1914), referred to. Held—That the order of the Subordinate Judge in this case resulted in his refusal to entertain and try the suit and although a preliminary question as to whether the Court had jurisdiction or not was a question which had to be determined by interpreting certain sections of the Court Fees Act and the Civil Courts Jurisdiction Act, still the result of the decision made upon a misapprehension of the true effect of the statutory provisions being either exercise or refusal of jurisdiction, the High Court was entitled to interfere in revision. A Judge cannot assume as a matter of law that which in fact has no existence in law and to give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of the statute deprive himself of the jurisdiction which properly belongs to him and if he refuses jurisdiction, the High Court may interfere. *Shew Prosad Bungshidhar v. Ram Chunder Haribux*, I. L. R. 41 Cal. 323 (1913) and *The*

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Manaraja of Burdwan v. Apurba Krishna Roy, 15 C. W. N. 872 (1911), referred to. *RAJANI KANTA BAG v. RAJABALA DASI* ... 16

... Partition for convenience of possession irrespective of shares, if a bar to decree for partition.] A partition for convenience of possession by itself cannot stand in the way of a decree for partition so long as it is not found that it was in conformity with the shares of the respective parties. *JOLFA BIBI v. AJALADDIN* ... 223

PARTNERSHIP BUSINESS—Mortgage payable by one partner paid by another who was managing partner and took back title deeds as such—Transaction whether equitable mortgage.] The owners of certain oil mills which were subject to a mortgage of Rs. 25,000 entered into partnership with the Plaintiff for a business of making and sale of oil. Plaintiff brought in Rs. 60,000 of capital and it was agreed that the mortgage of the mill was to be paid off out of the mortgagor's share of the profits of the partnership business. The mortgagees pressing for payment, the amount was paid by the Plaintiff who was managing partner of the business and who took back the deeds. In a suit by Plaintiff in which he claimed to be equitable mortgagee by deposit of title deeds of the mills the Plaintiff in the course of his cross-examination admitted that he took charge of the title deeds as such manager of the business when the mills were redeemed and he lent the money as for the owners of the mills: Held—That the transaction was an advance from one partner to the others to be paid off like advances already existing out of profits and was not an equitable mortgage independently between the Plaintiff and the other partners. *HENG MOH AND COMPANY v. LIM SAW YEAN* ... 12

... continued after a partner's death—Effect—Right of representatives of deceased partner to accounts after death—Court, if may direct Commissioner to allow remuneration for management in the accounts—Objection, to Commissioner's ruling in Court.] If a partnership business is continued after the termination of the partnership by the death of a partner, it becomes a partnership at will and the representatives of the deceased partner are entitled to have accounts taken of the partnership subsequent to his death until its final dissolution on the footing that they have the same share as the deceased partner had in the business. The direction of the High Court to the Commissioner that all just allowance shall be made including fair remuneration for the management of the business was a proper order to make it being open to any party to take exception to the Commissioner's ruling in Court. *Haji Hedaye-Tulla v. Mahomed Kamil* ... 161.

- PARTNERSHIP DEBT**—Mortgage by one partner of his properties to secure debt, if extinguishes debt—Dissolution agreement between partners—One partner taking over exclusive liability for debt, effect of—Right of other partner to indemnity—When and how enforceable—Right of released partner to recover from co-partner upon discharging debt—Contract to secure obligation to indemnify—Consideration.] One of the partners of a firm, V. executed a mortgage of his properties to secure a partnership debt and a further advance to himself. This mortgage was held not to operate as a novation of the contract and an extinction of the debt. This was followed by a dissolution of the partnership by agreement between the partners under which A took over the above amongst other debts. The creditor being no party to the agreement. Held—That the joint liability of both partners remained unaffected by the agreement, though as between the partners themselves. A became solely responsible for the debt and V. became entitled to an indemnity from the latter against all liability in respect of it and he was entitled to have that right of indemnity declared and enforced (by an order on the other, for example, to pay off the debt) if the right was disputed or the obligation neglected. But V. could not recover the debt from A unless and until he himself paid it. Subsequently A executed a mortgage in favour of S. who was benamidar for V. the consideration whereof was agreed to be paid to the creditor in part discharge of his debt. No money was in fact advanced to A or paid to the creditor in pursuance of the mortgage contract. Held—That though there was consideration for the mortgage, which was intended to secure A's liability to indemnify V. in the circumstances no decree under secs. 86-90 of the Transfer of Property Act (now Or. 34 of the Civil Procedure Code) could be made on foot of the mortgage in favour of V. against A. **VEERAPPA CHETTY v. L. A. R. ARUNA CHELLAM CHETTY** 438
- PERMANENT TENANCY**, under the law as it stood before the passing of the Transfer of Property Act (IV of 1882), if transferable and when—Custom—Standing by.] A permanent tenancy created before the passing of the Transfer of Property Act, for the purpose of habitation, is not transferable, except by custom or express contract to that effect or unless pucca buildings have been allowed to be erected thereon by the landlord. **Banes Madhab Banerjee v. Joy Krishna Mukherji**, 12 W. R. 495; 7 B. L. R. 152 (1869), explained. **Nabu Mandal v. Cholim Mullick**, I. L. R. 25 Cal. 396; a. c. 2 C. W. N. 405 (F. B.) (1908) and **Hanuman Prasad Singh v. Das Charan Singh**, 7 C. L. J. 309 (1903) followed. **Ambika Prasad Singh v. Baldeo Lal**, 20 C. W. N. 1113 (1916), **Sulim**
- PERMANENT TENANCY**—contd.
Mohan Banerji v. Raj Krishna Ghose, 25 C. W. N. 420 (1920), **Harinath Karmakar v. Raj Chandra Karmakar**, 2 C. W. N. 122 (1897) and **Madhab Chandra Pal v. Bejoy Chand Mahtab**, 4 C. W. N. 574 (1900), referred to. **Madhusudan Sen v. Kamini Kanta Sen**, I. L. R. 32 Cal. 1023; a. c. 9 C. W. N. 895 (1905) and **Ram Charan v. Hari Charan**, 7 C. L. J. 107 (1906), distinguished. **SAFAR ALI MEA v. ABDUL RASHID KHAN** 428
- PLEADER**, purchase by, of decree obtained against client in the benami of his wife and purchase of property at Court sale in name of latter—Concealment, if vitiates sale.—Trusts Act (11 of 1882), s. 88—Advantage gained by concealment by person in fiduciary position.] A decree before it was fully executed was, without the knowledge of the judgment-debtors, purchased by the person who had acted as their pleader in the suit benami in the name of his wife N and in partial execution of the decree certain properties were purchased in the name of N with leave obtained on her behalf to bid at the sale, but in this transaction also the pleader was the real purchaser, and this fact was not disclosed to the Court. Held—That the pleader was bound to reconvey both the decree and the properties to the judgment-debtors, although he had ceased to be the judgment-debtors' pleader when the properties were purchased and no unfair dealing was established—the mere fact of concealment by a person standing in a confidential position whereby he secured an advantage being sufficient to vitiate the transactions. Sec. 88 of the Trusts Act embodies the ordinary equitable conditions which apply to such cases. **Lewis v. Hillman**, 3 H. L. C. 607, 630 (1872) and **McPherson v. Watt**, 3 App. Cas. 254 (1877), referred to. **SM. NAGENDRAMALA DAS v. DINANATH MAHESW** 491
- PRESUMPTION** of permanent tenancy, elements necessary to raise—Principles upon which such presumption is raised. See under Tenancy. **ABDUL HAKIM KHAN CHAUDHURI v. ELAHI BAKSHA SHA** 138
- PRINCIPAL and agent**—Property, if passes to agent as against principal—Destruction by fire of goods purchased by agent—Loss to be borne by principal or agent.] The Plaintiffs were employed by the Defendants as agents for buying various goods. A fire broke out after some goods had been bought for the Defendants by the Plaintiffs. The lower Appellate Court in affirming the decision of the trial Court held that the Plaintiffs must bear the loss, the property not having passed to the Defendants. Held in reversing the judgment of the lower Appellate Court—That it is contrary to the whole idea of the relation between agent and principal to hold that property so purchased passes to the agent as against the principal, and in the

- PRINCIPAL**—*concl.*
absence of proof of negligence the loss falls on the principal. **DHUNPUL SINGH KUTAHRI v. HARI CHARAN AGARWALLA** 121
- PRIVY COUNCIL**—*Practice*—Application to Board to interpret previous—Orders in Council, if and when may be entertained.] It is no part of the functions of the Judicial Committee, generally speaking, to interpret Orders in Council which have been already made, unless they are brought before them in the ordinary way upon appeal. But in the peculiar circumstances of the present case, they did so, upon application by a party to the Order. *Ex parte Yariagadda Durga, L. R. 31 I. A. 64 (1903)*; referred to **HURNANDRAI FULCHAND v. PRAGDAS BUDIHESEN** 515
- PROBATE**—Appointment of a member of a firm as executor—Application for probate, proper form of.] Where a member, not named, of a firm is appointed an executor under a Will the member who applies for probate must shew that he was a member of the firm at the date of the Will and at the date of the testator's death. **IN THE GOODS OF GEORGE NASH** 373
- PROHIBITORY ENACTMENT**—See **Contract Act, sec. 7. SURAJMULL NAGOREMULL v. THE TRITON INSURANCE CO.** 893
- PUNJAB PRE-EMPTION ACT (II Punj. of 1905), sec. 3 (1)**—Punjab Alienation of Land Act (XIII of 1900), sec. 2 (3)—Tea garden and factories, sale of—Lands if pre-emptible.] Held (affirming the High Court)—That a tea garden is agricultural land and pre-emptible as such within the meaning of sec. 3 of the Pre-emption Act (Punj II of 1905) read with sec. 2 (3) of the Punjab Alienation of Land Act, 1900, but the factory buildings at which tea grown in the fields is prepared for the market are not lands occupied for purposes subservient to agriculture and pre-emptible under the Act **KAJU MAL v. SALIG RAM** 395
- PUTNI LEASE**, as such if conveys minerals to putnidar See minerals. **SATYA NIRANTAN CHAKRAVARTI v. RAM LAL KAVIRAJ** 725
- RAILWAY COMPANY**—Suit against agent if may be ordered to proceed against the Company. See under C. P. C., Or. VI, r. 17. **AGENT, BENGAL NAGPUR RAILWAY v. BEHARI LAL DUTT** 611
- RECEIVER**, appointment of, by consent, in execution proceedings—Supersession of previous arrangement regarding liquidation of decretal debt payable under a mortgage decree—Suit by Receiver against decree-holder for possession.] The decree-holder, having obtained a mortgage decree as contemplated by Or. 34, r. 4 of the Civil Procedure Code, came to an arrangement with the judgment-debtor under which the decree-holder was given possession of the mortgaged property in lieu whereof he was to be debited with a given sum annually. That a subsequent consent order under which a Receiver was appointed to take over all the properties of the judgment-debtor including the mortgaged property and administer them under a scheme which would enable the debts due by the judgment-debtors to be paid off gradually superseded the arrangement and entitled the Receiver to sue the decree-holder for recovery of possession of the mortgaged property. **MAHARAJADHIRAJ SINGH RAMESHWAR SINGH BAHADUR v. HITENDRO SINGH** 429
- Or. 40, r. 2? **ALKAMA BIBI v. SYED ISTAK HUSSAIN** 898
- REGISTRATION ACT (XVI of 1908), secs. 34, 35**—Registration, if void, of a conveyance executed by a constituted attorney of a vendor (power not produced) and execution thereof by the vendor admitted before the Registrar of Assurances by another constituted attorney of the said vendor under another power—Registrar, duty of—Conveyance, if properly executed—Jurisdiction to register the same—Executant, meaning of—Bakalam signature, what is—The conveyance, if a good title. A conveyance, dated 2nd September 1890, was executed by A by his constituted attorney B under a power, dated 20th June 1889. This power was not produced. When the conveyance was registered, the execution thereof by A was admitted before the Registrar of Assurances by C as an attorney for A under a power, dated 2nd May 1891. Held per Sanderson, C. J.—That, in the circumstances, the presumption was that the deed was executed by B, the attorney of A, by whom it purported to have been executed, and that B was the duly authorised agent of A to execute the deed on A's behalf. That as the appearance of A to admit the execution would have been sufficient, it was competent to A to authorise some person to appear on his behalf before the Registrar and to admit the execution. The conveyance itself and the Registrar's certificate showing that a power, dated 2nd May 1891, duly executed by A in favour of C was produced by C at the Registrar's office and was authenticated by the Registrar and that C admitted execution of the conveyance by A, the admission of execution by C was as valid and effective as if A himself had appeared before the Registrar on the day of registration and had admitted the execution of the deed. It was part of the duty and within the powers of the Registrar to satisfy himself as to the authenticity of the power-of-attorney which was produced to him and the provisions of sec. 35 of the Registration Act had been complied with. Held per Rappin, J.—Executing means signing a document as a consenting party thereto. The man whose name has been put to the document as evidencing his assent thereto is the "executant" for the purpose of the section. In case of bakalam signature a person whose name is put with his authority in.

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evidence of his assent to a document is "executant" within the meaning of s. 35. *Muhammed Ewaz v. Brilal*, I. L. R. 4 I. A. 166, s. c. I. L. R. 1 All. 465 (1877). *Bisendoyal v. F. Schlaepfer*, 22 W. R. 65 (1874). *Kesho Deo v. Hari Das*, I. L. R. 21 All. 231 (F. B.) (1899), in the matter of *Ram Chunder Biswas*, 16 W. R. 180 (1874). *Raj Lakhi Ghose v. Debendra Chander Majumdar*, I. L. R. 24 Cal. 668 (1897) and *Kanhaya Lal v. Sardar Singh*, I. L. R. 20 All. 284 (1907) discussed. *MONMOTHO NATH MUKERJEE v. PURAN CHAND NAHATTA* ... 539

RELIGIOUS PROCESSION—Civil right—Religious procession, right of a sect to conduct, along highway—Extent of right—Obstruction—Special damage, if necessary to found suit for damages or injunction against obstructors—English law, inapplicable.] Persons of whatever sect in India are entitled to conduct a religious procession with its appropriate observances along a highway, subject to the orders of the local authorities regulating the traffic, to the Magistrate's directions and the rights of the public. Persons of different sects or religions cannot as of right claim that the functions of the procession should cease as it passes places of worship belonging to the former, but it would be open to the Magistrate in the special circumstances of a case to order that the observances should cease within a certain distance of such a place of worship. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India. A suit for damages for preventing the Plaintiffs from conducting a religious procession along a highway or for a declaration and injunction is maintainable without proof of special damage other than the obstruction of the procession. *Parthasaradi Ayyangar v. Chinna Krishna Ayyangar*, I. L. R. 5 Mad. 304 (1882). *Sundram Chetti v. The Queen*, I. L. R. 6 Mad. 203 (F. B.) (1883). *Sadagopachariar v. A. Rama Rao*, I. L. R. 20 Mad. 376 (1902). *Baslinnaona Parappa v. Dharmanna Basanna*, I. L. R. 31 Bom. 571 (1910) and *Mohamed Abdul Hafez v. Latif Husein* I. L. R. 24 Cal. 524 (1907), approved. *Vijayaraghava Chariar v. Emporner*, I. L. R. 26 Mad. 554 (1903). *Satku Valad Kadir Saucare v. Ibrahim Ana Valad Mirza Aga*, I. L. R. 2 Bom. 457 (1877) and *Kazi Fajaudin v. Madhavdas*, I. L. R. 18 Bom. 693 (1893), disapproved. *SATYID MANZUR HASAN v. SAIYID MUHAMMAD ZAMAN* ... 468

RENT, suit for—Devolution of tenant's interest upon several persons by assignment and succession—Letter, whether joint tenants or tenants in common—Liability of each for entire rent on account of privity of estate—Suit against some—Decree, effect of, as decree for money only—Defendant's right to insist on other tenants in common

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being made co-Defendants—Other tenants not added or added after limitation—Suit, if to be dismissed for defect of parties—Necessary parties, who are—Indian Contract Act (IV of 1872), s. 43—Bengal Tenancy Act (VIII of 1885), Ch. XIV.] *Per Curiam* (C. C. Ghose and Mukerji, JJ., not agreeing).—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. The heirs of a tenant take as tenants in common. All persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord whether they get into possession by right of succession or assignment, under the privity of estate which exists between each one of them and the landlord in the whole of the leasehold. Either on this ground or because a contract is implied for payment of rent by all tenants in common in possession of a leasehold, any one of such tenants may be sued for the entire rent due to the landlord. A decree in such a suit will not have the effect of a rent decree under Chap. XIV of the Bengal Tenancy Act. *Per Mukerji, J.*—Each one of the persons in whom a share of a leasehold may vest by assignment or inheritance has a privity of estate with the lessor in respect of the whole estate; and each of them would be liable to the lessor on the covenants running with the land and so for the whole rent. A decree for the entire rent against some of such persons in the absence of the others is not a nullity and is valid and effective as a decree for money. But the Defendants so sued, not on contract but on account of privity of estate, may insist on all the persons jointly liable to be made parties. Defendants as they are necessary parties, and if the Plaintiff does not, on being required by the Court, amend the plaint and implead as Defendants all parties, who are known to be tenants of the holding, the suit would be liable to dismissal as not properly constituted. If the latter are added as parties Defendants the suit will not necessarily fail because the Plaintiff may have lost his remedy against the added Defendants. *KAILASH CH. MITRA v. BROJENDRA K. CHAKRAVARTY* ... 1000

RENT CONTROLLER, Calcutta, if can make reference to High Court under Or. XI, VI, r. 1, C. P. C. See C. P. C., Or. XLVI, r. 1. *D. TANCREED v. D. N. MULLICK* 521

RENT-FREE TITLE, presumption of—Long possession without payment of rent—Presumption under s. 103B, Bengal Tenancy Act (VII of 1885), rebuttal of.] Where a tenant sued for a declaration that no rent was payable in respect of his tenure which was entered as rent-paying in the record-of-rights to which he was no party, and it was found by the Courts below that for more than 60 years no rent

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was paid and the landlord failed to prove that he ever realised rent, and that in partition proceedings between the Defendant landlord and his co-sharers under the Estates Partition Act, the lands in suit were described as rent-free: Held—That upon the facts found the tenant had proved a rent-free tenure. Long possession without payment of rent may in certain circumstances justify the inference of rent-free title. An open and adverse assertion by a tenant that the land, which he has held is rent-free may, after the lapse of the period of limitation, create a presumption that the tenure has been held without payment of rent as against the landlord. The tenant may by assertion of adverse title acquire a limited interest in the land which he holds. *Jagdeb Narain Singh v. Baldeo Singh*, L. R. 49 I. A. 399; s. c. 27 C. W. N. 925; 36 C. L. J. 499 (1922) and *Bipradas Pal Choudhury v. Monorama Debi*, 22 C. W. N. 396 (1917), referred to. *Jafar Ahmed v. Bipendra Kishore Manikva*, 22 C. L. J. 126 (1913), distinguished. **CHATTRA NATH CHOWDHURY v. BARAE ALI** ... 333

RES JUDICATA—Issue left open by trial Court, expressly decided as being necessary to decrees in appeal Court—Decision, if res judicata—Question as to whether issue was necessary, if may be considered in later suit. In the previous suit for joint possession the Defendant having set up exclusive jote right, an issue thereon was raised, but Plaintiff having waived the question, the trial Court held that it was unnecessary to decide whether Defendants had the jote right claimed. On appeal, the Defendant insisted in the Appellate Court trying the issue and the Appellate Court being of opinion that the decision of the issue was necessary determined it against the Defendants and though in the Appellate decree no reference was made to the alleged jote right of the Defendants, it affirmed the decree of the trial Court for recovery of joint possession by the Plaintiff: Held, in the present suit—That the Court ought not to assume that the Appellate Court in the previous suit discussed a question which was irrelevant to the case and then granted no relief in respect of it, but rather that it discussed and negatived the alleged tenancy right and intended to, and did, give a decree which should give effect to its findings thereon. That if the Court then held the decision of the issue necessary and did decide it as such, then whether it did so rightly or wrongly, the decision would be as much res judicata as the final determination of the issue on the merits. **THE MIDNAPUR ZEMINDARY CO. v. NARESH NARAYAN ROY** ... 34

instance of, on the facts of a particular case. See head-note under **LIMITATION. DINA NATH SHAHA v. JADU NATH BISWAS** ... 202

See C. P. C., sec. 11.

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SAROJINI DEBYA v. LAKHI PRIYA GUHA ... 259

See under Fraud. **NALI-NI KANTO MUKHERJI v. HARI NIBARI** ... 325

Application of the principle where proceeding is taken in continuation of previous proceeding in which order was made by consent—Consent order appointing Receiver for purposes of execution—Construction of order—Binding character of order, limits of—Mal-administration or proved futility of scheme of administration, if releases consentor. Where, decrees having been obtained upon mortgages by a decree-holder against the judgment-debtor who also owed other debts to other creditors, the latter applied for the appointment of a Receiver with a view that "all the debts which will be considered as legally due may be paid up gradually," and to this the decree-holder consented, and a Receiver was appointed with all powers ipse alia of "realisation, management, protection," etc., of the properties of the judgment-debtor: Held—That the order did not bind the Receiver to pay off the mortgage-debts out of the income alone and he had authority, if occasion required, to realise, by sale of the properties or any of them; but it did not give the decree-holder a right to compel the Receiver to sell any such property contrary to the Receiver's own ideas of prudence or advantage, the decree-holder having clearly agreed by the consent order to a scheme of administration which he knew would take years to complete. That the consent order operated as res judicata in all proceedings which were continuations of the proceeding in which the order was made, not under sec. 11 of the Civil Procedure Code, but upon general principles of law. *Ram Kirpal Shukul v. Mussumat Rup Kuar*, L. R. 11 I. A. 37; s. c. I. L. R. 6 All. 269 (1883) and *Hock v. Administrator-General of Bengal*, L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 915 (1921), referred to and applied. That the decree-holder would be released from the consent order upon establishing either that the administration thereunder was such as to amount to a malfeasance or that it had been proved by experience to be in substance so protracted and imperfect as to be futile. **MAHARAJADHIRAJ SIR RAMESHWAR SING v. HITENDRO SING** ... 413

See C. P. C. **FATEH SING v. JAGANNATH** ... 751

See C. P. C., sec. 11. **NRI-PENDRA NATH BHOWMIK v. BASANTA KUMAR LAHRI** ... 861

REVENUE SALE LAW (Act XI of 1859)—Application for setting aside auction sale held under Act XI of 1859 on the ground that there were no arrears—Onus of proof, on whom, lies—Civil Procedure Code (Act V of 1908), Or. 47, s. 7. The Plaintiffs applied for setting aside an auction sale held under the provisions of Act XI of 1859 on the ground, that the Collector

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tor had no authority to sell the estate as there were no arrears, and further that the processes were not duly served and there were other acts of fraud. The trial Court decreed the suit on the ground that there were no arrears. On review, the trial Court held that there were arrears of revenue but he upheld the Plaintiff's allegations of fraud. On appeal by the Defendant purchaser, the Appellate Court held that the review was limited to the one question whether there were arrears of revenue and the Defendant purchaser was to have proved it, and that he could not deal with the questions of fraud, etc.: Held—That the onus was on the Plaintiffs to prove that there were no arrears of revenue to justify the sale. O. S. MEAH v. DURGA CHURN DUTTA 1027

REVIEW—Civil Procedure Code (Act V of 1908), Or. 47, r. 1—Error apparent on the face of the record—Judgment reviewed on the ground that decision of Privy Council relied on by High Court was differently interpreted in a later judgment delivered by the Privy Council after the judgment of the High Court.] In a Second Appeal, judgment was given by the High Court for the Defendant-Appellant relying on a decision of the Judicial Committee. After an application for a review of this judgment was presented but before its hearing the Judicial Committee delivered another judgment in which the case relied on in the judgment of the High Court was construed in a manner which rendered the judgment of the High Court wrong. A rule was issued on the basis of the later decision of the Judicial Committee: Held—That the expression "error apparent on the face of the record" was wide enough to embrace a case like the present and the Court was justified in granting the review. BRINDABAN CHANDRA GHOSH v. DAMODAR PRASAD PANDAY 118

REVIEW OF JUDGMENT, appeal from—Parties, if can re-open in Appellate Court questions dealt with in the reviewing judgment though the review was limited to one question only.] That the Plaintiffs were protected by r 7 of Or. 47, C. P. Code, and whether the order granting review was limited in its scope or not, it remained open to the Plaintiffs after the second judgment of the first Court to re-open in the Court of Appeal the questions of fraud and suppression of processes. O. S. MEAH v. DURGA CHURN DUTTA 1027

REVISION by High Court of interlocutory order. See under Partition Suit. RAJANI KANTA BAG v. RAJARAJA DAS 76

RULING—WILL: Respondent in appeal arising in connection with his zamindari in British India, death of, pending appeal—Succession to state of heir who is ever 16 but under 18 years of age—Application for substitution—Heir, if minor. See C. P. C., Or 32. RAMESH CHANDRA DAS v. NARAJA BIRENDRA KISHORE MANIKYA BAHADUR 287

SEA INSURANCE, contract of. See Con-

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tract Act, sec. 7. SURAJMULL NAGOREMULL v. THE TRITON INSURANCE CO. 898

SECOND APPEAL—Ground when may arise out of question of fact. See C. P. C., sec. 100. THE MIDNAPUR ZAMINDARY CO. v. UMA CHARAN MANDAL 131

SHEBAIT—Rule as to gift to an unborn person being invalid, if applicable to shebaitship—Provision as to shebaitship devolving on persons born after the death of the founder—Hereditary character of shebaitship—Difference, if any, between bare trusteeship and trusteeship with emoluments—Right of persons born after death of founder to maintenance out of endowed property where bequest as to shebaitship fails as offending against rule of perpetuities.] A Hindu by his Will made a gift of certain valuable properties to an idol and appointed several persons shebait of the endowment and further provided that after the death of the aforesaid shebait the seniormost in age amongst their legal heirs would be the shebait: Held—That the principle of law enunciated in the case of Tagore v. Tagore, L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (1872) and extended to an hereditary office and endowment by Gnanasambanda v. Velu Pandaram, L. R. 27 I. A. 69; s. c. I. L. R. 23 Mad 271; 4 C. W. N. 329 (1899) that the gift to an unborn person is invalid and contrary to Hindu law is applicable to the office of shebaitship. That the office of shebait in the present case was hereditary and the condition as to seniority of age did not deprive it of its hereditary character and it made no difference whether the trusteeship carried with it any emoluments or not. That after the death of the last of the persons born before the death of the founder qualified to hold the office of shebait under the Will the bequest so far as it provided that the person senior in age amongst the heirs of the first shebait shall succeed as shebait failed and the shebaitship reverted to the heirs of the founder. Gopal Chandra Bose v. Kartick Chandra Dey, I. L. R. 29 Cal 716 (P. C.) (1902) and Kunjamani Dassi v. Nikunja Bihari Das, 20 C. W. N. 314 (1915), followed. As to the question whether persons born after the death of the testator could claim maintenance from the endowed estate: Held—That the directions given by the founder as to management not being inconsistent with the character of a religious trust recognised by Hindus will not cease to be operative simply because the original provision as to the devolution of shebaitship ceased to be operative owing to succession to the shebaitship being varied. PROMOTHO NATH MUKHERJEE v. ANUKUL CHANDRA BANERJEE 17

It can be called upon to furnish security before receiving payment of surplus sale proceeds of debutter property.] A touzi mehal belonging to an idol was sold

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for arrears of Government revenue and in a suit for the establishment of shebaitship and the consequent right to the surplus sale proceeds the lower Court while declaring the Plaintiff's title directed that the shebait should furnish security before the money could be made over to him. Held—That the lower Court was not justified in imposing this condition. If the property was wasted proceedings could be taken to restrain the waste or recover the property wasted in a proper suit. That apart from express statutory provisions like those in the Guardians and Wards Act, the Lunacy Act and the Code of Civil Procedure, it was not open to the Court to direct security to be given in a case of this nature. **SRI SRI NEWAL KISHORE JEW v. THE SECRETARY OF STATE FOR INDIA**

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'SPECIFIC RELIEF ACT (I of 1877), secs. 16, 14-17—Contract, part of, which cannot be specifically performed—Specific performance as to rest when can be decreed, when part not negligible—Court, if may make new contract for parties—Costs, when defence without merit, allowed.] Secs. 14 to 17 of the Specific Relief Act taken together constitute a complete Code within the terms of which relief by way of specific performance dealt with therein must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the section must ultimately prevail. Before a Court can exercise the power given by sec. 16 (in a case where it is not proved that the part of the contract left unperformed bore only a small proportion in value to the whole within sec. 14 and that the purchaser had declined to accept relief on the terms of sec. 15) it must have some material tending to establish that (1) taken by itself there was a part of the contract which could and ought to be specifically performed and (2) which stood on a separate and independent footing. It cannot apply the section on a mere surmise that, if opportunity were given for further inquiry, such material might be forthcoming and possibly might be found to be sufficient. Further the words of the section do not authorise the Court to take action otherwise than judicially and in particular do not permit it to make for the parties or to enforce upon them a contract which in substance they have not already made themselves. The words exclude a new bargain that cannot be said to be contained in the old one. The successful Appellant was deprived of his costs, his defence having been "singularly devoid of merit." **WILLIAM GRAHAM v. KRISHNA CHANDRA DEY**

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STAMP ACT, INDIAN (II of 1899), sec. 7—Contract of sea insurance not expressed in a sea policy, if enforceable—Point taken at late stage, if may be disregarded—Prohibitory enactment.] The enactment in sec. 7 of the Stamp Act, that no contract of sea insurance shall be valid unless the same is

expressed in a sea policy, is prohibitory and compliance with it cannot be dispensed with by the consent of the parties or by a failure to plead or to argue the point at the outset. It is not confined to affording a party a protection of which he may avail himself or not as he pleases, nor is it framed solely for the protection of the revenue or to be enforced solely at the instance of the revenue official, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. Reference under the Stamp Act, I. L. R. 30 Cal. 565 (1903), and **Bhugwandas v. Netherlands Insurance Co., 14 A. C. 83 (1883)**, distinguished. **SURAJMULL NAGORE-MULL v. THE TRITON INSURANCE CO.**

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secs. 26 and 35, proviso (a)—Mining lease—Suit for royalty exceeding amount on which stamp paid—Document, if becomes admissible on payment of penalty.] The proviso (a) to sec. 35 of the Indian Stamp Act is of equal ambit with the body of the section, and just as an instrument cannot be acted upon and nothing can be recovered under it unless it has a proper stamp, so if that is not a proper stamp, it may, under the proviso, be put on afterwards on payment of a penalty and the instrument then becomes effective. Royalty claimed under a mining lease in excess of the amount for which ad valorem stamp duty was paid under sec. 26 of the Stamp Act thus became recoverable on payment of the penalty as provided for by sec. 35. **LACHMI NARAYAN AGARWALA v. RAMESWAR PROSAD SINGH**

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STRIDHAN property of degraded woman, succession to. See Hindu Law. **SHAIKH TALEB ALI v. SHAIKH ABDUL REZACK**

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SUCCESSION ACT, INDIAN (X of 1865), secs. 48, 49—Will—Testamentary capacity, onus to prove—Case of undue influence or coercion—Onus—Decision to be based on legal testimony and not on suspicion.] The rules for the establishment of the capacity of a testator and the circumstances which would lead to the invalidation of a Will are embodied in secs. 46 and 48 of the Indian Succession Act which practically embody the principles of the English law on the subject. The onus of establishing capacity lies on the proponent of the Will but when a caveator impugns a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish the case. In matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

Tyrrell v. Painton, 1894, P. 151. and **Sree-manchunder Dev v. Gopaulchunder Chuckerbutty** 11 M. J. A. 44; 7 W. R. 10 (P. C.) (1866), referred to. **MOTIBAI HORMUSJEE KANGA v. JAMSETJEE HORMUSJEE KANGA** ... 45

... sec. 107 and Exception—Gift of properties remaining after maintaining family, to son on attaining majority—Gift, whether vested or contingent—Gift of income, and "direction to make over properties remaining," "difference between—Property and income both unascertainable—Exception to section, it applies.] A testator by his Will directed the executor to maintain himself, the testator's wife and the son or daughter of the testator out of the properties and effects of the testator (and not merely out of the income thereof), and on the son coming of age, make over the whole of his remaining properties to the son. If the maintenance of the family did not exhaust the whole income, a discretionary power was given to the executor to spend the surplus income in giving encouragement to education, etc.: Held—That the bequest to the son was contingent within the meaning of the first clause of sec. 107 of the Succession Act and did not fall within the Exception thereto, inasmuch as (i) there was no direct gift to the son but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son came of age, (ii) the remaining properties were not in any way ascertained or ascertainable, (iii) there was no definite ascertained income to arise out of the fund to be given to the son absolutely or so much of it, applied for his benefit as might be necessary. **COWASJI EDALJI DADACHANJI v. RATANBAI** ... 629

SUIT, valuation of, Court's power to revise. See Court Fees Act. **G. M. FALKNER v. MIRZA MAHOMED SYED ALI** ... 627

SYMBOLICAL POSSESSION, delivery of—Effect on limitation—Limitation Act (IX of 1908,) Art. 142.] Where a co-sharer in execution of a decree for recovery of joint possession against another co-sharer had possession delivered to him under sec. 264 of the Code of Civil Procedure of 1882 by the usual modes of sticking bamboos and the beating of drums and by proclaiming aloud in Bengali, in the presence of a number of persons in the vicinity, the terms of the decree and the *parwana* for delivery of possession and then, the judgment-debtor remaining in actual possession, sued the latter for partition and separate possession within twelve years of the delivery of such symbolical possession, the suit was not barred by Art. 142 of the Limitation Act. **THE MIDNAPUR ZEMINDARY CO. v. NARESH NARAYAN ROY** 34

TAXING OFFICER, Original Side—Decision, when final. See Letters of Administration. **IN THE GOODS OF BHUBANESWAR TRIGUNAIT** ... 879

TENANCY—Elements necessary to raise presumption of permanency—Principles upon which such presumption is raised—Question of law—Second appeal—Non-agricultural tenancy before Transfer of Property Act—Dwelling house with mud walls and tiled roof covered with thatched chalas, pucca stairs, gateway and privy situated within Municipality—Origin of tenancy not unknown—Absence of written lease—Long possession—Succession—Uniform payment of rent—Permanent pucca building, if necessary to raise presumption of permanent tenancy—Tenancy in absence of proof of definite terms of permanency, if from year to year.] In a suit for ejectment of the Defendants from their homestead situated within a Municipality, the facts found by the Courts below were: (1) The tenancy was 44 or 45 years old, the lands being let out by the Plaintiff's mother to the Defendants' father for dwelling purposes, and its origin was not unknown. (2) Uniform payment of rent at the rate of Rs. 5-10 as per year. (3) There was one case of succession to the Defendants from their father. (4) Defendants' father built a house with mud walls and tiled roof, over which there were thatched chalas, and also constructed a pucca staircase and a pucca gateway. The Defendants constructed a pucca privy. Upon these facts the Munsif held that the structures were not of a substantial character and the Defendants failed to establish that the tenancy was a permanent one, and gave the Plaintiffs a decree for ejectment. Upon appeal the Subordinate Judge held that the structures were of a substantial character and the facts justified the presumption of permanency of the tenancy, and he therefore dismissed the Plaintiffs' suit. Plaintiffs thereupon preferred this second appeal: Held—That upon the facts found there were no substantial pucca buildings on the land, and the presumption of permanency was not justifiable. In order that the presumption of permanency may be drawn it must be established that the origin of the tenancy must be unknown and that substantial pucca structures must be built without objection by the landlord. **Moharam Chaprasi v. Telamuddin Khan**,* 16 C. W. N. 567; s. c. 15 C. L. J. 220 (1911), not followed. Pucca stairs and pucca privy within a Municipality are not structures which a reasonable landlord can object to so long as the tenancy subsists. The fact that the tenant is allowed to continue in possession of lands for generations, without alteration of rent, is of common occurrence in this country and is usually attributable to the reluctance of the landlord to eject a tenant from his home so long as he does not make himself objectionable and regularly pays his rent. Mere forbearance to enhance the rent or eject the tenant, where the right exists,

* Reporter's Note.—See the case of *Shorashi Charan Ghosh v. Jagloo Sah*, 22 C. L. J. 65.

means nothing. Held also—That the tenancy in the absence of proof of any definite terms of permanency, would be at best one from year to year. Absence of a written lease could not improve the position of the tenant because he must know under what terms he held the land of his lessor. Held further—That the circumstances of each case must determine whether the presumption of permanency should be made or not. The question as to whether upon the facts found the presumption of permanency can be raised is a question of law and is open to correction in second appeal. Before the Transfer of Property Act there was no statute dealing with homestead land as distinguished from agricultural land. No person after the Transfer of Property Act came into operation can claim to hold a permanent tenancy in what is called *bastu* land unless it was created by a written and registered lease. In respect of a non-agricultural holding created before the Transfer of Property Act, the tenant must prove the nature and extent of the interest which the landlord granted to him and thereby put a limitation to his own rights. In such cases where the terms of the original tenancy cannot be directly proved, the inference of permanency of the tenancy is made upon two broad principles: (1) The first principle is, that in cases where the origin of the tenancy is unknown and its inception is lost in antiquity the principle of a lost grant is invoked by the tenant and from the conduct of the parties and the surrounding circumstances the Court is asked to presume that the tenancy was a permanent one. The conduct of the landlord in recognising succession, transfer and in standing by, when *pucca* buildings have been raised upon the land are mainly relied on in finding out the terms of the lease at its inception. (2) The second principle is that of equitable estoppel against the landlord shewing that the lease was a terminable one. Decided cases shew the existence of the following elements in order that the presumption of permanency of a tenancy may be thus raised:—(1) The origin of a tenancy for residential purpose must be unknown; (2) existence of permanent *pucca* buildings on the lands built long before any controversy arises and that to the knowledge of the landlord; (3) uniform payment of rent; (4) recognition of succession and transfer by the landlord. Absence of either of the first two elements will be ordinarily fatal to any claim of permanency on the theory of a lost grant. Absence of the 3rd and the 4th elements usually will raise difficulties in the way of raising the presumption, but may not be decisive if there are other circumstances in aid of the presumption. The case-law on the point reviewed. **ABDUL HAKIM KHAN CHAUDHURI v. ELAHI BAK-SHA SHA** ... 138

TRADE MARKS—Sale of foreign goods by purchaser under correct description—

Sole importer of such goods, if and when may object when no protecting covenant—False description, basis of right of action—Law applicable in India.] There being no Trade Marks Act in force in India, the ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods apply. It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness, so that if goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action. But, in the absence of a protecting covenant, there is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer. The manufacturer or his lawful successor cannot reasonably claim that he can stop a trader to whom goods have been lawfully sold under a particular description and by whom they have been lawfully bought under that description from reselling them under the same description—in the absence, at any rate, of anything to show that the time, place or circumstances of the resale imported some representation that the goods were other than what they were. **THE IMPERIAL TOBACCO COMPANY OF INDIA LTD. v. ALBERT BONNAN AND BONNAN & CO.** ... 81

TRANSFER OF PROPERTY ACT (IV of 1882), secs. 8, 50, 52—Constructive notice—*Lis pendens*—The mortgagee as a purchaser, whether affected or bound by the constructive notice of the tenant's rights or any collateral arrangements made previous to the mortgage, between the mortgagor and lessee by way of advance to be reckoned as rent paid in advance—Receiver acting beyond his powers—Validity—If the arrangement between the mortgagor and tenant for prepayment of rent or for setting off future rent against money due from the tenant to the mortgagor, he made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee; such arrangement will in equity bind a person taking a transfer of the reversion, unless he can show that he purchased for value without notice. If there is a tenant upon a property, his open possession is notice, not only of the immediate terms of his tenancy, but collateral agreements as well, in the absence of all enquiry by the transferee. A mortgagee cannot repudiate a transaction because the Receiver in his suit acted beyond his power in sanctioning the same, after the transaction had been carried through and after the Receiver and mortgagee had taken advantage thereof. **Ashburton (Lord) v. Mocton, [1915]**

1 Ch. 274, *Green v. Rheimberg*, [1911] 104 L. T. 149 C. A., and *Daniels v. Davison*, 16 Ves. 249 (1809), referred to. *Per Rankin, J.*—In order to get the benefit of the protection of sec. 50 of the Transfer of Property Act, the tenant must pay rent as rent and must not pay rent in advance which, in the circumstances, is a mere loan to the mortgagor. *DeNicholls v. Saunders*, L. R. 5 C. P. 589 (1870), referred to. *TILOKE CHAND SURANA v. J. B. BEATTIE & CO* ... 953

... sec. 106—
joint tenants—Notice to quit addressed to and served on one, it binds others.] In order to bind even a joint tenant, the notice to quit must be addressed to and served on him in one of the ways mentioned in the second clause to sec. 106 of the Transfer of Property Act, e.g., either on him personally or to one of the family or servants or affixed to a conspicuous part of the property. The question whether service of notice on one of the joint tenants is sufficient notice on the other tenants is a question of fact. Held—That where no notice was addressed to one of the joint tenants, the mere service of notice upon the other joint tenants is not a sufficient notice to quit according to law. *Harihar Banerjee v. Ram Shashee Ray*, L. R. 45 I. A. 222; s. c. I. L. R. 46 Cal 458; 23 C. W. N. 77 (1918), *Macartney v. Crick*, 5 Esp 196; 8 R. R. 848 (1805). *Doe v. Watkins*, 7 East 551; 8 R. R. 670 (1806) and *Rajoni Bibi v. Hafissonnessa Bibi*, 4 C. W. N. 572 (1900), discussed. *BEJOY CHAND MAHAJAB v. KALI PRASANNA SEAL* ... 620

... sec. 108 (o).]
Sec. 108 (o) of the Transfer of Property Act deals with the ordinary right of a lessee in an ordinary lease. Its terms do not cut down the right to work minerals expressly conveyed. *SATYA NIRANJAN CHAKRAVARTI v. RAM LAL KAVIRAJ* ... 725

TRUSTEESHIP with encumbrances and without any—Difference, if any, between the two. See under *Shebait* ... 17

UNDER-RAIYAT—Customary right of occupancy, if heritable—Personal right—Bengal Tenancy Act (VIII of 1885), ss. 26, 113 (1) and 183.] *Per Greaves, J.*—The right of occupancy of an under-raiyat is a right acquired by custom or usage, and before such right can be said to be heritable, it must be proved by evidence in the usual way that by custom or usage heritability is an incident of such right. *Per Cuming, J.*—An occupancy right is a personal right created by statute. Apart from sec. 26 of the Bengal Tenancy Act which makes the occupancy right of a raiyat heritable, there is no right of heritability in regard to such a right. The occupancy right of an under-raiyat is thus not heritable by law, but it is open to the under-raiyat to prove that by custom or usage the occupancy right is heritable. *SUDHANYA KUMAR DAS v. SAIF ISMAIL* ... 733

WAJIB-UL-AZAZ, record of, by Settlement Officer.—Value as evidence.] A custom is not established by an ambiguous statement of it in a *wajib-ul-arz*. Settlement Officers in recording customs in *wajib-ul-arz* have to perform duties which the Government orders them to perform. One of these duties is to record customs as the Settlement Officer finds them and not as he may think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. *BALGOBIND v. BADRI PRASAD* ... 465

WILL—Testamentary capacity, onus to prove. See under *Succession Act, Indian* ... 45

—, probate of, set aside in appeal merely on comparison of signatures—Propriety of procedure. See under *Handwriting*. *AMBIKA CHARAN BARUA v. NARESWARI DASI* ... 75

—, construction of. See under *Hindu Will*. *LAL RAM SINGH v. THE DEPUTY COMMISSIONER OF PARTABGARH* ... 86

—, genuineness of.—No probate taken out but produced to obtain mutation of names.—Will substantially representing testator's wishes.] The genuineness of a Will, the terms of which appeared to be natural in the circumstances, having come into question twenty-five years after its execution, it was shown to have been produced for obtaining mutation of names shortly after the testator's death and for a similar purpose on a later date. But it was never produced for probate. The two attesting witnesses still living were both clear that the Will was really executed; that it represented what the testator wished and although he might not have understood some of the flowery expressions, he was yet perfectly competent to comprehend its simple provisions. Held—That the Will was properly upheld, and the mere fact that it was not produced for probate did not make any difference, as this is not often done. *CHANDRA BAKHSH SINGH v. MADHO SINGH* ... 582

—, revocation of, by subsequent Will.—*Animus revocandi* must be unqualified. See head-note under *Mnth*. *GOBINDA RAMANUJ DAS MOHANTA v. RAM CHARAN DAS* ... 931

—, Interpretation of.] The intention of a testator, when not expressly and unambiguously stated in the Will, may be inferred by a Court from other facts stated and referred to in the Will, e.g., that legacies bequeathed by the Will should not be paid until the conclusion of the litigation in which the testator was engaged when the Will was made. *Lord v. Lord*, 2 Ch. App. 788 (1867). *Roddy v. Fitzgerald*, 6 H. L. C. 876 (1858) and

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 WITNESS, credibility of—Appellate Court, if
 should reverse first Court's views thereon
 and when—Collusive award—Release given
 in pursuance of such award, if valid. |
 When the Judge, who has seen a witness
 and has heard his evidence, comes to the con-
 clusion that the witness is credible, that
 is to say, a witness who to the best of his
 recollection intends to tell the truth, it
 requires circumstances of exceptional cha-
 racter to justify a Court of Appeal in
 coming to a different conclusion. It is
 not a question of the weight of evidence,
 but of the attitude and trustworthiness of
 the witness and of the effect of his whole
 demeanour in the witness box. A release
 granted in pursuance of an award which
 was found to have been obtained by collu-
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the award itself being invalid. MA THAN
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 which a Criminal Court directs a complai-
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 vered by suit—Criminal Procedure Code
 (Act V of 1898), secs. 544, 547, if apply.] A
 suit lies for the recovery of money which
 the Criminal Court directs the complainant
 to pay to a witness called by him for ex-
 penses incurred by him. The power to
 order payment of expenses to a witness is
 vested in the Criminal Court, not by any
 provision in the Code of Criminal Proce-
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the Criminal Procedure Code, and the Magistrate passed an order that he was to be dealt with under sec. 443, Cr. P. C., which order, however, the prosecution did not take any step to get set aside or corrected, an appeal against the conviction would lie on matters of fact as well as on matters of law, as contemplated by sec. 449 (1), Cr. P. C., even though it would appear that the distinction between a claim to be tried as a European British subject and a claim to be dealt with under the provisions of Chap. XXXIII was not properly appreciated by the enquiring Magistrate, and that there was hardly any foundation for the claim to be tried under the provisions of Chap. XXXIII. *I. G. SINGLETON v. KING-EMPEROR* ... 260
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B. C., of 1923, they were irregular and the order of the Municipal Magistrate could not be allowed to stand as the party had not been heard by the Corporation, as he was entitled to be, before sanction for prosecution was given. That the proceedings under sec. 449 of the Calcutta Municipal Act (III, B. C., of 1899), could only be initiated by the General Committee and therefore, in respect of unauthorised structures which existed before 1st April 1921, when the Calcutta Municipal Act of 1923 came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under sec. 449 of the Act of 1899. The Municipal Magistrate appointed under sec. 531 of the Calcutta Municipal Act of 1923 is a Court of inferior Criminal jurisdiction within the meaning of sec. 6 of the Code of Criminal Procedure and orders for demolition passed by such a Magistrate are subject to revision by the High Court under secs. 435 and 439 of the Code of Criminal Procedure. The order for demolition was a judicial order and whether made in the exercise of the Magistrate's Civil or Criminal jurisdiction was open to revision by the High Court. *Recent v. Advocate-General of Madras*, T. L. R. 43 Mad 146 (P. C.) (1919), referred to. **RAM GOPAL GOENKA v. THE CORPORATION OF CALCUTTA** ...

COMMITMENT, quashing of, at the instance of the Crown, on the ground of non-compliance with s. 360, Criminal Procedure Code (Act V of 1898)—Objection by accused to quashing of commitment and holding *de novo* trial—Proper order in the circumstances of the case to cure the defect in procedure.] Where the trial of the accused persons was commenced before the Assistant Sessions Judge and a large number of witnesses were examined but the provision of sec. 360 was not complied with in respect of the depositions of the majority of the witnesses and the Sessions Judge on the application of the Public Prosecutor transferred the case to his own file and made a reference to the High Court recommending the quashing of the commitment and the holding of a fresh enquiry and the accused persons who appeared in the High Court objected to the reference being accepted: Held (on a consideration of the circumstances)—That the commitment should not be quashed at the instance of the Crown and a *de novo* enquiry ordered, but that the case should be sent back to the file of the Assistant Sessions Judge where the witnesses whose depositions were not read over to them in the presence of the accused would be recalled and the provision of sec. 360 complied with. **THE KING-EMPEROR v. ABDUR RAHIM** ... 698

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prospectus—Omission to file copy of such advertisement with Registrar of Joint Stock Companies before publication, if offence] The Petitioner as the representative and Secretary of a limited Company, registered under the Indian Companies Act, the prospectus whereof had already been filed with the Registrar of Joint Stock Companies, published an advertisement in a newspaper offering to the public some shares of the Company for sale: Held—That the advertisement came within the definition of "prospectus" as contained in sec. 2, cl. (14) of the Act and the omission to file a copy thereof with the Registrar of Joint Stock Companies for registration before issuing it was an offence under sec. 92, cl. (5). **PRAMATHA NATH SANYAL v. KALI KUMAR DUTT** ... 5

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639 (1881), *R. v. Scott, D. & B.* 47 and *Emperor v. Bhagi Vedu*, 8 Bom. L. R. 697 (1900), followed. *Abbas Peada v. Queen-Empress*, I. L. R. 25 Cal. 730: s. c. 2 C. W. N. 484 (1898), referred to. Sec. 164, Cr. P. C., in spite of the alteration that it has undergone by the amendment introduced by Act XVIII of 1923, does not apply to confessions recorded by a Presidency Magistrate in the course of investigations held by the Calcutta Police. To decide whether a confession is irrelevant under sec. 24 of the Evidence Act, the Court will have to perform a threefold function, viz., (a) to determine the sufficiency of the inducement, threat or promise as affording certain grounds, (b) to clothe itself with the mentality of the accused to see whether the grounds would appear to the prisoner reasonable for a supposition that is mentioned in the section, (c) to judge as a Court if the confession appears to have been caused in consequence of the inducement, threat or promise. *Reg. v. Balavant Pendharkar*, 11 Bom. H. C. R. 137 (1874), *Emperor v. Mukhun Kumar*, 1 C. L. R. 275 (1877), *Queen-Empress v. Dada Ana*, I. L. R. 15 Bom. 452 (1889), *Queen-Empress v. Gharya*, I. L. R. 19 Bom. 728 (1894), *Ghatu Pramanik v. King-Emperor*, I. L. R. 28 Cal. 613 (1901), *Emperor v. Bhagi*, 8 Bom. L. R. 697 (1906), *Ashutosh Dutt v. King-Emperor*, 26 C. W. N. 54 (1921) and *King-Emperor v. Basvanta*, I. L. R. 25 Bom. 168 (1900), referred to. The section does not require positive proof, as defined in sec. 3, of improper inducement to justify the rejection of the confession, the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required. The true and generally recognised view is that a confession duly recorded by a Magistrate with the proper certificate appended to it will be admitted in evidence subject to the provisions and restrictions contained in sec. 24, Evidence Act, under which a well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession because it would be idle to expect the accused to prove the inducement, threat or promise, for in most cases such proof cannot be available. Held—That the presumption under sec. 80 of the Evidence Act did not apply in this case as the section speaks of confessions "taken in accordance with law," and as sec. 164 of the Code of Criminal Procedure had no application, there was no law under which the Presidency Magistrates could record these confessions. They came before the Court without any presumptive force of their own and their admissibility must be judged as that of any other evidence adduced in the case. A contravention of the circular orders of the High Court in recording confessions would not render the record bad if otherwise the confessions are voluntary. Held,

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on a consideration of the circumstances of the case—That the grounds contained in the retractations put forward by the accused were utterly unfounded but there were circumstances in the case which made the Court hesitate to hold that they were not such as should be excluded as coming within sec. 24 of the Evidence Act, and acting on the principle that in a case of doubt on the question of admissibility of evidence when it is of such vital importance to the prisoners as their own confessions one should not hold them as admissible unless one is affirmatively satisfied as to their relevancy. In order to ensure the voluntariness of a confession the Magistrates should question the accused with a view to discover whether he confesses voluntarily and this questioning must be in pursuance of a real endeavour to find out the object of it. This requirement is not satisfied by putting a few formal questions, but it does not also imply that there must always be an enquiry as to the motive of the accused in making the confession. *Thien Maung v. R.*, 4 Cr. L. J. 198 (1905) and *Jogjiban Ghose v. King-Emperor*, 13 C. W. N. 862 (1909), and other cases referred to. Delay in producing before the Magistrate prisoners who are willing to have their confessions recorded affects the value of the confessions. If a prisoner wishes to make a voluntary statement, the Police must produce him before a Magistrate and let him do it whatever might be its character. Whether the statement is satisfactory or inconsistent is not a question with which the Police are concerned. Held—That the questions and answers as recorded by the Magistrate while recording the confessions did not afford any sufficient data for arriving at the conclusion that it was voluntary. A Deputy Commissioner of Police, Calcutta, had no power of detention for an unlimited period by virtue of his being a Justice of the Peace. In the matter of *Mahamed Ramian v. King-Emperor*, Decided 18th September 1909. The reported referred to. *EMPEROR v. PANCHIKART DUTT*

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CONSPIRACY—Acquittal of a conspirator in a subsequent trial, if a ground of reversal of the conviction of the only other conspirator tried before. See under Acquittal. I. G. SINGLETON v. KING-EMPEROR 260
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s. 139A

—Magistrate's bounden duty when the person against whom notice has been issued under s. 133 appears. Under sec. 139A, as soon as a person against whom a notice under sec. 133 has been issued appears, the Magistrate is bound to question him as to whether he denies the existence of a public right in

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the subject-matter of the proceeding and if he does so the Magistrate is bound to enquire into the matter before proceeding under sec. 137 or 138. The Magistrate is not to wait for the objection to be raised by one of the parties to the proceeding, nor can the Magistrate refuse to enquire into the matter because the objection was not taken until a late stage of the case.

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s. 144, cl.

(3) and (6)—Rival hats—Injunction—Order under s. 144, extension of, by Magistrate beyond 2 months, if legal—Form of order—Order directing the public in general to abstain from attending a hat, if bad.]

Where an injunction was issued by a Sub-Divisional Magistrate on the 22nd September 1924 against a number of persons of the 2nd party enjoining them from holding or attending a hat on certain days on which another hat was held, and on the 20th November 1924 the injunction was made absolute; and on the same date on the basis of a fresh Police report the order was also directed against the public generally, whereby a fresh injunction was issued on the public generally on the same terms: Held—That the order of the 20th November 1924 which virtually extended the period of two months so far as the 2nd party were concerned was bad. To draw up the same order merely adding to the parties affected is an attempt to evade the provisions of cl. (6) of sec. 144, Cr. P. C.: Held, further—That the order in so far as it directed the public in general to abstain from attending the hat was bad since it was not until the public attended the hat that the order could be binding on them. ASHUTOSE ROY v. HARISH CHANDRA CHATTOPADHYA ... 411

s. 145—Applicability of sec. 360 to proceedings under section. See Cr. P. C., sec. 360. NARENDRA CHANDRA RUDRA PAL v. SABARALI BHUIYA ... 701

s. 164—If applies to confessions recorded in Calcutta. See Confessions. EMPEROR v. PANCHKARI DUTT ... 300

s. 181, sub-sec. (2), secs. 179, 177—Indian Penal Code (Act XLV of 1860), sec. 405—Criminal breach of trust—Venue for trial where accused liable to render accounts at a particular place but fails to do so—Lots how far an ingredient of the offence—Offence of criminal breach of trust, when may be said to be committed—Necessity of proof of overt act of accused showing dishonesty—Scope of sec. 181, sub-sec. (2), Cr. P. C.] The case for the prosecution was that the complainant entrusted certain articles to the accused in Calcutta giving him instructions to sell them if he obtained fair price for them and to remit the amount to Madhupur where the complainant had gone

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and also to adjust the account at Burdwan on complainant's return to that place, that the accused sold the articles in Calcutta, remitted a part of the sale proceeds to Madhupur and when the time came for adjusting the accounts submitted a false account instead of paying in the balance of the sale proceeds. The accused was prosecuted on a charge of criminal breach of trust in the Court of the Magistrate at Burdwan and was discharged on the ground that the Court there had no jurisdiction to try the case: Held—That the Magistrate at Burdwan had jurisdiction to try the case. Criminal breach of trust is not an offence which counts as one of its factors the loss, that is, the consequence of the act. It is the act itself which in law amounts to the offence. The jurisdiction of a Court to try an offence of criminal misappropriation or breach of trust is governed by sec. 181, sub-sec. (2) and not sec. 179 of the Criminal Procedure Code. Under sub-sec. (2), sec. 181, Cr. P. C., an offence of criminal breach of trust may be enquired into or tried in a Court within the local limits of whose jurisdiction (a) any part of the property which forms the subject of the offence was received or (b) retained by the accused person or (c) the offence was committed. If the property which forms the subject-matter of the offence or any part of it was received by the accused at a particular place, the Court having local jurisdiction over the place will have jurisdiction to deal with the offence; so also as to the place where the property or any part of it was retained by the accused. The Court within the local limits of whose jurisdiction the offence was committed will also have jurisdiction. The place where the offence is committed is where there has been misappropriation or conversion or user or disposal of the property or where the accused wilfully suffers any other person to use or dispose of the property. In cases where by reason of the secrecy observed by the accused, the manner, point of time and place where the misappropriation, conversion, user, disposal or sufferance takes place is a matter within the special knowledge of the accused himself, the overt act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence, and till the time arrives when that act is done it cannot be said with certainty that the offence was committed. Where the accused is under liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate may inquire into and try the offence under the provisions of sec. 181, sub-sec. (2), Cr. P. C. GUNANANDA DHONE v. LALA SANTI PROKASH DANLEY ... 432

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ss. 192 (1), 202, 203, 204—If a Magistrate taking cognisance of a case and directing an investigation can after the receipt of the report transfer the case to the file of another Magistrate simply for passing orders only—Jurisdiction of the Magistrate to whom the case is transferred.] Sec. 192 (1), Cr. P. C., empowers the Magistrate to transfer a case for inquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under sec. 202, Cr. P. C., which he has himself ordered. The provisions of sec. 192 or sec. 202 do not entitle a Magistrate, after he has proceeded under the latter section to make an order under the provisions of sec. 192, Cr. P. C., transferring the case for the purpose of being dealt with under sec. 203 or sec. 204 without a fresh investigation as contemplated by sec. 202, Cr. P. C. **MAHABIR SINGH v. GIRI-BALA DASSI**

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s. 197—Sanction of Local Government, if necessary for prosecution of member of Union Committee—Sec. 360—Reading over of deposition by literate witness himself, if sufficient compliance with section.] The sanction of the Local Government under sec. 197, Cr. P. C., is not necessary for the prosecution of the Chairman of a Union Committee who is not removable from his office only by the Local Government. Under sec. 360, Cr. P. C., both the witnesses whose statements have been recorded and the accused who is on his trial are to be given an opportunity of knowing what has been recorded and a mere reading over of the evidence by the witnesses cannot convey to the accused what has been recorded as the evidence given by the witnesses and is not a sufficient compliance with the section. **MUHAMMAD YASIN v. THE KING-EMPEROR**

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ss. 221, 225—Necessity of charge being sufficiently explicit to give notice of accusation to accused—Indian Penal Code (Act XLV of 1860), sec. 420—Cheating—Manner of cheating vaguely set out in charge—Material defect.] Where in a charge of cheating the manner of the cheating was set out to be "by deceiving with false representations and promises as well as by conduct": Held—That the expression used was too vague and indefinite to give the accused proper notice of the manner of the cheating and was so dangerously wide as might include almost anything. An accused person is entitled to know with certainty and accuracy the exact value of the accusation brought against him. The omission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not

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occasioned a failure of justice. **KEDAR NATH CHAKRAVARTI v. THE KING-EMPEROR**

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ss. 233, 235 and 239, joint trial of several persons for conspiracy, murder and arson—One joint charge against several persons for several offences of murder, legality of—Charge of the evidence of conspiracy—Prejudice to accused and confusion to Judge and jury, to be avoided in framing charge.] A charge was framed against several persons of murder of several persons, along with a charge against them for conspiracy for murdering them and for arson, and they were all tried together and the jury returned a unanimous verdict of guilty on all the charges against all the accused: Held—That upon the allegation that all the offences were committed in pursuance of the conspiracy or at any rate in the course of the same transaction, such a joinder of charges was permissible. Applying the exception in secs. 233 and 239, Cr. P. C., all the charges could, no doubt be legally joined, but the provisions of these sections are merely enabling and if there is risk of embarrassing the defence such joinder of charges should not be resorted to. Where a conspirator is present at the commission of the offence he may under the provisions of sec. 114, I. P. C., be deemed to have committed the offence, but in such a case, he should be specifically charged with such offence as read with the provisions of sec. 114, I. P. C. Held—That the accused were embarrassed in their defence, and the jury misled and confused, and that there had not been a trial of the case upon charges properly framed in consonance with the facts alleged by the prosecution; a multitude of charges not having any proper foundation and obscuring the case which the accused had got to meet were put forward and therefore there was no proper trial which the accused were entitled to under the law. **ALIMUDDIN NASKAR v. THE KING-EMPEROR**

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ss. 250, 537—One of two accused discharged and the other subsequently acquitted—On the latter occasion complainant directed to show cause and ordered to pay compensation to both accused—Propriety of procedure—Effect of the amendment of the section—Defect, if curable.] One of two accused was discharged, and the case against the other accused was adjourned to a subsequent date when he was acquitted and the Magistrate called upon the complainant to show cause against an order for compensation being passed and directed the complainant to pay compensation to each of the accused. Held—That under sec. 250, Cr. P. C., as now amended, the procedure adopted was illegal. The case against the accused who was discharged was at an end when the order of discharge was made and

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the order to show cause under sec. 230 so far as payment of compensation to him was concerned should have been made along with the order of discharge. That sec. 537 of the Code of Criminal Procedure did not cure the defect. **SURESH CHANDRA GURTA v. ABDUL JABBAR** ... 127

Criminal Procedure Code (Act V of 1908), ss. 4 (1), 6, 97 (1), 9 (2), 29, 31, 193, 194, 206, 216, 217, 218, 219, 226, 227, 267, 275, 334, 335, 339A, 347, 443, 444, 446, 447, 448, 449, 469, 528A and 528B—Chaps. XXIII, XXXIII, XLIV—**Criminal Procedure Amendment Act (XVIII of 1923)**—**Criminal Law Amendment Act (XII of 1923)**—High Court exercising Original Criminal Jurisdiction, if a Court of Session—An accused committed by a Presidency Magistrate for trial to the High Court, if can claim benefit of sec. 275 of the Criminal Procedure Code even though no claim to establish his status was made before the Committing Magistrate—Proper time for putting forward such claim—Difference in the effect of refusal by Presidency Magistrates and by the Magistrates in the mofussil to entertain the claim pointed out—Jurisdiction of the committing Court after commitment, if any—Principle of construction of a statutory enactment made for the benefit of the accused—**Indian High Courts Act, 1865 (24 & 25 Vict., c. 104)**—**Government of India Act, 1915 (5 & 6 Geo. 5, ch. 61)**—Cl. 22 of the Letters Patent of 1865.] It was committed by a Presidency Magistrate for trial to the High Court. At the trial before the first juror was called the Counsel on behalf of the accused claimed that a majority of the jury should be Indians as the accused was an Indian British subject. The application was opposed on behalf of the Crown on the ground that the claim was not entertained in view of the fact that it was not put forward before the Committing Magistrate. It was argued on behalf of the accused that (i) the High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure; (ii) that being so, secs. 528A and 528B could not possibly apply to a case which was inquired into by a Presidency Magistrate and committed to the High Court; (iii) as there was no other provision in the Code of Criminal Procedure under which a claim to be dealt with as Indian British subject should be put forward, the claim made under sec. 275 of the Code of Criminal Procedure to be tried by a jury the majority of whom should be Indians should succeed: **Held**—That the High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure. **Held also**—That from a consideration of sec. 275 and Chap. XLIV of the Code of Criminal Procedure, the following propositions may be

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deduced:—(a) An Indian British subject claiming to be dealt with as such must put forward his claim before the Magistrate before whom he is brought for the purpose of inquiry or trial. This applies to Presidency Magistrates, as well as Magistrates in the mofussil. (b) If the Magistrate rejects the claim and tries him the decision shall form a ground of appeal from the sentence or order passed in such trial. This applies to Presidency Magistrates. (c) If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not in the High Court exercising Original Criminal Jurisdiction. (d) If the Court of Session rejects the claim and tries him the decision shall form a ground of appeal from the sentence or order passed in such trial. (e) If a claim is made before a Presidency Magistrate and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court and the accused will not be entitled to put in, under sec. 275 of the Code of Criminal Procedure, before the High Court a further claim for being tried by a jury the majority of whom should be Indians. (f) Where no such claim was put forward before the Magistrate and there being no provision for repetition of the claim before the High Court, sec. 528B of the Code of Criminal Procedure is a bar to the assertion of the same in any subsequent stage of the case. **Held**—That the accused is not entitled to claim to be tried by a jury the majority of whom should be Indians. **Semle**—The claim on the ground of status may be put forward at any time before commitment is made. **EMPEROR v. HORENDRA CHANDRA CHAKRAVERTY** ... 381

tion of jurors from outsiders in case of deficiency of persons summoned.] In case of deficiency of persons summoned, the number of jurors required may be chosen from such other persons as may be present in Court. These may not be chosen by lot and may not be at all in the jury list. **THE GOVERNMENT OF BENGAL v. MUCHU KHAN** ... 652

s. 307—Reference to High Court on difference between Judge and jury—High Court when justified in refusing to accept verdict of jury on such reference.] In a Reference under sec. 307, Cr P C., what the High Court has got to find before it can refuse to accept the verdict of the jury is that the verdict is unreasonable. **EMPEROR v. PREMANANDA DUTT** ...

s. 307—Reference to High Court on disagreement between Judge and jury—Duty of High Court—Verdict, if should be disturbed when it is

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not perverse.] In a Reference under sec. 307, Cr. P. C., it is the duty of the High Court not only to consider the entire evidence but to give due weight to the verdict of the jury and the opinion of the Judge and where it appears that the jury might come to the conclusion at which they arrived and their verdict could not be said to be perverse the High Court ought not to interfere. **THE KING-EMPEROR v. MOFIZEL PEADA** ... 842

... s. 342, al. (1), 2nd part—Nature of questions that must be put to the accused—Insufficient examination of accused, effect of.] Per Newbould, J.—A formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of sec. 342, Cr. P. C., since it enables the accused to explain any circumstance appearing in the evidence against him. To what extent the Court when complying with the mandatory provisions of the section should also exercise its discretionary powers under the other provisions of the section is a different question. The exercise of this discretion must vary with and depend on the circumstances of each particular case but in the majority of cases it is neither necessary nor desirable that there should be any detailed questioning of the accused. Mukerji, J.—In questioning the accused under sec. 342, Cr. P. C., the Court must point out to the accused the salient points appearing in the evidence against him in a succinct form and he must be asked to explain them if he wishes to do so. If on a general question as to whether he wishes to say anything being put the accused answers in the negative it will be no use asking him any further questions. If on the other hand it does not appear that he would refuse to answer questions put to him or it appears that he desires to respond, his attention should be called to the salient points appearing against him so that an opportunity is really afforded to him to explain them if he can do so. In such examination every precaution should be taken not to entrap him to make incriminating answers, and all questions in the nature of cross-examination should be avoided. A refusal to give the accused an opportunity to make a statement at a stage when the mandatory part of sec. 342, Cr. P. C., is operative vitiates the trial, but an insufficient examination at that stage does not necessarily invalidate it. **KING-EMPEROR v. ALIMUDDI NASKAR** ... 231

... sec. 345 (2)—Composition of the offence of cheating allowed by High Court. **T. C. S. MARTINDALE v. THE KING-EMPEROR** ... 447

... s. 360, if applicable to enquiries under Chap. XII—

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Accused, meaning of.] Sec. 360, Cr. P. C., is applicable to enquiries under Chap. XII of the Code. "Accused" in sub-sec. (1) of sec. 360 means a person over whom the Criminal Court is exercising jurisdiction. **ASWINI KUMAR DUTT v. PUTI** ... 474

... ss. 360, 145 —Party to proceeding under sec. 145, if an accused—Depositions of witnesses, if should be read over under sec. 360 in the presence of parties to proceedings under sec. 145—Magistrate, if must give reasons for final order—Full Bench, reference to—Third Judge to whom reference is made on difference of opinion if can make reference to Full Bench.] Held per Buckland and Cuming, J.J. (Subhawardy, J., contra).—That a party to a proceeding under sec. 145, Cr. P. C., is not an accused person within the meaning of sec. 360, Cr. P. C., and that section does not apply to such proceedings. Per Buckland and Subhawardy, J.J. (Cuming, J., contra).—The final order under sec. 145, Cr. P. C., should contain a statement of the reasons for the decision sufficient to enable the High Court to determine whether the Magistrate has or has not complied with sub-sec. (4) of sec. 145 and directed his mind to the consideration of the effect of the evidence adduced before him. **ISHAN CHANDRA SAMANTA v. HRIDAY KRISHNA BOSE** ... 475

... s. 360—Effect of non-compliance on commitment. See Commitment. **THE KING-EMPEROR v. ABDUL RAHIM** ... 698

... s. 360, if applicable to a proceeding under sec. 145—Party to such proceeding, if an "accused." Held by a majority of the Full Bench—That the provisions of sec. 360, Cr. P. C., do apply to proceedings under sec. 145, Cr. P. C., to this extent at least that as the evidence of each witness is completed it must be read over to him. The parties to a proceeding under sec. 145, Cr. P. C., are not "accused" and their attendance at the reading over is not necessary. **NARENDRA CHANDRA RUDRA PAL v. SABARALI BHUIYA** ... 701

... s. 364, omission to comply with the requirements of, if vitiates the trial.] The examination of the accused during their trial in the Court of Sessions was not recorded. Held—That the omission to comply with the requirements of sec. 364 of the Code of Criminal Procedure vitiates the trial. The convictions and sentences were set aside and the case was directed to be heard according to law. The provisions of sec. 364 of the Code of Criminal Procedure are mandatory. **MESSER BEPARI v. THE KING-EMPEROR** ... 939

... ss. 407, 408 —Appeal, by a convicted person, from an order passed against him under sec. 562, relating on probation of good conduct, if lies

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—Scheme of the old Code and the amending Act of 1923—Sec. 415A, right of appeal of other convicted persons who go non-appealable sentences.] A convicted person has a right of appeal from an order passed against him under sec. 562 (1), Criminal Procedure Code, releasing him on probation of good conduct, though no provision as to appeal has been expressly made in respect of an order under sec. 562. **Emperor v. Manchar Das**, 24 P. R. Cr. 1901; 1 Cr. L. J. 1098 (1904). **Hayata v. Emperor**, 18 Cr. L. J. 400; 38 I. C. 961 (1916) and **Emperor v. Ghasite**, 1 L. R. 37 All. 31 at p. 33 (1914), referred to. As an appeal lay on behalf of the convicted persons against whom the order under sec. 562 (1) was made, there was a right of appeal; in the other convicted persons who were not so released but who got non-appealable sentences, by the operation of sec. 415A. **BAHADUR MOLLA v. ISMAIL** ... 151

sec. 429—A third Judge to whom a reference is made under sec. 429, Cr. P. C., cannot make a reference to a Full Bench. **ISHAN CHANDRA SAMANTA v. HRIDIOY KRISNA ROSE** ... 475

s. 449 (1) (c)—Appeal against conviction in trial by jury in the High Court in a Presidency Town—Application for leave to appeal, if to be made before trial Judge or the Criminal Bench of the High Court—Omission to claim privilege of European British subject under sec. 528A, if bar to such application for leave to appeal.] Held—That the Criminal Bench of the High Court had jurisdiction to entertain and dispose of the application for leave to appeal, but (per Walmley, J.) it was desirable that such applications should be made to the trying Judge. That notice of such application should be given to the Crown. That the omission on the part of the accused to claim the benefit of sec. 528A of the Code of Criminal Procedure, did not debar him from urging in support of his application for leave to appeal under sec. 449, sub-sec. (1), cl. (c), that the conditions mentioned in cl. (a) or cl. (b) of sec. 443 (1) existed. **T. C. S. MARTINDALE v. THE KING-EMPEROR** ... 447

s. 449 (1) (c), sec. 443 (1), cls. (a) and (b)—Application for leave to appeal against conviction in trial by jury in High Court in a Presidency Town—Question to be tried in disposing of such application—Such application to be heard by Division Bench.] On an application under sec. 449 (1) (c) for leave to appeal the Court has only to decide whether the case would, if it had been tried outside the Presidency Town, have been triable under the provisions of Chap. XXXIII of the Code of Criminal Procedure in view of the conditions set

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out in subcls. (a) and (b) of cl. (1) of sec. 443 of the Code of Criminal Procedure. If the existence of these conditions is decided by the High Court in favour of the accused he is entitled as of right to an appeal. Such application for leave to appeal should be heard by a Division Bench of the High Court rather than by a single Judge. **A. H. TURNER v. THE KING-EMPEROR** ... 458

s. 476B—Order by Subordinate Judge refusing to make a complaint—Appeal to District Judge—Limitation—Limitation Act (IX of 1908), Art. 154.] Under sec. 476B any person whose application for the making of a complaint under sec. 476 has been rejected, or against whom such a complaint has been made may appeal to the superior Court mentioned in the section and under Art. 154 of the Limitation Act, the period of limitation for filing such appeal when the Appellate Court is not the High Court is thirty days. An order under sec. 476B made in an appeal filed out of time was set aside by the High Court. **CHANDRA KUMAR SEN v. SM. MATHURIYA DEBYA** ... 1035

sec. 488—"Living in adultery," meaning of—Single act of adultery, if sufficient to cause forfeiture of maintenance.] Under sec. 488, Cr. P. C., unless continuity of conduct is established it cannot be inferred from a single act of adultery that the woman is "living in adultery" so as to be deprived of maintenance from the husband. Held—That it was open to the trying Magistrate to find that, apart from the circumstance that the woman had given birth to an illegitimate child, she was not living in adultery, and the High Court refused to interfere. **JATINDRA MOHAN BANERJEE v. GOURI BALA DEBI** ... 647

sec. 491—Directions in the nature of habeas corpus—Jurisdiction of Criminal Appellate Bench of High Court to entertain application—Sec. 54, cl. 7—Arrest without warrant on suspicion for offence committed outside British India—Conditions necessary to justify arrest under section—"Reasonable suspicion," "credible information," meaning of—Liability for arrest and detention in British India, if to be present existing liability or future possible liability—Duty of Police to produce person arrested under cl. 7, sec. 54, immediately before a Magistrate—Deputy Commissioner of Police, Calcutta, as Justice of the Peace, if has power to direct detention of person arrested for unlimited time.] The Petitioner, a servant of the Jodhpur State, was arrested without warrant by the Calcutta Police under cl. 7 of sec. 54 of the Code of Criminal Procedure on receipt of certain information from the Jodhpur State. The Pe-

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tioner applied to the High Court under sec. 491 of the Code of Criminal Procedure: **Held**—That the information received did not contain sufficient material to justify the arrest of the Petitioner whose detention was therefore improper. That in consequence of the amendment introduced in sec. 491 by Act XII of 1923, the Criminal Appellate Bench of the High Court had jurisdiction to entertain an application under sec. 491 of the Code of Criminal Procedure. **Per** Walmsley, J.—

The words "credible" and "reasonable" in cl. 7 of sec. 54 must have reference to the mind of the person receiving the information and bare assertions cannot form the material for the exercise of an independent judgment. **Per** Mukerji, J.—To satisfy the requirements of cl. 7 of sec. 54, two conditions must be present. The first of these requisites contemplates either the proof of a fact, namely, the fact of the person having been concerned in the act or a reasonable complaint or credible information or a reasonable suspicion of his having been concerned therein. The wording of cl. 7 clearly indicates that the arresting police officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information. The second requisite is that there must be a present liability for apprehension or detention and not a future possible liability. The issue of some sort of process under the law would create such a liability though the process may not have arrived and is not available for execution. Where all the conditions necessary to satisfy the requirements of cl. 7 of sec. 54 are made out and an arrest is validly and lawfully made the Police must forthwith produce the person arrested before a Magistrate. The provisions contained in the Indian Extradition Act and the Fugitive Offenders Act referred to. **Quere**.—Whether a Deputy Commissioner of Police as a Justice of the Peace in Calcutta has power under the Calcutta Police Act to direct detention for an unlimited period **SUBODH CHANDRA RAY CHOWDHURI v. THE KING-EMPEROR** ... ss. 526, 363

—Transfer by High Court on the application of complainant—Magistrate's note on record of deposition of witness giving rise to ground for transfer.] Where in recording the evidence of a witness for the prosecution the Magistrate made a note

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to the effect that the witness faltered and it appeared from his demeanour that he had not told the truth and the complainant moved the High Court for a transfer of the case: **Held**—That it was desirable that the case should be transferred to some other Magistrate. **GOLAM BARI GAZI v. YAR ALI KHAN** ... 316

ss. 526—**Grounds of transfer—Relationship between the Muktear and the trying Magistrate, if a good ground for transfer of the case.]** In an application by the accused under sec. 526 of the Criminal Procedure Code for transfer of a case on the ground that the muktear appearing for the complainant was a near relation of the trying Magistrate and that the complainant was giving out that on account of such relationship, conviction was certain: **Held**—That in the circumstances there was good ground for transfer of the case to another Magistrate. "It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation." **NITYARANJAN MONDAL v. THE KING-EMPEROR** ... 648

sec. 537—**Scope of, in proceeding under sec. 250, Cr. P. C. See under Criminal Procedure Code, sec. 250. SURESH CHANDRA GUPTA v. ABDUL JABBAR** ... 127

sec. 562—**Appeal against order under, by convicted person. See Cr. P. C., secs. 407, 408. BAHADUR MOLLA v. ISMAIL** ... 151
DEFAMATION—Prosecution when maintainable by an individual though the defamatory matter relates to a class of individuals, etc. See Penal Code, sec. 499. PROTAP CHANDRA GUHA ROY v. THE KING-EMPEROR ... 904

DYING DECLARATION, evidentiary value of—Distinction between English and Indian law—Circumstances which Court must consider in relying on dying declaration—Record of dying declaration—Desirability of recording statement verbatim and questions put with the answers.] Dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. Under the Indian Evidence Act, the weight to be attached to a dying declaration depends not upon the expectation of death which

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is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, so that it becomes almost always a question of fact as to whether it should be relied upon or not. Where in recording a dying declaration, the Magistrate appeared to have put questions which were not all recorded, though the answers were: Held—That the procedure was open to objection, in that in the first place the questions might be leading questions and in the condition of a person making a dying declaration there was always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statements. *Per Cave. J.* in *R v. Mitchell*, 17 Cox. C. C. 503 (1892), referred to. **EMPEROR v. PREMANANDA DUTT**

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EVIDENCE ACT, INDIAN (1 of 1872), ss. 14, 15—Evidence of previous fraud, if admissible in trial under sec. 420, I. P. C.] Evidence with regard to a previous act of fraud alleged to have been committed by an accused person who is on his trial on a charge under sec. 420, I. P. C., is inadmissible in law. Such evidence cannot be brought in either under sec. 14 or sec. 15 of the Indian Evidence Act, the case being one in which the innocence or guilt of the accused depends upon proof of actual facts and not upon the state of the accused's mind. **GOKUL KHATIK v. THE KING-EMPEROR**

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FULL BENCH, reference to, cannot be made by a third Judge to whom a reference is made under sec. 429, Cr. P. C. **ISHAN CHANDRA SAMANTA v. HRIDYO KRISHNA BOSE**

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HABEAS CORPUS, directions in the nature of—Application if lies to Criminal Appellate Bench. See Cr. P. C., sec. 431. **SUBODH CHANDRA RAY v. THE KING-EMPEROR**

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JURORS, selection of, from outsiders in case of deficiency of persons summoned. See Cr. P. C., sec. 276. **THE GOVERNMENT OF BENGAL v. MUSHU KHAN**

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JURY—Verdict of guilty on charge of criminal breach of trust without being able to ascertain the amount embezzled and recommending lightest punishment on that ground—Conviction on such verdict, legality of—**Criminal Procedure Code** (Act V of 1898), sec. 222. (2)—Effect of the amendment—Sec. 303 (1)—Duty of Judge to put questions to jury to ascertain the scope and

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import of verdict.] Where on a charge of criminal breach of trust under sec. 408, I. P. C., the jury returned a verdict of guilty but recommended the lightest punishment on the ground that the amount misappropriated was much less than that stated in the charge and the Sessions Judge accepting the verdict convicted the accused: Held—That the conviction could not stand on such a verdict. The verdict in question was not a simple verdict of guilty or not guilty on the whole matter covered by the charge but a special or qualified verdict to ascertain the exact scope and import of which it was the duty of the Judge to ask the jury such questions as were necessary under sec. 303 (1), Cr. P. C. **KHERODE KUMAR MUKHERJI v. KING-EMPEROR**

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charge to—Proper summing up, what is—Misdirection in charge to jury, vitiating verdict—**Criminal Procedure Code** (Act V of 1898), sec. 360—Deposition read by witness himself and explained by Judge to accused though not in the presence of witness—Section, if sufficiently complied with.] The summing up by the Judge in his charge to the jury as contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it as a sound judicial discretion would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration and collate the evidence pro and con bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have deposed at the trial and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination instead of aiding the jury only confuses them. Where the Judge's charge to the jury did not fulfil the aforesaid conditions, it was held that the verdict was vitiated. **Semble**.—It is not a sufficient compliance with sec. 360 of the Code of Criminal Procedure where the deposition is read by a witness himself and it is explained by the Sessions Judge to the accused though not in the presence of the witness. **JESSARAT v. KING-EMPEROR**

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LEGAL PRACTITIONER, practising in a Court presided over by a near relation, undesirability of. **NITYANUNDO MANDAL v. KING-EMPEROR**

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MAPS, in criminal cases, how to be prepared.] A person who makes a map in a criminal case ought not to put upon it anything

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more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted in the body of the map but in a separate sheet of paper annexed to the map as an index thereto. **THE KING-EMPEROR v. MOFIZEL PEADA** ... 842

PENAL CODE (Act XLV of 1860), sec. 30—Counterfoil of paying in slip at Bank, if valuable security. See Penal Code, sec. 471. **A. H. TURNER v. THE KING-EMPEROR** ... 868

sec.
34, interpretation of—Different acts done by different persons with a view to committing a particular crime—Liability of all for the crime—Secs. 33, 37, 38, 114, 149—Statute—Interpretation of the Penal Code.] Sec. 34 of the Indian Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself. "That act" and "the act" in the latter part of the section include the whole of the action covered by "a criminal act" in the first part of the section. Secs. 33, 37 and 38 referred to and considered. Secs. 149 and 114 distinguished. Sec. 114 deals with the case where there has been the crime of abetment, but where also there has been the actual commission of the crime abetted and the abettor has been present thereat. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes by this section the very crime abetted. The section is evidentiary not punitive. Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption, *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by sec. 114 brings the case within the ambit of sec. 34. If to presence at the commission of the offence abetted, there is added proof of participation in the offence, the abettor may also be convicted under sec. 34. The Indian Penal Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as the principal in the first or second degree, but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly expressed, **Emperor v. Nirmal Kanta Roy**, J. L. R. 41 Cal. 1072: s. c. 18 C.

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W. N. 723 (1914) and Emperor v. Profulla Kumar Mazumdar, J. L. R. 50 Cal. 41 (1922), overruled. **The King-Emperor v. Barendra Kumar Ghosh**, 28 C. W. N. 170 (F. B.) (1923), affirmed, **BARENDRA KUMAR GHOSH v. THE KING-EMPEROR** ... 181

, sec. 114—Scope of, as distinguished from sec. 34. See under Penal Code, sec. 34. **BARENDRA KUMAR GHOSH v. THE KING-EMPEROR** ... 181

ss. 302, 304 (A)—Trial on a charge under sec. 302—Conviction under sec. 304 (A), if legal.] The evidence justifying, an accused person tried under sec. 302 of the Indian Penal Code may be found guilty of an offence under sec. 304 (A) of the Code. **THE KING-EMPEROR v. MOFIZEL PEADA** ... 842

ss. 380, 23, 24, 378, iii.
(J)—Theft from a building—Elements necessary to constitute offence—Necessity of proof that removal was with the intention of causing wrongful gain to one or wrongful loss to another—Kettle given for repairs to artisan forcibly removed by owner after time stipulated for finishing repairs—Offence, if committed by such act—Contract Act (IX of 1872), secs. 55, 170—Time, when essence of the contract—Reasonable time—Repairer's lien, when repair done in part.] One of the accused gave a kettle for repairs to the complainant who promised to finish the repairs within six or seven days. Some days after the stipulated time the accused who gave the kettle to the complainant went to his shop accompanied by two others and demanded return of the kettle which the complainant refused to part with unless he was paid for the repairs already done. The accused refused to pay the amount, took away the kettle from the almirah of the complainant and walked out with it. All the three were convicted under sec. 380, I. P. C.: Held—That in order to sustain a conviction under sec. 380 it was necessary to prove that the accused took away the kettle from the possession of the complainant with the intention of causing wrongful gain to himself or wrongful loss to the complainant. That on the facts and circumstances the conviction under sec. 380 could not stand. The repairs had been partly done and the kettle as so repaired was useless, so that the complainant had no lien over the kettle under sec. 170 of the Contract Act. The kettle moreover was not repaired within the time stipulated, and even if time was not of the essence of the contract, the accused had not acted dishonestly in demanding and taking back the article after the lapse of reasonable time. **E. J. JUDAH v. THE KING-EMPEROR** ... 1011

sec. 405—Criminal breach of trust—Venue for trial where accused liable to render accounts at a particular place but fails to do so. See Cr. P.

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G. sec. 181. GUNANANDA DHONE v. SANTI PROKASH NANDEY ... 432

sec. 408—Criminal breach of trust by clerk or servant—Elements constituting the offence—Necessity of definite finding of a definite sum embezzled.] The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must therefore be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction. The object of the amendment of sec. 222 by the introduction of sub-sec (2) was not to amend the Penal Code but merely to alter the procedural law so as to get rid of technical difficulties in framing a charge, viz., (1) where there was a running account and the prosecution were unable to put their hands on a specific item out of which the particular sum was embezzled or to which it was attributable and (2) where the amount said to have been embezzled was made up of many items, the joinder of which contravened the provisions of sec. 234. Cr. P. C. KHIRODE KUMAR MUKHERJI v. KING-EMPEROR ... 54

sec. 417—Cheating—Untrue praise of goods in advertisement, if criminal offence—Quashing of proceedings by High Court.] Where the allegation against the accused was that he advertised in the papers that he was willing to sell an almost new jazz set, and the complainant answered the advertisement and after some correspondence sent the price settled to the accused, and on receipt of the goods the complainant found that they were not of the quality he expected according to the advertisement and certain articles mentioned in the list were not sent, and the accused was summoned to answer a charge of cheating: Held—That the allegations were insufficient to justify the prosecution of the accused for a criminal offence, and the proceedings against the accused were quashed. The giving of untrue praise of articles by a seller does not amount to a criminal offence. Regina v. Bryan, D. B. 265: s. c. 26 L. J. M. C. 85 (1857). referred to. W. H. DA COSTA v. J. P. DEEPHOLTS ... 362

sec. 465, 420—Forgery, cheating—False document, what is—Dishonest concealment of facts, how far a constituent of the offence of cheating—Criminal Procedure Code, sec. 345 (2)—Composition of offence of cheating allowed by High Court.] The accused went to the market and after making some purchases tendered a cheque to the shop-keeper who called a Poddar who cashed it for a small commission. On being presented the che-

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que was dishonoured by the Bank. The accused was tried in the High Court Sessions on charges of forgery and cheating and convicted. It appeared that the brother of the accused, G. R. Martindale, had an account with the Bank and the signature on the cheque was only Martindale. The evidence was that he made an alteration in the date on the cheque in the presence of the shop-keeper and the Poddar as though he were the drawer but made no representation about G. R. Martindale. That inasmuch as the accused had no intention of inducing in the minds of the shop-keeper and the Poddar the belief that the cheque had been signed by his brother and had no such intention in regard to the Bank, the cheque in question was not a false document and consequently the charge of forgery failed. That in the circumstances of the case there was dishonest concealment of facts on the part of the accused and he was rightly convicted of cheating. T. C. S. MARTINDALE v. THE KING-EMPEROR ... 447

sec. 471/465—Using as genuine a forged document—Sec. 30—Counterfoil of paying-in slip of Bank, if valuable security.] The Appellant was tried and convicted by the Chief Presidency Magistrate of Calcutta under secs. 471/465, I. P. C., in respect of a counterfoil of a paying-in slip purporting to be an acknowledgment of receipt of a sum of money by the Bank: Held—That the document in question came within the definition of valuable security as laid down in sec. 30, I. P. C., and the case was therefore triable exclusively by the Court of Sessions. A. H. TURNER v. THE KING-EMPEROR ... 869

sec. 499 and 500—Defamation—Prosecution, when maintainable by an individual though the defamatory matter relates to a class of individuals—Charges, how to be framed in such circumstances—Sec. 499, Explan. (2), meaning of—The police force at a particular place, if an association or collection of persons contemplated by the explanation—Distinction, if any, between a criminal proceeding and a civil suit with reference to this point—Trial on improperly drawn charges, if a proper trial—Charging a person with crime—Plea of veritas, how established—Abuse and defamation distinguished.] The complainant was a member of the police force stationed at a particular place and the chief investigating officer in connection with two occurrences alleged to have taken place there, one of dacoity and the other of assault on the police. The Petitioner, a member of the District Congress Committee, on hearing stories of oppressive acts committed by the police in the locality, came there, questioned the villagers and took

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down notes of statements made by them. He was convicted on two charges of defamation relating to two speeches made by him on two different occasions, the averment in the first charge being that the Petitioner had defamed the complainant by making and publishing an imputation concerning the police force employed at the particular place of which the complainant was a member, and the principal officer in charge of the investigation to the effect that, not to speak of the police only, but the British Government themselves and the superior officers from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct; the averment in the second charge being that the Petitioner defamed the complainant by making an imputation against the said police force to the effect that the said police force had bitten off the nipple of the breast of women and had bitten the cheek of a woman nine months pregnant. *Held per Newbould, J.*—That the words set out in the first charge were not mere abuse but were clearly defamatory and, the imputations appearing from the evidence to have been made against the police force as a whole of which the complainant was a member, the conviction on the first charge was properly had. That the imputations in the second charge, not being against a collection of persons as such of which the complainant was a member but of certain definite brutal acts against some individual members thereof, were not defamatory of the complainant. *Per B. B. Ghose, J.*—That the charges were not sustainable against the Petitioner at the instance of the complainant. To speak of a person as a beast or a pig is defamatory, but the words "the British Government themselves and the superior officers including from the District officer down to the Daroga and Chowkidars were all beasts and pigs" were too wide to admit of the construction that any particular police officer was defamed. *Eastwood v. Holmes*, 1 F. & F. 347 (1858), relied on. The words in explanation 2 of sec. 499, 1 P. C., mean that a collection of persons as such may be collectively defamed in the same manner as a "company." The general principle on which a company may be said to have been defamed would therefore apply equally to the case where it is alleged that a collection of persons as such has been defamed. *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87 at p. 90 (1859), *Mayor, etc., of Manchester v. Williams*, [1891] 1 Q. B. 94, *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. 133, *The King v. Osborne*, 2 Barn. 138; 2 Swan. 503d., *King v. Orme*, 1 Ld. Raym. 426, and *Rex v. Williams*, 5 Barn. & Ald. 595 (1811), referred to. The true rule is that if a person complains that he has been defamed as

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a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation. All circumstances which were apparent to the bystanders at the time the alleged defamatory words were uttered and what meaning such words would have fairly conveyed to their minds have to be considered to determine whether the words were defamatory and whether they referred to the complainant. Applying these principles and taking all circumstances into consideration the words complained of in the charges were not proved to have been used with reference to each and every member of the police force and the complainant could not therefore be said to be a person aggrieved by the offence complained of. The words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. Where there is a denial the evidence in support of the prosecution must be scrutinised. *Held further*—That at the trial the accused was entitled to prove the notes of statements of complaints against the police taken down by him when he went to the locality as evidence of his good faith and these were relevant on the question although the persons who made the statements were not examined. Where the defamation imputes a crime to the complainant, to sustain a plea of veritas there must be the same strictness of proof as on a trial for such crime. *Held per Buckland, J.*—That Exp. 2 to sec. 499, 1 P. C., is intended to include a company or an association or collection of persons as such within the word person as used in the definition, so that the latter should not be limited to individuals. In a case in which the explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this explanation justify a charge of defaming an individual and a charge cannot combine the explanation with the definition for such a purpose. That it is doubtful if the police force at a particular place is such an association or collection of persons as is contemplated in Exp. 2, sec. 499. *Aldridge v. Barrow*, 1 L. R. 34 Cal. 662; s. c. 11 C. V. N. 680 (1907), referred to. That there was confusion in the charges framed between the complainant and the police force at the particular place in relation to the various ingredients of the charge and the charges framed did not conform to the requirements of the definition of the offence of defamation. That inasmuch as a trial on the char-

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was framed was no trial at all the accused must be retried on charges properly framed. That the offence of defamation consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it and an individual may be as much defamed by words apparently only of general application as by words referring to him by name. **PRA-TAP CHANDRA GUHA ROY v. THE KING-EMPEROR** ... 901

PRESIDENCY MAGISTRATE—Law, if any, under which such Magistrate can record confession. See Confession. **EMPEROR v. PANCHKARI DUTT** ... 300

PRIVY COUNCIL, appeal to, against decision of Full Bench or High Court dismissing accused's application for review of sentence upon Advocate-General's certificate—Letters Patent (Calcutta), Arts. 25, 26, 41—Special leave in criminal case—Misdirection—Irregularity as distinguished from error affecting due course of justice—Point not raised at the trial. The decision of a Full Bench upon a review of a judgment or sentence passed on an accused person by a Judge of the High Court exercising its Original Criminal Jurisdiction, held in pursuance of a certificate of the Advocate-General given under Art. 26 of the Letters Patent, is not a judgment, order or sentence of the High Court made in the exercise of its Original Jurisdiction within the meaning of Art. 41. **Quære**:—Whether the accused has a right of appeal to the Privy Council under Art. 41 against the decision of the Full Bench rejecting on review his application for reconsideration of a sentence passed on him, in pursuance of the Advocate-General's

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certificate under Art. 26. **Subrahmaniam Ayyar v. King-Emperor**, L. R. 28 I. A. 257; s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 866 (1900), referred to. The Judicial Committee must not be understood as giving any encouragement to appeal in criminal matters under Art. 41 where no point of law has been raised by the trial Judge under Art. 25, nor are persons who have appealed in the usual way to the King in Council from a decision in review passed by the Full Bench upon a certificate of the Advocate-General to assume that an application for special leave to appeal as an alternative will be granted or even entertained by the Judicial Committee. **Quære**:—Where the evidence is the same, the guilt the same and punishment the same, but error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, whether the error is more than an irregularity, specially when this error could have been corrected in time, if the accused had put his counsel in a position to raise his defence clearly and in due form at the trial. **Held**:—That there was no misdirection in the summing-up of the trial Judge to the jury; still less was it such a summing-up as affected the due course of justice and the right of the prisoner to be fairly tried according to law within the strict and narrow limits which have long been laid down by the Judicial Committee when special leave to appeal is asked for in criminal matters. Points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave. **RARENDRA KUMAR GHOSH v. KING-EMPEROR** ... 187

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PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW. THE SECRETARY
LORD BLANESBURGH. OF STATE FOR
MR. AMKER ALI. INDIA IN COUN-
SIR LAWRENCE JENKINS. CIL, Appellant,
LORD SALVESEN. v.

1924, ROY JATINDRA
Heard, 19, 21, 22 and NATH CHOW-
25. February. DHURY and anr.,
Judgment 2, May. Respondents.

Diara proceedings—Act IX of 1847, sec. 6—Alluvial accretions from non-navigable river-beds within permanently settled zamindari, liability to revenue—Assessments by and orders of Board of Revenue, when final—Ground on which orders of administrative body may be attacked in Civil Court—Fundamental irregularity, what is and what is not—Onus of proof Objections which merely propound riddles, if sufficient to discharge onus—Superimposition of maps to determine change in locality.

Government is entitled to public revenue under Act IX of 1847 from chars formed in a non-navigable river, even when it flows through a permanently settled Zamindari, as well as up to the middle line of the river where that is the boundary of the Zamindari and this even where it appears that the river bed was part of the permanently settled Zamindari.

THE SECRETARY OF STATE FOR INDIA v. THE MAHARAJAH OF BURDWAN (2) followed.

The finality imposed by sec. 6 of the Act on the orders of the Board of Revenue regarding assessment of Diara lands is subject to two conditions, viz., first, that fundamental irregularity, that is to say, a defiance of or non-compliance with the

(2) L. R. 48 I. A. 565; s. c. I. L. R. 49 Cal. 103; 26 C. W. N. 619 (1921).

essentials of the procedure for assessment would still give ground for questioning the proceedings in a Court of law; and secondly, that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it.

It follows that objections affecting measurements, surveys and maps of localities and other details of investigation which should have been raised before the administrative authority and could properly have been set at rest by such authority—are not sufficient grounds for review by the Civil Court of the orders of that authority.

The objection that the area of the alluviated land was arrived at by the superimposition of maps of the locality prepared on successive dates—a proceeding not illegal in itself and natural in the circumstances—was one for consideration by the officials acting in the revenue proceedings and eminently fit for settlement and decision by the Board of Revenue.

Such belated objections amounting merely to propounding of riddles are not sufficient to throw doubts upon investigations made by persons authorised by law to make them.

RAJCOOMAR ROY v. GOBINDA CHUNDER ROY (1) and KUMAR BASANTA KUMAR ROY v. SECRETARY OF STATE FOR INDIA (3) referred to.

This was an appeal from a decree, dated the 15th March 1920, of the High Court of Bengal affirming a decree, dated the

(1) L. R. 19 I. A. 140 (1892).

(3) L. R. 44 I. A. 104; s. c. I. L. R. 44 Cal. 258; 21 C. W. N. 642 (1917).

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27th July 1918, of the Court of the Subordinate Judge of Backergunj.

The suit was brought by the Respondents against the Government for a declaration that certain alluvial lands are within the ambit of Plaintiffs' mahal Debnathpur and not liable to resumption under the Diara Act, and that all operations in connection with the Diara proceedings about the disputed land be declared illegal and void and the Diara proceedings be set aside.

The mahal is situated in the Sunderbans. It was leased by the Government rent free in *ijara* to Debnath Roy, the predecessor-in-interest of the Plaintiffs for a period of 20 years.

In September 1853, Debnath Roy applied for a grant under certain new rules made by the Government in respect of waste lands in the Sunderbans, and on the 17th November 1856 he received a grant and executed a *kabuliyat* which defined the boundaries of the lands and the terms of the lease which was for 99 years from 1839.

The lands were described as bounded—

* * * *

"On the east by the Doondoos Nadi :

"On the south by the Bamni or Sapleza River :

"On the west by the Baleswar River."

In 1862-63 a revenue survey of the locality took place as the result of which two maps were prepared.

Subsequently as a result of litigation Debnath Roy's title to 33,441 bighas of land was established and in 1870 he executed a *doul kabuliyat* stating in detail the revenue to be paid for the remaining 68 years of the settlement.

About the same date a map was prepared by Mr. Ellison under the instructions of the Commissioner of the Sunderbans.

In 1900 it was determined to make a new Diara survey of the banks of the Sunderbans rivers including the rivers Baleswar and Sapleza.

In the course of the survey new maps relating to the locality now in question were made in 1904-5 and it was alleged by the Government that certain new lands were shewn to have been added or accreted to the Plaintiffs' estate. Notifications were accordingly issued and an order made under Act IX of 1847 that an assessment should be made thereon.

Objections were preferred by the Plaintiffs which were rejected by the Collector, and on appeal, by the Board of Revenue.

The Respondents accepted the new assessment under protest and instituted the suit now under appeal. The Subordinate Judge found that the property leased to the Plaintiffs extended to wherever the Baleswar and Sapleza went during the 39 years, that the lands in dispute were not accretions and were not liable to be included in the Diara proceedings and he made a declaration that the disputed lands were included in estate Debnathpur and that all operations in connection with the Diara proceedings in respect of the lands in suit were *ultra vires* and void, and passed a decree accordingly. On appeal, the High Court (Fletcher and Ghosh, JJ.) affirmed the decree of the trial Court and found "that the grantee in this case cannot be said to be the holder of an 'estate paying revenue directly to Government.' If that is so, then sec. 6 of Act IX of 1847 cannot be invoked for assessing lands alleged to be additions with revenue payable to Government."

They were of opinion that the proceedings under Act IX of 1847 were not themselves in order, that the onus lay upon the Government to show that lands outside those mentioned in the *kabuliyats* of 1856

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and 1870 had come into existence and had been added to the original lands, and that that onus had not been discharged.

In the event the High Court dismissed the appeal and confirmed the judgment of the lower Court.

The present appeal was preferred on behalf of the Secretary of State for India in Council against the decree of the High Court.

Messrs. A. M. Dunne, K. C. and Ken-worthij. Brown for the Appellant.—It is not contested that alluvion has taken place, and *prima facie* land which has emerged is liable to revenue. The High Court have erred in holding that an alluvial formation formed within the middle line of the stream is land which the owner of a riparian mahal is entitled to hold free of assessment. *Secretary of State v. Maharajah of Burdwan* (2).

The Diara survey was made, the Collector found that the lands in suit were additions to the estate and an order was made under Act IX of 1847 for their assessment. The Respondents appealed from that order and their objections were heard by the Board of Revenue which dismissed their appeal.

The order of the Board of Revenue finally determined the question as to the liability to assessment of the lands in question and it is not open to revision by suit.

[Sec. 6, Act IX of 1847.]

The survey proceedings were duly carried out and their legality was never questioned before the Board of Revenue. The Respondents are not entitled to raise contentions in this suit other than those raised in their appeal to the Board of Revenue. The accuracy of the maps has been impugned, and the procedure adopt-

ed in comparing later with earlier maps, but even if the method was incorrect, which the Appellant denies, the Board of Revenue alone are competent to decide upon it. The Respondents' contention that the lands in question were included in the former settlement with their ancestor is an affirmative one and the onus lay upon them to prove it. That onus they have failed to discharge.

Jagadindra Nath Ray v. Secretary of State (4).

Reference was also made to *Secretary of State v. Sm. Fahamidunissa Begum* (5).

Messrs. DeGruyther, K. C. and B. Dubé for the Respondents.—Government claims assessment on the ground that the lands in suit have been added by alluvion. The Respondents deny that the land has been thrown up.

If a river is tidal and navigable, the bed is the property of Government, if not, the property in the bed depends on the construction of the grant.

The lower Court has found that this was not a public and navigable river, and the Respondents' grant was to the middle of the river.

[SIR LAWRENCE JENKINS.—If you say the river is not tidal and navigable the proof of that is on you. There is no presumption either way.]

The Civil Court has power to revise the decisions of the Board of Revenue. This is clear from a reference to the provisions of Bengal Regulation II of 1819 and Bengal Regulation XI of 1825.

The word "final" in Act IX of 1847 means final only as to the amount of the

(4) L. R. 30 I. A. 44, 52; s. c. I. L. R. 30 Cal. 291; 7 C. W. N. 193 (1902).

(5) L. R. 17 I. A. 40; s. c. I. L. R. 17 Cal. 590 (1889).

(2) I. R. 48 I. A. 565; s. c. I. L. R. 49 Cal. 103; 26 C. W. N. 619 (1921).

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assessment, the liability to be assessed may still be contested in the Civil Courts.

Secretary of State v. Sm. Fahamidunissa Begum (5).

In any event there were such irregularities in the survey proceedings as to nullify any decision based on them.

There was no proper enquiry on the ground to discover whether there had actually been alluvion and under Act IX of 1847 there is no provision whereby the Board of Revenue can make an enquiry, or prepare a map as they have purported to do here. They are only entitled to look at the Government map and to draw inferences from that.

The Diara rules provide that the map on which the assessment is to be based shall contain both the old and the new boundary. The map of 1904 does not contain the old line in relation to which the correctness of the new line may be judged.

The assessment has been made not on the difference between the lands now and at the time of the grant but on the difference between now and 1870.

There has been no real survey of the lands as they were at the time of assessment and even though the maps may be accurate the Respondents are not bound by them for they are not maps made in accordance with the Diara Survey.

Mr. Dunne, K. C., replied.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORE STAW.—This is an appeal from a decree, dated the 15th March 1920, of the High Court of Judicature at Fort William in Bengal, which affirmed a decree, dated the 27th July 1918, of the Additional Subordinate Judge of Backergunj.

The Plaintiffs are Roy Jatindra Nath Chowdhury, and Roy Harendra Nath Chowdhury.

They instituted this suit on the 30th January 1917, after due notice, against the Secretary of State for India in Council, contesting the legality of the assessment imposed in the course of an alleged Diara Survey on lands in the villages of Amragathi Hagalpati and Nizamia Gopekhali in the district of Backergunj.

These villages are part of an estate called Debnathpur bearing towzi No. 4908 of the Backerguni Collectorate owned and possessed by the Plaintiffs. The Plaintiffs' title to this estate is undisputed, and its earlier history is set forth in a Rubokari of the Sunderbans Commissioner of the 15th July 1872.

On the 1st September 1839, a grant was made by the Government to Debnath Roy, benamidar for the Plaintiffs' predecessors-in-title, of a tract of the jungle and forest land then known as Tushkhali, but later as Debnathpur. The grant was an *ijara* lease for 20 years, and was rent free.

Debnath Roy, taking advantage of rules recently framed by the Government, obtained a grant on the 17th November 1856, of the portion of waste land in the Sunderbans estimated to contain 34,000 bighas, described as Lot or Abad Debnathpur, shown in Captain Hodge's map and bounded on the south and west by the Sapleza and Baleswar rivers respectively. The transaction was evidenced by a *pottah* and a *kabuliyat* (Ex. 3). The grant was at a progressive rent for a term of 99 years, to take effect from the 1st September 1839, and power was reserved to the Government to make a survey and measurement at any time between the twentieth and thirtieth years from that date to ascertain the area of the land granted and to calculate the stipulated re-

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venue. In the course of a survey of the leased lands directed by the Commissioner of the Sunderbans in 1858, a map was prepared in or about 1863, and it was determined that the grant included an area of only 14,505 bighas 5 cottahs. This led to a litigation (after-mentioned) as the result of which a doul, of 9th April 1870 (Ex. H), was executed in favour of the Plaintiffs' predecessors-in-title of 38,441 bighas 17 cottahs 7 chittacks of land, known as Debnathpur for the remaining 68 years of the 99 years' lease. In 1870, Mr. Ellison, in the course of a survey, prepared a map (Ex. J) in which the Plaintiffs' mahal is depicted. The Plaintiffs have been paying revenue in accordance with the arrangement, and their mahal has been numbered towzi No. 4908.

On the 2nd October 1900, the Government issued five separate notifications. By No. 1959 T.R., the Lieutenant-Governor, in exercise of the powers conferred upon him by sec. 101 (1) of the Bengal Tenancy Act as amended and with the previous sanction of the Governor-General in Council, directed that a survey should be made and a record-of-rights prepared in respect of all lands included within the external boundaries of Thanas Bauphal, Nalchiti, Barisal and Backergunj in the district of Backergunj, with certain exceptions therein specified. By Notification No. 1960 T.R., under the powers vested in him by sec. 3 of the Bengal Survey Act V of 1875, the Lieutenant-Governor ordered that a survey be made of the lands in Thanas Barisal, Backergunj, Banphal and Nalchiti, and that the boundaries of estates, tenures, mouzas and fields be demarcated in lands to be surveyed. By Notification No. 1961 T. R., under sec. 4 of the same Act, Mr. Beatson-Ball was appointed to be the Superintendent of Survey for the purpose of carrying

out the survey and demarcation of boundaries ordered in Notification No. 1960 T. R. By Notification No. 1962 T.R., under the same section, Babu Peari Mohan Basu was appointed to be an Assistant Superintendent of Survey for the same purpose. And by Notification No. 1967 T.R., under the powers conferred upon him by sec. 3 of Act IX of 1847, the Lieutenant-Governor ordered that a new survey be made of the lands falling within the district of Backergunj which were situate on the banks of rivers and on the shores of the sea, and that new maps be prepared according to such survey. By two later notifications of the 27th October 1902, and the 14th November 1903, Mr. Bedford was appointed Extra Assistant Superintendent and Mr Beatson-Ball was again appointed Superintendent.

As already stated in 1900 the Government decided to make a Revenue Survey of the Backergunj district in accordance with the provisions of the Bengal Tenancy Act (VIII of 1885). Whilst the Revenue Survey was proceeding—itsself a work of great labour, minuteness and complexity—it was considered desirable to make a survey also of the alluvial accretions that had taken place to the north and east of the two rivers—Sapleza and Baleswar, by the recessions of the rivers between the years 1872 and 1900. The entire proceeding is set out in considerable detail in the final report of the Diara Commissioner (p. 30 of Pt. III). This is an important document which requires full consideration to judge whether the Revenue authorities acted in accordance with the law or not in carrying out the Diara measurements:—

"It was originally intended," says the report "that the Diara survey should be carried out concurrently with the preparation of the record-of-rights in the district and by Notification No. 1967 T. R., dated

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the 2nd October 1900, published in the *Calcutta Gazette* of the 10th October 1900, a new survey was ordered of the lands situated on the banks of the rivers and on the shores of the sea within the district of Backergunj according to the provisions sec. 3 of Act IX of 1847. During the preparation of the record-of-rights, it was, however, found that the Settlement Officer's hands were too full to take up this additional work, which the Diara survey of 1879—1881, confined only to the Ganges and the Meghna rivers, had shown to be of considerable complexity, and it was then decided to postpone the Diara operations until after the final publication of the record-of-rights. The final publication was complete of the permanently settled portion of the district early in 1908 and the Collector in his letter No. 216 K.M., dated the 11th May 1908, to the Commissioner of the Dacca Division proposed the initiation of Diara proceedings in the district."

It appears to have taken eight years for the completion of the Revenue Survey. Then the Diara Survey was taken in hand. On its completion certain notices were issued by the Diara Deputy Collector to the Plaintiffs. That of 4th July 1914 will be hereafter cited.

It has to be borne in mind upon the one and only substantial question, namely, whether alluvion had taken place, that no doubt was or is thrown upon that as a matter of fact.

Nor, further, was any doubt suggested upon the proposition that emergent lands should certainly and naturally and under the statutes be lands from which Government revenue should be derived. The objections made on a variety of points, and with much minuteness, were that the correct procedure to enable such revenue to be imposed was defective, and that, consequently, up to date, the lands stood free from taxation. •

On 4th July 1914, the following notice

was sent to the Plaintiffs by the Diara Deputy Collector :—

"Whereas by virtue of Government Notification No. 1967 T. R., dated the 2nd October 1900, issued under sec. 3 of Act IX of 1847, a new map has been prepared for the lands of mouzah Amragachia Hogalpati No. 3500, on the bank of the Sapleza River in thana Matharia and the said map has been compared with the Revenue survey map and it appears from such comparison that the undermentioned area has accreted to mahal Deknathpur, No. 4908, in the said mouzah."

Then it is added :—

"Be it further known that if there be any objection to this procedure the same should be filed within fifteen days from the date of receipt of this notice."

No objection appears to have been filed. The Diara Collector accordingly made his order for the assessment of the accreted lands on the 22nd October 1914. The objectors (the Plaintiffs) applied for time (apparently for further representation) which was allowed three times. But they appear to have done nothing, and the order for assessment was finally enforced on the 2nd February 1915. The Plaintiffs thereupon executed a *kabuliyat* simply stating that they would bring a suit in the Civil Court in respect of the said Diara lands and that they executed the *kabuliyat* under protest.

By a further notice of the 11th February 1915, it was stated that it had been found, on a comparison with the settlement map of 1870, that smaller areas had formed as Diara accretions. This correction was based upon the fact that it had been discovered that certain diluvion had taken place, reducing the extent of the emergent or alluviated lands. It was accordingly just and proper that the assessment should proceed upon the extent thus corrected. The parties were thus joining issue upon the fact (1) of alluvion and its extent, and (2) whether, notwith-

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standing alluvion, the emergent lands were assessable in law or were already assessed as within the existing mahals.

Objections were filed by the Plaintiffs, but they were disallowed successively by the Deputy Collector, the Collector, and the Board of Revenue.

Revenue was accordingly assessed on the lands alleged to have accreted, and the Plaintiffs executed under protest *kabuli-gats* by which they undertook to pay this revenue.

The Plaintiffs then instituted this suit in the Court of the Subordinate Judge of Backergunj, contesting the propriety and legality of this assessment. They allege in their plaint that "no new survey was made of any land on the banks of the rivers Sapleza and Baleswar in accordance with Government Notification No. 1967 T.R., dated 2nd October 1900, issued under Act IX of 1817, and that no map was prepared under the said Act." Therefore, they contended, all the operations in connection with the Diara proceedings were *ultra vires* and void.

The Defendant's answer to this in his written statement was that new maps of mouzas Amragachia and Nizamia on the banks of the two rivers "were prepared in the course of the District Settlement operations," and that from comparison and relay of these maps and the Revenue Survey maps, as well as the Settlement map of 1870, it appeared that land had been added to towzi No. 4908, Abad Debnathpur. Other pleas were advanced to which it is not necessary to refer at this stage. The fourth issue framed is in these terms:—

"Is the Diara proceeding valid and legal, and is it liable to be set aside?"

On the 27th July 1918, the Additional Subordinate Judge of Backergunj pronounced judgment in the Plaintiffs'

favour and declared that all operations in connection with the Diara proceedings in respect of the lands in suit were *ultra vires* and void. The Court's decree was in accordance with the judgment.

An appeal from this decree was preferred by the Defendant, but it was dismissed by the High Court on the 15th March 1920. From this decree of dismissal the present appeal has been preferred.

Numerous points have been raised in the course of the litigation, but with one exception they do not call for more than passing notice.

The plea of limitation has not been pressed, for the Defendant seeks a decision on the merits and, in particular, on the legality of the assessment.

The Plaintiffs' contention that rule 745 of the Bengal Settlement Manual was expressly incorporated in their lease cannot be sustained, nor is there any force in their argument that this rule was otherwise a bar to assessment proceedings even if legally initiated.

Equally ineffective is the contention that a survey after the thirtieth year from its commencement was in contravention of the terms of the lease; the survey proposed was of land not comprised in the lease. For this reason, too, the provision in the lease defining the rate of revenue has no application.

The High Court's view expressed in the forefront of their judgment that mahal Debnathpur is not, as Act IX of 1847 requires, "an estate paying revenue directly to Government," is obviously erroneous, as is its ground of decision on the position of the lands in dispute and the character of the rivers Baleswar and Sapleza.

With the exception of the one point about to be noted, their Lordships have now dis-

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cussed all the objections that were dealt with in the course of a minute and protracted argument, and they are of opinion that these objections fail. As already mentioned it is not denied that considerable accretion of land by alluvion did in fact occur. Nor is it denied that the legislation upon this subject, including Act IX of 1847, will fail in its main object unless such lands be subjected to assessment.

Their Lordships desire to make it clear, however, that the proceedings of the assessing authorities may be still subject to being quashed in the ordinary Courts of law if they have been tainted by fundamental irregularity. Their Lordships say so in view of the provisions of sec. 5 of the Act of 1847. That section is in the following terms :

"Whenever on inspection of any such new map it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Board of Revenue, whose orders thereupon shall be final."

It appears to their Lordships that it is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities, with which the assessing officials on the one hand and owners on the other have presumably intimate local knowledge, such objection should be tabled to, and considered and reported upon by, the Board of Revenue. The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation appear to their Lordships not only to be imperative but most salutary.

Two conditions, however, must be

noted; the first is that mentioned, *viz.*, that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would still give ground for questioning the proceedings in a Court of law. The second proposition is that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. Unless this last rule be adhered to it is manifest that the way will be opened to endless objections to procedure, even though these are substantially on questions of fact, and the object of the statute, namely, the assessment of lands, will thereby fail.

To these two conditions a third, by way of supplement, may be added, namely, that it is not sufficient to submit in a Court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body.

All other objections having been dealt with, the one which remains is set out in Art. 7 of the plaint in the following terms :—

"That actually no new survey was made of any land on the banks of the rivers Baleswar or Sapleza in accordance with Government Notification No. 1967 T. R., dated 2nd October 1900, issued under Act IX of 1847, and that no map was prepared under the said Act."

This objection is in two parts, first, that

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there was no new survey, and, second, that there was no map. On these subjects the two witnesses are the Diara Deputy Collector, Hara Kishore Biswas himself and Peari Mohan Hazra, the surveyor who was in service in the Diara office under the Deputy Collector. The result of the evidence is to leave no doubt upon these two points, namely, that there were previous maps to go by, and that the alluviated land was visited and surveyed in fact. The testimony of these witnesses makes that clear beyond question. The survey of 1862-3 and the maps of that date were used. Further information was obtained from the map prepared by Mr. Ellison in the year 1870, an important year in the history of this piece of ground. For a controversy had arisen which resulted in litigation under decree of the High Court, dated 11th March 1868, establishing Debnath Roy's right to hold 33,441 bighas. A map called the Ellison map was made at the time, and, following these proceedings, on the 9th April 1870, the Respondents' ancestors executed to the Government a doul *kabuliyat*, stating in detail the revenue to be paid. With these materials, namely, the maps of 1862-3 and the map of 1870, the Deputy Collector in charge of the Diara operations and his surveyor proceeded to work. He reduced the district settlement map to a 4-inch scale map, then he superimposed it upon the revenue survey map, he himself prepared a comparative map, then he made comparisons locally "to test if the line was accurately drawn, and to find out where in the locality the line stood." He then adds details such as these:—

"The chowkidar, panchayet and many other tenants were present. In comparing the map in the locality and finding out how much land of each individual tenant fell within the Diara area, I at first enlarged the

map of 1870 to 16-inch scale and, superimposing the cadastral survey map over it, drew out the line, and, locating it by measurement, found out the positions and drove pegs. . . . I first of all tested the accuracy of the District Settlement map and found it correct. I was not entrusted to enquire how much land was diluviated—still, I made measurement and showed the line of diluvion in the District Settlement map and comparative maps."

Various maps appear in a book on this appeal. One of these is No. 6, which was Ex. N in the Court below, which contains the line drawn to show the lines, not only of alluviation, but of the subsequent diluviation already referred to, and the witness explains that "the lines in yellow in Exs. N, N (1), etc., are in my hand. I put them on that occasion in the locality. I showed the Diara as also the diluvion lines on the map."

As already explained, not only had this land been previously surveyed and maps made as mentioned, but much care seems to have been taken, not only to mark the alluvion in 1904-5, but in 1914 to give the benefit to the tax-payer by a re-survey and a re-drawing so as to exclude from assessability land subsequently diluviated.

After a careful and anxious examination of all the facts submitted, their Lordships are quite unable to affirm that a Diara survey was not made. It is true that one map was superimposed upon another, surely a very natural thing to do when land was supposed to have between two dates undergone accretion; but the land itself was visited and surveyed.

What remains appears to be that—granted superimposition of plans—a separate map was not made of the alluviated land *per se*. That is to say, the results of the comparative map formed by inscribing the results of superimposition marked upon the maps used in that pro-

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cess, and when marked thus formed a comparative map, were not put upon a separate piece of paper which contained the outline of the alluviated land.

Their Lordships are clearly of opinion that all this was in the practical region eminently cognisable by the officials acting in the revenue proceedings and eminently fit for settlement and decision by the Board of Revenue. So much so is this the case that it would appear to be pretty clear that, had this objection been made then and there, the Board of Revenue would at once have ordered the separate sheet to be prepared, which was desiderated.

Passages occur in the judgment of the Court below which seem to taint with illegality or impropriety the operation of superimposition of maps. There is nothing wrong with this from the legal point of view, and from the practical point of view the Revenue Court can deal with it. In *Rajcoomar Roy v. Gobinda Chunder Roy* (1), this Board said:—

“In boundary cases of this kind nothing is easier than to propound riddles which cannot be answered by merely looking at the maps or reading the statement which appears in the Record. If it were enough to show to this tribunal difficulties which the Respondent's counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local Courts have advantages over the remote ones.”

In their Lordships' view this language aptly applies to Board of Revenue Court proceedings, and more particularly so in view of the finality of that Board's orders under sec. 5 of the Act of 1847. In the same case the following pronouncement was made:—

“They can show many difficulties of a kind which probably no amount of mapping

or verbal description would avoid. Mr. Madge's map does not, so far as their Lordships can see, show in terms, and on its face, the *Thackbust* line which was complained of and corrected in the *mutnaza* suit, nor the lands described in the plaint. But those objections were before the High Court, who were satisfied that Mr. Madge had shown the things required; and, though it does not appear that Mr. Madge was present to explain his map, the Court could certainly have required his presence if any real difficulties had been felt on those points.”

Again, their Lordships think it right to say that this language aptly applies to the Board of Revenue proceedings, and they further desire to add that, while the survey proceedings and the map proceedings had been the subject of the examination of the two officers practically and personally connected with this work, the Respondents, who have resisted throughout having assessment made on these lands, did not appear as witnesses on the subject, although, in the evidence already given, it had been clearly shown that the survey had properly been made in the presence of many persons named.

It would rather appear as if the whole of this point was a mere incident in a case which was essentially founded on a mistake. The Respondents resisted the assessment of this increment of the estate upon grounds which this Board has recently found to be unsound in law. They maintained, in short, that the mahal included the increment because its boundaries extended in the case of each of the rivers mentioned, namely, the Baleswar and Sapleza, *ad medium filum*. The High Court, in their judgment, erroneously treated this as a sound ground. Their judgment was pronounced upon the 15th March 1920.

But the law applicable to this subject is to an opposite effect, as has been

(1) L. R. 19 I. A. 140 (1892).

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settled in the case of *The Secretary of State for India v. The Maharajah of Burdwan* (2). That case was a *fortiori* of the present, and it was held that the Government is entitled to public revenue under Act IX of 1847, from *chars* formed in a non-navigable river, even where it flows through a permanently settled Zamindary, as well as up to the middle line of the river where that is the boundary of the Zamindary, and this even where it appears that the river bed was part of the permanently settled Zamindary. Against this judgment of the Board, delivered by Lord Cave, no argument could, of course, be raised at their Lordships' Bar.

That was the matter of substance, and fundamental, because if the Respondents' mahal included the alluvion as already assessed lands, the fresh assessment thereof was necessarily illegal. That fundamental objection having been got rid of, however, the Respondents were, of course, within their rights in raising the other points now dealt with, including that just described as incidental. Upon that incidental point, however, whether there was or was not a new survey map prepared in such a way as to satisfy the requirements of the Act of 1847—it must be repeated that it lies upon the Respondents challenging the assessment proceedings to prove the fundamental illegality of which they complain.

As the result of a long and searching argument, the most that can be said is that the point may have been left not entirely cleared up. On principle, and on authority, this is entirely insufficient. The Appellants have merely propounded a riddle. The case of *Kumar Basanta Ku-*

mar Roy v. Secretary of State for India (3) has been cited by the Additional Subordinate Judge as an authority condemning the practice of finding an excess area by superimposition of maps. Their Lordships do not read the judgment in any such sense, but the passage of Lord Sumner's pronouncement, which is apparently referred to, has, in the view of the Board, a direct bearing of another kind upon the present proceedings. It is to the following effect:—

"The Respondents' argument rested on three points: First, that since 1886 they had been, as they said, in possession of certain portions of a char known as char Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906 it would be seen that part of the area disputed in this action, although claimed as part of char Raninuggur No. 2, really fell within char Raninuggur No. 1, and that there had been a confusion of mauza Jirat, which lay in the north of the disputed area, with an area called char Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now [*Rajcoomar Roy's case* (1)] to deprecate the practice of 'propounding riddles of this kind,' and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now."

The Board is of opinion that these observations fitly apply also to proceedings in the Board of Revenue, a Board specially charged with the settlement of disputes as to boundaries and changes therein and other matters of fact and procedure which are capable of being most satisfactorily treated with all the advantages of local and special and accumulated experience. It has

(1) L. R. 19 I. A. 140 (1822).

(2) L. R. 48 I. A. 565; s. c. I. L. R. 49 Cal. 103; 26 C. W. N. 619 (1921).

(3) L. R. 44 I. A. 104; s. c. I. L. R. 44 Cal. 859; 21 C. W. N. 642 (1917).

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been noted accordingly that objections were taken and discussed before the Collector of Backergunj, and, after his disposal thereof, two petitions of appeal were presented by the Respondents to the Board of Revenue on the 31st March 1915, and 19th November 1915, the latter being confined to the Sapleza river. Every conceivable point seems to have been taken, but, in the course of the 12 paragraphs of statement, and the five reasons for appeal, this point as to the alleged absence of a proper map is not taken. For the reason about to be given, their Lordships express little surprise at this. For the record of the proceedings of the Board of Revenue appear to disclose, not only that such an objection is ill founded on fact, but must have been known to be so by the Plaintiffs' local representatives appearing for the purpose before the Revenue Board.

On the 22nd October 1914, a long entry appears in the order-sheet of the objection existing in the Diara Settlement office, and point (b) thereof is in the following terms:—

"By virtue of Government Notification No. 1967 T.R., dated the 2nd October 1900, a survey of the lands which are situated on the banks of the rivers within the district of Backerganj was made in the course of the District Settlement operations. An index map showing the surplus accretions was prepared by the Diara Officer. The portion diluviated since the District Settlement has also been shown in the comparative map after local enquiry."

The argument did not go so far as to suggest that this record is in any way impeachable. In these circumstances the map point may be said not to be left in doubt, but to disappear.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the suit dismissed with costs here and below.

Solicitor: *The Solicitor, India Office for the Appellant.*

Solicitor: *Mr. Douglas Grant for the Respondents.*

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

VISCOUNT HALDANE.

LORD SHAW.

LORD PARKER.

MR. AMER ALI.

1923,

Heard, 27, April.

Judgment, 27, April.

HENG MOH AND
COMPANY,
Appellants,

v.

LIM SAW YEAN
and ors.,
Respondents.

Partnership business—Mortgage payable by one partner paid by another who was managing partner and took back title deeds as such—Transaction whether equitable mortgage.

The owners of certain oil mills which were subject to a mortgage of Rs. 25,000 entered into partnership with the Plaintiff for a business of making and sale of oil. Plaintiff brought in Rs. 60,000 of capital and it was agreed that the mortgagee of the mill was to be paid off out of the mortgagor's share of the profits of the partnership business. The mortgagee pressing for payment, the amount was paid by the Plaintiff who was managing partner of the business and who took back the deeds. In a suit by Plaintiff in which he claimed to be equitable mortgagee by deposit of title deeds of the mills the Plaintiff in the course of his cross-examination admitted that he took charge of the title deeds as such manager of the business when the mills were redeemed and he lent the money as for the owners of the mills:

Held—That the transaction was an advance from one partner to the others to be paid off like advances already existing out of profits and was not an equitable

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mortgage independently between the Plaintiff and the other partners.

This was an appeal against the decree of the Chief Court of Lower Burma, dated the 12th July 1920, which reversed the decree of the District Court of Insein, dated the 21st September 1919.

The suit was brought by the Appellant to enforce by a decree for sale a mortgage by deposit of title deeds alleged to have been made by the first Defendant, now deceased, on the 2nd November 1911.

The District Judge passed a decree as prayed, but this decree was reversed on appeal by the Chief Court. The Plaintiff preferred this appeal.

Chwa Chwee Gee, the first Defendant, carried on business (together with certain partners including the second Defendant) under the style of Hock Tong Aik & Co. and carried on business chiefly in oil. The firm owned two ground-nut oil-mills, one of which was mortgaged on the 13th November 1906 to Raman Chetty to secure Rs. 25,000 and interest.

Kyew Sum, the Plaintiff, was the proprietor of an ancestral business known as Heng Moh & Co., and as such he carried on business as banker and money-lender. He was also a member of a trading partnership, which was financed by him, called Heng Hoe & Co.

On the 2nd April 1911, a partnership was arranged between the firm of Heng Hoe & Co. and that of the first Defendant, and the firm thus formed was known as Heng Aik & Co. The partnership agreement provided that "the entire management of the mill of this firm at Kemmendine" shall be vested in the first Defendant; and it provided *inter alia* as follows:—

"2. It is agreed that both 'Gee Aik' and 'Gwan Aik' oil-mills with the lands (on which they stand) shall be valued at

Rs. 40,000, and that Heng Hoe & Co. do contribute Rs. 60,000 as capital for the partnership business for the purposes of buying ground-nuts and for selling on credit (the oil etc.). A very large sum of money will be needed (for this purpose) and Heng Hoe & Co. shall try and provide (the same). In case the sum utilised exceeds Rs. 60,000, then interest at the rate current at the time shall be paid to Heng Hoe & Co. (on any sum that may be in excess thereof). This item of interest shall be paid out by Heng Aik.

"3. This (partnership) matter is the result of unanimity of feelings between us. So it is feared that perhaps in the course of the (said partnership) business, a change may take place and each party may elect to do a separate business. Accordingly it is hereby agreed that the oil-mills at (the) two places be valued at Rs. 40,000, irrespective of duration of time. In the event of (the said parties) being desirous to dissolve (this business) the oil-mills at (the) two places shall nevertheless at the time of dissolution be valued at Rs. 40,000 and shall revert to their original owners who shall accept (the same) without any addition or deduction whatsoever, so that it may be equitable.

"4. From the (date of) execution of this agreement and henceforth the firm name of 'Hock Tong Aik' which has been established heretofore in the Port of Rangoon, shall be withdrawn and ceased and all matters whatsoever, concerning Heng Aik shall be managed by Heng Hoe & Co.

"9. At the present time Mr. Chwa Chwee Gee has taken a loan of Rs. 65,000 from (a) man on the security of his two oil-mills. Hereafter if the business make profit each year, whatever may be his (i.e.) Mr. Chwa Chwee Gee's share of the profit same shall be saved up to cover

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the (said) debt and to be used in the first place to redeem the two oil-mills, so as to make the common, i.e., 'partnership' property of Heng Aik."

Shortly after the said agreement, the mortgagee Raman Chetty desired to call in his loan. The mortgage money, viz., Rs. 25,000, was furnished from Plaintiff's ancestral business and Plaintiff took over the title deeds from the mortgagee upon redeeming the mortgage.

In 1912 disputes arose between the partners and the first Defendant claimed to dissolve the partnership. He then arranged to sell the Kemmendine mill to the second Defendant who carried on business as Hock Moh & Co. The vendee advanced Rs. 25,000 which sum the first Defendant offered to pay back to Heng Hoe & Co.

On the 7th January 1913, the Plaintiff wrote to the first Defendant demanding the Rs. 25,000 and all arrears of interest thereon at Re. 1 per cent. per mensem as due to him upon a mortgage of the Kemmendine mill, and received a reply that the amount had been offered and refused and later debited to the first Defendant in the partnership accounts.

Shortly afterwards the Plaintiff instituted as managing partner of Heng Hoe & Co. against the first and second Defendants a suit (Civil Suit No. 28 of 1913) for a declaration that the partnership still subsisted and for an injunction restraining the sale, asking for no relief as mortgagee. The Plaintiff failed in both Courts and the suit was dismissed.

On the 22nd May 1918, the Plaintiff brought the present suit in the name of Heng Moh & Co. alleging that the first Defendant "who was then the managing partner of the said firm of Hock Tong Aik" borrowed from the Plaintiff the said sum of Rs. 25,000 on behalf of the last-

mentioned business and deposited with him the said title deeds as security for re-payment of the same at Rs. 1-4-0 per cent. per mensem and that no payment of principal and interest had been made and he prayed for a mortgage decree for sale. The third Defendant was the vendee from the first.

A written statement of defence was put in by the first and second Defendants in which they relied on the partnership agreement quoted above and pleaded *inter alia* as follows:—

"(4) The said partnership deed *inter alia* provides for the redemption of the mortgages on the said two oil-mills, out of the partnership profits, and these Defendants state that on or about the 2nd November 1911, the first mortgage to T. A. Raman Chetty was so redeemed, and the amount paid to T. A. Raman Chetty was debited against these Defendants in the partnership account, and the partnership profits due to them were appropriated towards the payment of same; T. A. Raman Chetty on receipt of the amount due on the mortgage deed, duly executed a deed of reconveyance of the mortgaged property to these Defendants on or about 2nd day of November 1911.

"(5) In or about September 1912, owing to misconduct on the part of the Plaintiff, these Defendants dissolved the partnership business of Heng Aik and sold their two oil-mills to Hock Moh & Co., the third Defendant for a sum of Rs. 1,20,000. The Plaintiff thereupon filed a suit in the Chief Court of Lower Burma being Civil Regular No. 28 of 1913 for a declaration and injunction in respect of the said two oil-mills and the suit was dismissed. The Plaintiff's appeal being Civil First Appeal No. 101 of 1914 of the Chief Court was also dismissed. These Defendants crave

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leave to refer to the said proceedings when produced in this Honourable Court.

"6. These Defendants deny that they ever deposited the title deeds of the said oil-mills with the Plaintiff to secure the sum of Rs. 25,000 and interest thereon at Rs. 1-4-0 being the amount which had been paid to T. A. Raman Chetty. These Defendants further deny that any equitable mortgage charge or incumbrance was created on the said two oil-mills in favour of the Plaintiff.

"7. These Defendants plead that the title deeds of their two oil-mills were taken charge of by the Plaintiff as managing partner of the partnership firm of Heng Aik in accordance with the articles of partnership."

The third Defendant pleaded that he was a purchaser in good faith without notice of any equitable mortgage.

During the pendency and before the hearing of the suit the first Defendant died and the present Respondents Nos. 1-5 were brought on to the record in his place.

The suit having come on for hearing before the District Judge he delivered judgment therein on the 18th August 1919, and passed a mortgage decree for Plaintiff for Rs. 54,545 as prayed.

The learned Judge treated the loan of Rs. 25,000 as an independent transaction effected by the first Defendant with the Plaintiff. But he explained that "when ever Heng Aik & Co. wanted money it used to borrow it from Heng Hoe & Co. who in turn borrowed it from Hong Moh & Co. (Plaintiff)." And added: "Heng Hoe procured Rs. 25,000 from Heng Moh and paid to the deceased Chwa Chwee Gee by a cheque, Ex. A. It must be remembered Heng Hoe and Heng Moh are the same because Yeo Kyee Sum is the proprietor of both; only in the account books the names are entered differently."

Against the said decree an appeal was preferred to the Chief Court of Lower Burma, and judgment was delivered therein for the present Respondents on the 12th July 1920, and a decree was passed dismissing the suit with costs.

The learned Judges considered the relations of the parties as they appear from the partnership agreement, and they refer to the litigation of 1913. They come to the conclusion, in view of Plaintiff's accounts and of the correspondence (on which the District Judge had founded an inference against the defence) and of the Plaintiff's conduct, that his evidence as to the alleged equitable mortgage to him could not be accepted. In arriving at this conclusion they said:—

"If Heng Moh & Co. had advanced the money to the Defendant on an equitable mortgage, it is incredible that Heng Moh & Co.'s account should contain no word about this mortgage and have no note as to the deposit of the title deeds. The Plaintiff explains that the entries were so made by a mistake of his clerk but it is clear for some reason that if the firm of Heng Aik wanted money they went to their partner Heng Hoe and Heng Hoe would in turn go to Heng Moh and entries of this description would be made. Mr. Vertannes in the course of his argument for the Plaintiff endeavoured to make out that the accounts ought to be read in an entirely different light and are not due to any such mistake. But that is a belated effort and is absolutely contrary to the explanation that Plaintiff who is a very shrewd man of business chose to put forward. It is important to notice also that throughout the correspondence that took place between the parties there is no reference in terms to an equitable mortgage. The only explanation suggested is that the correspondence did not take

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place with Heng Moh but took place with Heng Hoe, an explanation which is not convincing seeing that both firms were really one and the same person."

Against the said decree the present appeal has been preferred by the Plaintiff in the ordinary course.

Messrs. DeGruyther, K. C., Kentworthy Brown and A. M. Talbot for the Appellants.

Messrs. Dunne, K. C. and G. S. Sanders for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—Their Lordships are in a position to deal with this appeal at once.

The question is a short one. It is whether an equitable charge was created in favour of the Appellant firm by deposit of certain title deeds to secure a sum of Rs. 25,000 with interest. The Court of first instance decided that such a charge was constituted. The Court of Appeal has reversed the decision.

The Appellant was a money-lender and banker and he also carried on business, under another firm name, as a merchant. His merchant firm entered into partnership with one, Chwa Chwee Gee, who is now dead, but who is represented among the Respondents. It was a business for the making and sale of oil. It is not necessary to go into the history of that business. It is enough to say that there was an existing mortgage on one of its mills for Rs. 25,000; the mortgagee was pressing for the money and Chwa Chwee Gee, who was the other active partner in the oil firm besides the Appellant, went to the Appellant and asked him to raise the Rs. 25,000 which was necessary to meet the mortgagee's claim. Under Art. 9 of the Articles of partnership between

the Appellant and Chwa Chwee Gee and the other persons in the firm, it was provided that the mortgages to which the mills were subject should be paid off out of the share of profits of Chwa Chwee Gee. The reason for that was that Chwa Chwee Gee and another partner had brought the mills into the partnership subject to these mortgages, while the Appellant, who had nothing to do with the mills, had brought in Rs. 60,000 of capital; and it was only right that the mills should be cleared so as to put the Appellant on the same footing as Chwa Chwee Gee and the other partner. The articles of partnership provided, as has been said, that the profits of Chwa Chwee Gee were to go to pay off these mortgages. When Chwa Chwee Gee went to him the Appellant sent his clerk to the office of the original mortgagee's lawyer, where the clerk paid off the mortgage and brought back the deeds and handed them over to the Appellant. Now it is not suggested that on that occasion, when Chwa Chwee Gee was present, there was any verbal agreement come to about the mortgage. The clerk says that what was done was done the day before, and the question is whether this is true.

The Court of Appeal, differing from the learned Judge, has said this in its judgment, at p. 68 of the record:—

"Having regard therefore to the evidence, oral and documentary, and to the undoubted facts of the case and the conduct of the parties, I am of opinion that Plaintiff has entirely failed to prove that Defendants mortgaged the property in suit to him as alleged."

The view taken was that this was a mere partnership transaction, an advance from one partner to another to be paid off, like other advances already existing, out of profits, and there was a very good prospect of profits; indeed, it is suggested

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that enough profits had come in to pay off everything. Whether that was so or not, it was a transaction which might very well have been entered into having regard to the state of the business and to cl. 9 of the articles of partnership.

The Court of Appeal negatives the alternative view that this was a transaction of mortgage independently between the Appellant and Chwa Chwee Gee, and they proceed on various grounds. One of these is an important admission, which it has been contended was a mistake, but still stands, made by the Appellant in cross-examination. He said he was manager of the firm in which he and Chwa Chwee Gee were partners, and that as such manager in chief he "took charge of all books and papers as such," that is, as manager of the partnership firm—"I took charge of title deeds from Raman Chetty," that is, the original mortgagee, "when the mill was redeemed. The title deeds came to me because I lent the money as Heng Moh's." That may or may not be so, but he said it was in the capacity of manager in chief of the partnership firm that he took charge of the deeds, and this is borne out by the documents, which show that the debt is one which is treated as a debit of Chwa Chwee Gee in the partnership accounts, both as regards the capital of Rs. 25,000 and also as regards the interest.

Then there is another very significant fact, and that is that in the Appellant's own books, the books of his own business, which he, a shrewd man of business, as the Court of Appeal said, carried on as money-lender or banker, there is not any entry of a transaction by way of mortgage, equitable or otherwise. What is found there fully supports the view that their Lordships take of the transac-

tion, in regard to which they are in agreement with the Court of Appeal.

Under these circumstances their Lordships conceive that the judgment of the Court of Appeal was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

There was a petition by the Respondents to bring further proceedings on the record. Their Lordships have not found it necessary to refer to those proceedings and the petition will be formally dismissed and the Respondents must pay their own costs of it.

Solicitors: *Messrs. Bramall and White* for the Appellants.

Solicitors: *Messrs. Sandersons and Orr, Dignams* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 2053 OF 1922

AND

12 OF 1923.

SUBRAWARDY, J.	}	PROMOTHO NATH
DUVAL, J.		MUKHERJEE and ors,
1924,		Defendants Nos. 1, 2
Heard, 10, 11, 13,		and 3, Appellants,
16 and 19, June.		v.
Judgment,		ANUKUL CHANDRA
21, July.		BANERJEE, Plaintiff,
		Respondent.

Shebait—Rule as to gift to an unborn person being invalid, if applicable to shebaitship—Provision as to shebaitship devolving on persons born after the death of the founder—Hereditary character of shebaitship—Difference, if any, between bare trusteeship and trusteeship with emoluments—Right of persons born after death of founder to maintenance out of endowed property where bequest as to shebaitship fails as offending against rule of perpetuities.

A Hindu by his Will made a gift of certain valuable properties to an idol and appointed several persons shebait of the

PROMOTHO NATH MUKHERJEE v. ANUKUL CHANDRA BANERJEE.

endowment and further provided that after the death of the aforesaid shebait the seniormost in age amongst their legal heirs would be the shebait.

Held—That the principle of law enunciated in the case of TAGORE v. TAGORE (2) and extended to an hereditary office and endowment by GNANASAMBANDA v. VELU PANDARAM (3) that the gift to an unborn person is invalid and contrary to Hindu law is applicable to the office of shebaitship.

That the office of shebait in the present case was hereditary and the condition as to seniority of age did not deprive it of its hereditary character and it made no difference whether the trusteeship carried with it any emoluments or not.

That after the death of the last of the persons born before the death of the founder qualified to hold the office of shebait under the Will the bequest so far as it provided that the person senior in age amongst the heirs of the first shebait shall succeed as shebait failed and the shebaitship reverted to the heirs of the founder.

GOPAL CHANDRA BOSE v. KARTICK CHANDRA DEY (5) and KUNJAMANI DASSI v. NIKUNJA BIHARI DAS (10) followed.

As to the question whether persons born after the death of the testator could claim maintenance from the endowed estate:

Held—That the directions given by the founder as to management not being inconsistent with the character of a religious trust recognised by Hindus will not cease to be operative simply because the

(2) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(3) L. R. 27 I. A. 69; s. c. I. L. R. 23 Mad. 271; 4 C. W. N. 329 (1899).

(5) I. L. R. 29 Cal. 716 (P. C. (1902).

(10) 20 C. W. N. 314 (1915).

original provision as to the devolution of shebaitship ceased to be operative owing to succession to the shebaitship being varied.

These were appeals preferred on the 1st of August 1922, against the decree of G. B. Mumford, Esq., 2nd Additional District Judge of Zillah 24-Perganahs, dated the 14th of July 1922, affirming the decree of Babu Upendra Nath Biswas, Subordinate Judge, 4th Court of that District, dated the 29th of July 1921.

The facts of the case will appear from the judgment.

In S. A. No. 2053 of 1922.

Mr. B. Chakrabarty (Counsel), Babus Mohendra Nath Roy, Baranashibashi Mukherjee and Krishnalal Banerjee for the Appellants.

Babus Ram Chandra Majumdar, Khitish Chandra Chakrabarty, Rishendra Nath Sarkar, Rama Prosad Mukherjee, Someswar Mukherjee, Gopendu Krishna Banerjee and Rupendra K. Mitter for the Respondent.

In S. A. No. 12 of 1923.

Babus Brojo Lal Chakrabarty, Rupendra Kumar Mitter, Bijan Kumar Mukherjee and Dharmadas Set for the Appellants.

Babus Baranashibashi Mukherjee, Krishnalal Banerjee, Khitish Chandra Chakrabarty and Rama Prosad Mukherjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

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This appeal has been argued at great length and with great ability and earnestness on both sides, but we do not regret the time occupied as the arguments at the Bar have been of great assistance to us.

The facts which have given rise to the present case and several previous cases are that Plaintiff's mother's father, Ram

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Kamal Mukherji, who died on the 1st August 1845, shortly before his death, viz., on the 4th February 1845, executed a Will by which, after providing for various annuities and legacies, he made a gift of certain valuable properties to an idol Sri Sri Gopal Jiu and appointed his wife Barada Sundari Devi and his three brothers Ram Kumar, Madhusudan and Chandra Mohan Mukherji *shebait*s of the endowments. As to future *shebait*s, he made the following provision:—"When you all have ceased to be, he who shall be of the Hindu persuasion and senior in age amongst your legal heirs shall have the management conferred upon him." We do not refer here to other provisions of the Will which will have to be considered in their proper places. This Will has been a fruitful source of litigation and after the death of each *shebait* the assistance of the Courts has been sought for the construction of the Will. It appears that of the four *shebait*s appointed under the Will Madhusudan was the last to hold the *shebaitship*. In 1863 when Madhusudan was acting as *shebait* three of his sons Ashutosh, Mritunjay and Aghore instituted a suit against him and certain transferees from him and impleaded in the suit all the heirs of the original *shebait*s—Jageswar, son of Ram Kumar, Kamini, daughter of the testator and Baroda Sundari, and Damayanti, widow of Chandra Mohan. The suit was for construction of the Will, for declaration of trusts created thereunder and for having the unauthorised alienations of the trust property declared inoperative. Kamini, the daughter of the testator and mother of the present Plaintiff, denied the genuineness of the Will and further urged that it did not create any valid endowment. The principal Sudder Amin who tried the suit decreed it in full, holding that the Will was

genuine, that it created a valid religious endowment and that transfers were null and void. On appeal by Kamini and one of the purchasers, this decree was affirmed by the High Court on the 16th May 1865. There was no further dispute till 1879 when Madhusudan died. Then Kamini, the mother of the Plaintiff, instituted a suit in the first Court of the Subordinate Judge at Alipur for the construction of the Will, for the determination of the nature and extent of the interest of the idol Gopal Jiu in the estate of the testator, for the appointment of a proper person as *shebait* and for other reliefs. All the then existing heirs of the original *shebait*s were made parties to the suit. The Subordinate Judge passed a decree in the suit by which he dismissed Kamini's claim for possession of the properties by right of inheritance. He declared that the entire property of Ram Kamal had vested absolutely in the idol and appointed Ashutosh, the eldest son of Madhusudan, as *shebait*, Damayanti, widow of Chandra Mohan, and the senior member in age, having waived her right to act as *shebait*. Kamini preferred an appeal from the decree of the Subordinate Judge to the High Court which allowed the appeal and held that there was no valid endowment, that the Will created a religious charge on the properties and that there was a devise of the surplus proceeds for the benefit of the heirs of the testator and his brothers. The matter was taken in appeal to the Privy Council and in 1888 their Lordships of the Judicial Committee reversed the decision of the High Court holding that the questions relating to the construction of the Will and the nature of the dedication were *res judicata* by virtue of the decision in the suit of 1863. They further held that Ashutosh had a preferential right to *shebaitship*. The decision of the

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Judicial Committee is reported sub-nominee *Kamini v. Ashutosh* (1). Soon after the decision of the Privy Council Ashutosh died on the 23rd August 1888. Damayanti who had previously waived her right to *shebaitship* in favour of Ashutosh now laid claim to the office and as Kamini resisted her claim, she commenced an action in 1888 for construction of the Will and for the appointment of herself as *shebait* or of any other suitable person if her claim was disallowed. All the heirs of the original *shebait*s then living were made parties to the suit. Kamini and Aghorenath, one of the sons of Madhusudan, disputed her right and each claimed the office. The Court of first instance held that Damayanti was disqualified as she had once waived her right and appointed Kamini to the *shebaitship*. On appeal, the first Appellate Court agreed in dismissing the claim of Damayanti but held that Aghorenath had the preferential title to the *shebaitship*. Damayanti appealed to the High Court which held that she being the senior in age among the heirs of the original *shebait*s was entitled to the *shebaitship* despite her previous waiver. Damayanti accordingly held the office till her death in 1905, when both Kamini and Aghore came forward to claim succession to the *shebaitship*. Kamini brought a suit in 1906 for declaration of her preferential right to *shebaitship* against Aghore and the present Appellants who are Aghore's brothers and succeeded in her claim up to the High Court. There were several litigations between her and Aghore and his brothers but Kamini held the *shebaitship* till her death in 1916. She was succeeded in the office by Aghore who acted as *shebait* till his death in 1918. Upon Aghore's death the pre-

sent controversy arose. On Aghore's death no one among the heirs of the testator and his brothers was left who was alive at the time of the testator's death, all the parties to this suit having been born after that event. Plaintiff, thereupon, instituted the present suit for declaration of his right and that of his brother (Defendant No. 23) to the *shebaitship* of the idol on the ground that on the death of all the persons living at the time of the death of the testator the office of the management of the endowed property reverted to the heirs of the testator. He further prayed that if the above contention was overruled he should be appointed as *shebait* being senior in age among the heirs of the original *shebait*s. This latter claim has been dismissed as it has been found that the Plaintiff is not senior in age to Defendant No. 1, and we need not consider it any further. As regards the Plaintiff's first contention, both the Courts below have given effect to it and decreed the suit.

The Defendants Nos. 1 to 3 have appealed and it is contended on their behalf that the view of the law taken by the Courts below is erroneous. Some other points have been raised which we will consider later, but the main question on which the decision of this appeal hinges is whether the principle of law enunciated in the case of *Tagore v. Tagore* (2) and extended to an hereditary office and endowment by *Gnanasambanda v. Velu Pandaram* (3) and now firmly established, that the gift to an unborn person is invalid and contrary to Hindu law, is applicable to the office of *shebaitship*.

It is first argued that this question is

(2) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(3) L. R. 27 I. A. 69; s. c. I. L. R. 23 Mad. 271; 4 C. W. N. 329 (1899).

(1) L. R. 15 I. A. 159; s. c. I. L. R. 16 Cal. 103 (1888).

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affected by the principles of *res judicata* in view of the previous litigations to which the Plaintiff's mother Kamini was a party. It is said that the Will of Ram Kamal has been construed on several occasions specially by their Lordships of the Judicial Committee in *Kamini v. Ashutosh* (1) who at page 116 of the report observe that it was decided in the suit of 1863 that "the Will was wholly valid and passed the entire estate to the idol." It is argued that the words "wholly valid" must be taken to mean that all its provisions are valid including the devolution of the *shebaitship* on persons unborn at the time of the testator's death. The questions raised in the suit of 1863 by Kamini were that the dedication was illegal and invalid and that at the most it created a religious charge on the secular properties of the testator and their Lordships say that in that suit it was decided that the Will bequeathing the properties to the idol was valid to the whole extent of the bequest and that the idol took the entire estate. The present question was not under consideration either in the suit of 1863 or of 1880, there was no issue on this point and there was no decision express or implied of this question. In fact the present controversy had not then arisen and there was no occasion or necessity for considering it. The dispute for the first time arose in 1918 after Aghore's death. We may note that the Will does not expressly say that the *shebaitship* will also devolve on the heirs of the original *shebait*s not in existence then. It contains a general provision that the office shall devolve on the heirs of the *shebait*s appointed under the Will. Plaintiff claims that this provision has now been exhausted and the *shebait-*

ship will henceforth follow the estate of inheritance.

It is next contended, to distinguish the decision of the Judicial Committee of the Privy Council in *Gnanasambanda v. Velu Pandaram* (3), that the office of *shebait* in the present case is not hereditary inasmuch as the condition of appointment is that the succession to the office depends on seniority of age and not on heirship to any particular person. The argument is ingenious but not sound. The *shebait* succeeds to the office because he is heir to one of the four original trustees. The Appellants for instance claim to be appointed *shebait*s because they are the sons of Madhusudan. The testator laid down two qualifications for the *shebaitship*—heirship to one of original trustees and seniority in age. The Will expressly says that the *shebaitship* shall devolve on the heirs of the first *shebait*s. It is possible that immediately on the death of a *shebait* his son may not succeed to the office not being senior in age, but it is equally possible that he may happen to be senior in age and succeed his father on the latter's death. In our judgment it cannot be said that the *shebaitship* in the present case is not a hereditary office.

The next point raised is that as no emolument or interest in property is attached to the office in this case it is not within the rule of *Gnanasambanda's* case (3). The facts of that case properly scrutinised will show that the office there did not carry with it any pecuniary interest. In fact the Government had taken charge of the temple and the endowment and subsequently released them in favour of Velu Pandaram, grandfather of the Plaintiff in that case. That Velu executed an agreement by which he

(1) L. R. 15 I. A. 159; s. c. I. L. R. 16 Cal. 103 (1888).

(3) L. R. 27 I. A. 69; s. c. I. L. R. 23 Mad. 271; 4 C. W. N. 329 (1899).

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undertook to do the *pūjā*, keep the temple in repairs and pay the Government revenue. There is no mention of the manager making any profit out of the management. In their judgment the Judicial Committee have nowhere referred to the peculiar character of the hereditary office there which attracted the operation of the rule in *Tagore* case (2). They hold that Art. 124, Limitation Act, applied to the case and then observe that the rule in *Tagore* case (2) applies equally to an hereditary office as to a gift. Art. 124 of the Limitation Act prescribes the period of limitation applicable to a suit for the recovery of an hereditary office without making any distinction between an office carrying personal benefit and one which has no gain attached to it and which the learned Counsel for the Appellants calls "bare trusteeship." We have not been referred to any authority either in the texts of the Hindu law or in decided cases that there exists in law any difference between a so-called "bare trusteeship" and a trusteeship carrying emoluments. It is however argued that there are three kinds of endowment, (1) where the whole property and its income are devoted to the idol, (2) where properties are dedicated to the idol but a portion of the usufruct is given to beneficiaries including the *shebait*, and (3) where secular property is charged with expenses of the worship of the idol. It is submitted that the endowment in the present case belongs to the first class, and, as held by the Judicial Committee in the case of *Vidya Varuthi v. Balusami Ayyar* (4), a *shebait* is a mere manager and has no right or estate in the endowed property and therefore the law

of gift to an unborn person should not be applied in the case of *shebait*. This argument virtually invites us to revise the correctness of the decisions of the Judicial Committee in *Gnanasambanda's* case (3) as also in the case of *Gopal Chandra Bose v. Kartick Chandra Dey* (5), which we are incompetent to do. The case of *Gopal Chandra Bose v. Kartick Chandra Dey* (5) affords a valuable guide for the determination of the present controversy as the facts of that case are to a great extent similar to those of the present case. There a Hindu testator created an endowment and directed that *shebaitship* should be held by his wife, after her death by his son and after his death by the testator's daughter and her husband and their male children. It was held that on the death of the last surviving son of his daughter, the succession to *shebaitship* failed and the *shebaitship* reverted to the heirs of the testator. The arguments pressed in this case were also advanced in *Gopal Chandra's* case (5). The Division Bench of this Court, whose decision was approved and upheld by the Judicial Committee, observed as follows:—

"It was contended before us for the Respondent that we are not dealing with an actual bequest or gift of immoveable property, but only with the appointment of persons to superintend and manage the *pagoda*. It would appear, however, from the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Gnanasambanda Pandaram v. Velu Pandaram* (3) that the rule in the *Tagore* case (2) is applicable to a hereditary office and endowment as well as to immoveable property." This, in our

(2) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(4) L. R. 48 I. A. 302; 8 C. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

(2) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(3) L. R. 27 I. A. 69; 8 C. I. L. R. 23 Mad. 271; 4 C. W. N. 329 (1899).

(5) I. L. R. 29 Cal. 716 (P. O.) (1902).

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judgment, supplies a conclusive answer to the Appellants' contention.

This being the view we take of the decisions of the Privy Council and the law laid down by it, it is not necessary to refer to the several cases of this Court to which the learned Counsel for the Appellants has drawn our attention in support of his argument. But we propose to refer briefly to a few of them which apparently favour the Appellants' contention. The first case is *Bisseswar v. Bhagabati* (6). In that case a Hindu Will provided that the senior in age among the lineal descendants and heirs of the testator was to take charge as *shebait* of the trust property dedicated to the worship of an idol. It was contended that possible and not actual events must be taken into account and that following the rule in *Tagore* case (2) and *Gnanasambanda's* case (3) the gift was bad *ab initio* as the senior in age amongst the lineal descendants might not be in existence at the death of the testator. It was in short argued that as the bequest would fail at a future time the whole of it is bad in law including the bequest in favour of persons living at the testator's death. The learned Judges held that it is not so and that such directions are common enough in Hindu Wills and they did not think that there was anything contrary to Hindu law in the provision. The parties in that case were all alive at the time of the testator's death and the judgment of the Court so far as it related to the validity of the bequest between the parties to the suit is quite correct. But if the learned Judges intended to hold that the bequest in favour of

unborn persons was also good they went beyond the scope of the suit and their observation must be regarded as *obiter dictum* and in conflict with the law as laid down by the Privy Council. But as one of the Judges who decided this case, Maclean, C. J., was a party to the case of *Gopal Chandra Bose v. Kartick Chandra Dey* (5); it may be fairly presumed that the learned Judges meant to hold that the bequest as between the parties to the suit was valid and binding, and it was not bad because at some future time it might fail for illegality.

The next case on which reliance is placed is *Mathura Nath v. Lakhi Narain* (7). There the testator had empowered his widow to appoint a *shebait* in succession to her. She appointed a person who was not in existence during the testator's life-time. The contention was that according to the rule in *Tagore* case (2) the bequest authorising the widow to appoint a *shebait* who possibly might not be in existence at the time of the testator's death is illegal. The learned Judges held that that rule did not apply in that case. Richardson, J., at p. 436 in giving his reasons why the *Tagore* case (2) did not apply observes that the testator might have empowered the Civil Court, instead of the widow, to appoint a *shebait* and the choice in that case need not have been restricted to persons living at the time of the testator's death. The ratio of that decision is that where appointment to *shebaitship* is to be made by nomination the rule of law governing directions in a Will for appointment of an unborn person designated or of a designated class will not apply. In *Rambrabha Chatterjee*

(2) L. R. 11 A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(3) L. R. 27 I. A. 69; s. c. I. L. R. 23 Mad. 271; 4 C. W. N. 329 (1899).

(6) 3 C. L. J. 606 (1906).

(2) L. R. 11 A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(5) I. L. R. 29 Cal. 716 (P. C.) (1902).

(7) I. L. R. 50 Cal. 426 (1922).

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v. Kedar Nath Banerjee (8) the question was whether daughter's sons of the founder who were not in existence at his death were entitled to share in the *bhog* or offering to the idol. It was held that share in the *bhog* not being interest in property is not subject to the rule in *Tagore* case (2).

In *Jotindra Mohon Mondal v. Ghanshyam Chowdhury* (9) an annuity was given by the testator to his daughter and absolutely to her son who was not then born. The learned Judges held that an annuity may be given to an unborn person under the Hindu law.

We are of opinion that none of the cases cited by the learned Counsel for the Appellants has any bearing on the present question. The learned Judge of the Court of Appeal below remarks that the office of *shebaitship* in this case carries with it the right to hold and manage properties belonging to the idol and so the appointment as *shebait* may be said to create an interest in immoveable property. This view is not without justification. It is suggested by the Respondent that a sufficient profit is left to the *shebait* of the idol. This is possible considering the frequent scramble for the office since the death of the testator. But we express no opinion on this point.

After a careful examination of the authorities we have arrived at the conclusion that after the death of Aghore the bequest, so far as it provides that the person senior in age among the heirs of the first *shebait*s should be appointed *shebait*, fails and we hold on the authority of *Gopal Chandra Bose v. Kartick Chandra Dey* (5)

and *Kunjamani Dassi v. Nikunja Bihari Das* (10) and other cases that the *shebaitship* reverts to the heirs of the founder Ram Kamal Mukherji. It is not disputed that the Plaintiff and the Defendant No. 23 are the heirs of Ram Kamal.

Lastly, it is contended that as the idol was established by the mother of Ram Kamal who founded the present endowment for the worship of that idol, according to Hindu law, the succession to the *shebaitship* of the idol which would include the management of the properties endowed by Ram Kamal, should descend to the heirs of Ram Kamal's mother and reliance is placed for this view on the case of *Ananda Chandra Chakravartty v. Brojolal Singh* (11). Hence the Defendants Nos. 1 to 3 being the heirs of Ram Kamal's mother are entitled to the *shebaitship* in preference to the Plaintiff. This point was not taken in either of the Courts below nor does it appear to have been mentioned in the pleadings. As determination of this question depends upon questions of facts, we do not think we will be justified in allowing the Appellants to take it at this stage and as a Court of second appeal we are not in a position to consider it. We may mention one fact to show that we are not competent to deal with this matter. There is no evidence that the idol was consecrated by Ram Kamal's mother. In the translation of the Will which is to be found in the report of the case of *Kamini v. Ashutosh* (1) certain vernacular words have been translated as "Thakur Gopal Jiu consecrated by my mother." We have looked into the Bengali document and we do not find that

(2) L. R. 1 A. Sup. Vol. 47; 9 B. L. R. 377 (1872).

(5) I. L. R. 29 Cal. 716 (P. C.) (1902).

(8) 36 C. L. J. 478 (1922).

(9) I. L. R. 50 Cal. 266 (1922).

(1) L. R. 15 I. A. 159; s. c. I. L. R. 16 Cal. 103 (1888).

(10) 20 C. W. N. 314 (1915).

(11) I. L. R. 50 Cal. 292 (1922).

there is any word there meaning "mother" but there is the sign "Ishwar" which may indicate God or a dead person. The Appellants say that Ram Kamal's mother was dead at the time of the Will; the Respondent denies it and there is nothing in the Will to show that she was dead at that time. In these circumstances we are unable to allow the Appellants to raise this point in second appeal.

In the view we have expressed this appeal fails and is dismissed with costs to the Plaintiff.

A cross-appeal is filed by the Plaintiff against the order in the decree of the first Court, confirmed by the decree of the Additional District Judge, whereby his and his brother's possession of the *shebaitship* and property is declared to be subject to the rights of the Defendants and members of the family of the original *shebait*s to reside in the Kidderpore house, to repair it if necessary, to get maintenance out of the offerings to the idol and to enjoy certain other rights.

Appeal No. 12 of 1923 is filed by the *pro forma* Defendant No. 23, the brother of the Plaintiff, against this declaration.

In cross-appeal it is urged on behalf of the Plaintiff on the principle of the *Tagore* case (2) that these provisions have lapsed since 1880 and anyhow cannot enure to the benefit of the younger members, not in existence at the time the testator died.

It is urged both by the Appellants (Defendants Nos. 1-3 in the lower Court) and by some of the *pro forma* Respondents (Defendants Nos. 12-15 and 16-22) that this matter was already decided by the Privy Council in restoring the order of the Subordinate Judge in the case between

the predecessors of the parties in *Kamini v. Ashutosh* (1) as in that matter the Subordinate Judge had held that these provisions in the Will were valid. The property is that of the idol and the *shebait*s get no property for their exclusive use by virtue of their office. The property is with the idol and the direction in the Will as to how the income shall be spent is not bad. In deciding this point in the suit of 1880 the learned Subordinate Judge said:—

"It is contended for the Plaintiff that those persons only who were born at the time of the testator's death, are entitled to maintenance from the estate, and not those who were born afterwards. This contention is based on the principle laid down in the *Tagore* case (2), viz., that no gift to an unborn person is valid. The Will virtually made no gift to any unborn person, the entire gift was to the idol, who was to have his daily *bhog* which ordinarily is distributed to the poor and needy or to Brahmins without any inquiry whether they were born during the testator's life-time or not. That is the immemorial custom of the Hindus in charge of the endowed property. The testator, alive to the proverb that charity must begin at home, preferred his blood relations including their future descendants as recipients of the *prosad* than out-door beggars or Brahmins.

"The five brothers and their descendants who by the Hindu law are entitled to maintenance from them, are all entitled to the *prosad* of the idol as well as to reside in the Kidderpore house; they are also entitled to their *poita* and marriage expenses as well as the charges of the per-

(1) L. R. 15 I. A. 159: s. c. I. L. R. 16 Cal. 103 (1888).

(2) L. R. 11 A. Sup. Vol. 47: s. c. I. L. R. 377 (1872).

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formance of their parent's *sadhs* to the extent of their ceremonial part. The income of the estate being totally inadequate to meet all the necessary expenditures, all secular charges like marriage portion, dower, or in the shape of ornaments or the like should not be made from the *debutter* funds."

The Subordinate Judge's order though not approved by this Court was restored by the Privy Council and so the matter cannot be re-opened. Learned Counsel also relied on the principles laid down in the case of *Rambrahma Chatterjee v. Kedar Nath Banerjee* (8), where it was laid down that "a founder who is competent to provide for the government and administration of a trust can give a direction for its management which is not inconsistent with its character as a religious and charitable trust. The test of each case is whether the direction given by the founder is inconsistent with the nature of the endowment as a religious and charitable trust or is a colourable device for the evasion of the law against perpetuities." The learned Subordinate Judge in 1880 found that the directions were not inconsistent with the character of a religious trust recognised by Hindus and with this opinion we agree. The directions as to management will not cease to be operative simply because the original provisions as to the devolution of the *shebaitship* cease to be operative owing to succession to the *shebaitship* being varied.

The cross-objection is therefore dismissed with costs to each set of Respondents appearing three in all.

Appeal No. 12 of 1923 really raises the same point in a different form. The Appellant is *pro forma* Defendant No. 23 in the first Court, brother of the Plaintiff. He raised certain issues in that Court

which were decided against him, it being held that his claim which as we have said above is similar to the claim in the cross-objection is barred by *res judicata*—a finding upheld by the learned Additional District Judge.

The arguments in his appeal are, however, different. Without going into the merits of the claim that the directions as to the use of the income accruing to the idol are good and valid, his arguments at the bar are—

1. That he is an heir of Kamini, whose interest in the estate arose by virtue of the terms of the Will: he now claims by inheritance from the original testator through his mother Kamini and Kamini in the previous suit did not claim as he does now by inheritance. Hence the ruling in *Katamar Natchiar v. Raja of Shioaganga* (12), which lays down that a reversioner would be bound by a decree fairly and properly obtained against a widow has no application in his case. Kamini's position in the previous litigations was that of a legatee under the Will with a chance of becoming a *shebait*; he is an heir of the testator through Kamini and is not bound by any decision to which Kamini was a party in another capacity.

2. There was no decision in the case of 1863 on the question now in issue, that suit was confined to the genuineness of the Will and the right of Ashutosh to see that its provisions as to the corpus of the property were carried out. The Privy Council decision of 1888 only declared that the decision on these points were *res judicata*. It did not decide anything more.

The second point may be considered first, and appears to us to be based on a misunderstanding of what the Privy Council decided in the case.

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The advice which the Judicial Committee gave to Her Majesty was that the appeal of the Plaintiff in that suit wholly fails and the cross-appeal wholly succeeds. The High Court ought to have dismissed the appeal with costs. Her Majesty in Council decreed accordingly. The decree of the Subordinate Judge restored by the order is in these words :--

Ordered.

" That the Plaintiff's claim to get the estate of her deceased father Ram Komal Mookerjee by right of inheritance be dismissed, as well as her claim to be the sole preferential *shebait* of Gopal Jiu Thakur. It is hereby further ordered, that the entire property of Ram Komal, deceased, having absolutely passed to and been vested in the said Thakur, Plaintiff's claim to a partition of that estate be also dismissed. It is further declared that the heirs and descendants of the five brothers, namely, Ram Komal Mookerjee and of his four brothers, Ram Kumar Mookerjee, Madhu Sudan Mookerjee, Chunder Mohon Mookerjee and Dino Nath Mookerjee who are by Hindu law entitled to maintenance from the said five persons, shall be entitled to participate in the daily *prosad* of Gopal Jiu Thakur, as well as to reside in the Kidderpore dwelling house. It is further declared, that the expenses of the religious portion only of the ceremonies of *sradh* of the parents of the aforesaid persons, of the marriages of their sons and daughters, and of the *Jognapobita* ceremonies shall be defrayed out of the income of the *debutter* estate, but on no account shall the said income be used in feasting Brahmins, etc., and other secular offices in connection with these ceremonies. It is hereby also declared, that the said dwelling house, along with the other properties of the testator, shall be under the control and management of the *shebait* for

the time being, who shall look to the necessary repairs of the building as next in importance to the daily worship of Gopal Jiu Thakur and distribution of *prosad* to the members of the family. The *shebait* for the time being shall strictly carry out the other provisions of the Will concerning Durga Puja, the celebration of Dolejatra, Ras, Hindola and Nandotsab. If sufficient funds should not be forthcoming from the estate for their due celebration, then the religious portion of the ceremonies, viz., the Pujas, etc., shall alone be performed. The Defendant No. 8, Damayanti Debi, who has the preferential right to be *shebait* having declined to accept the duties of *shebait*, the Defendant No. 1, Ashutosh Mookerjee, as the next senior member of the family shall conduct all the duties in terms of the Will. The Plaintiff shall pay to the Defendants Nos. 1, 2 and 3 one set of costs according to the schedule. The Plaintiff and the remaining Defendants shall bear their own respective costs. The costs incurred by the Defendant No. 1, Rs. 10 and those incurred by the Defendants Nos. 2 and 3, Rs. 2-8 annas, and the one set of Vakil's fees payable by the Defendants Nos. 1, 2 and 3 in proportion to the claim amounting to Rs. 899-14 annas, and interest thereon, i.e., on the entire amount aforesaid from this day to the date of realization, shall be paid by the Plaintiff at the rate of 8 annas per cent. per month.

This is the decree which Her Majesty in Council adopted. It is over forty years old and no one has ever suggested before that it was not justified by the judgment of the Judicial Committee and it certainly cannot be challenged before us.

2. The first point needs little argument. The whole of the then existing beneficiaries were before the Court in 1863 and in 1860 (in the latter year including the

PROMOTHO NATH MUKHERJEE v. ANUKUL CHANDRA BANERJEE.

present Appellant) and the Appellant cannot under any principles, urge that he is not bound by the decree of the Privy Council of 1888. But apart from any thing else we have only to add that in considering the appeal and cross-appeal we have come to a decision that the property does not belong either to the Plaintiff or the Appellant. It belongs to the idol and this Appellant is only a *shebait*, nor an owner—a trustee for the idol bound to carry out the trust which we hold the testator had full power to make.

This appeal is therefore dismissed with costs. One set divided between the three sets of Respondents.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 478 OF 1924.

SUHWARDY, J.
CHAKRAVARTI, J.
1924,

Heard, 15, August.
Judgment,
28, August.

NIRMAL KUMAR
SINGH NOWLAKSHA,
Petitioner,

v. .

THE COMMISSIONER OF
INCOME TAX, BENGAL,
Opposite Party.

Income Tax Act (XI of 1922), secs. 22, 23 (2), 66 (2), 66 (3)—Non-compliance with sec. 23 (2)—Question not raised at the time of assessment, if may be referred.

Where the Income Tax Officer, disbelieving the return filed by the Petitioner under sec. 22 of the Income Tax Act, forthwith assessed the tax payable by him, without serving upon him a notice as provided by sec. 23, cl. (2) of the Act giving him an opportunity to produce evidence in support of his case, and Petitioner's application to the Commissioner to refer the question to the High Court was refused:

Held, on application to the High Court under sec. 66 (3) of the Act—That the question which challenged the very

foundation of the assessment "arose out of the order" for assessment as contemplated by sec. 66 (2) although it was not referred to in the judgment of the Income Tax Officer assessing the Petitioner to the tax complained of.

This was a Rule obtained upon an application under sec. 66 (3) of the Indian Income Tax Act against an order of the Commissioner of Income Tax, Bengal (Mr. W. Prentice, I. C. S.), refusing to refer certain questions of law for opinion of the High Court, under sec. 66, cl. (2), of the Act.

The facts of the case as stated in the order of the Commissioner, dated the 19th March 1924, were as follows. The applicants by an order, dated 16th May 1923, were called on to file a return under sec. 22 (2) of the Income Tax Act by 26th June 1923. They failed to do so, and several times applied for time. Finally on 11th October 1923 they filed a return and produced certain accounts which were examined on the 12th October. On the 13th October the Income Tax Officer passed his assessment order in which he stated among other things: "The books are unadjusted and in some instances the sale figures have not yet been totalled. Profit and loss accounts have not been made up and the balance taken to capital account. No balance sheet has been drawn up. The accounts being unadjusted I have calculated profit as follows." Thereafter he dealt with the various kinds of business, arrived at certain figures on the materials available and made his assessment.

Against this assessment the assessee appealed to the Assistant Commissioner, Burdwan. The appeal was filed on the 9th November and was fixed for 14th January. On that date the Assessee appeared and asked for an adjournment which was granted till the 31st January

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1924. On that date the Assistant Commissioner heard the appeal and his order included the following:—Gour Mohan Sarkar *gomostha* appears with pleader Babu Shamlal Sarkar and produces accounts which are not yet ready. The profit and loss accounts for any of different (six) businesses is not yet ready, far from having a combined account of Profit and Loss. There are no *kutchha* books produced nor is there any account in the name of the proprietor or *malik* nor any capital account. . . . The pleader presses for another adjournment at this stage to complete and adjust the accounts for the last year which closed about 10 months ago. . . . No regular *malkhata* is even kept for the branches. . . .” Accordingly he rejected the appeal.

The Commissioner was asked to refer to the High Court 10 points of law which were said to arise out of this appellate order of which point (d) only is material to this report. On this point the Commissioner observed as follows:—

“Point (d) refers to the alleged absence of any notice under sec. 23 (2). But this point was never raised before the Assistant Commissioner, and does not therefore arise out of any order under sec. 31, and consequently cannot be referred to the High Court under sec. 66 (2). For, a reference is restricted to questions of law arising out of an order under sec. 31 or sec. 32.”

In the result he was of opinion that no point of law arose out of the appellate order of the Assistant Commissioner of Burdwan, and therefore refused to make the reference.

The Petitioner thereupon moved the High Court and obtained this Rule.

Babus Tarak Chandra Chakravarti and Profulla Chandra Chakravarti for the Petitioner.

Babu Surendra Nath Guha, Senior

Government Pleader, for the Commissioner of Income Tax.

The JUDGMENT OF THE COURT was as follows:—

CHAKRAVARTI, J.—This Rule arises out of an application under sec. 66, cl. (3) of the Indian Income Tax Act, XI of 1922, by an assessee under that Act.

The assessee was assessed by the Income Tax Officer on the 13th October 1923.

There was an appeal by him to the Assistant Commissioner of the Range Burdwan and this appeal was dismissed on the 31st January 1924.

The assessee then made an application, after the required deposit, to the Commissioner under cl. (3) of sec. 66 of the Act praying that he might refer to the High Court a question of law which he submitted arose out of the proceedings but the Commissioner refused the application on the 14th March 1924.

The Petitioner then moved this Court under cl. (3) of sec. 66 of the Act praying that this Court might require the Commissioner to state the case and refer it to the High Court and this Court issued the Rule which has now come up for decision before us. The Government have appeared through the Senior Government Pleader to show cause against this Rule.

The question of law which the Petitioner urges arose in the case was that after the return required under sec. 22 of the Act was filed by the Assessee, the Income Tax Officer might either accept the return and assess him accordingly or if he had reason to believe that the return made under sec. 22 was incorrect he was bound to serve upon the person who made the return a notice under cl. (2) of sec. 23 requiring him, on a date specified, to produce any evidence on which such person may rely in support of the return. In the

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present case, although the Income Tax Officer refused to accept the return filed on the 11th October 1923 as correct, he assessed the tax without serving any notice as provided for by sec. 23, cl. (2) and gave no opportunity to the Petitioner to produce evidence in support of his case. The procedure followed by the Income Tax Officer was contrary to law and that the assessment made was illegal. The facts shortly stated are these:—

That the Petitioner, a resident of Azimganj in the District of Murshidabad, carries on business in jute and other commodities in various districts and also in Calcutta.

That the Petitioner was served with a notice under sec. 22 of the Act to file a return which he eventually filed on the 11th October 1923 together with his accounts.

That the Income Tax Officer was not satisfied with the correctness of the return but assessed Rs. 12,919-1-1 as the tax payable by him on the 15th October but it appears no notice under sec. 23, cl. (2) was served nor any formal evidence was called for or taken.

Then the various proceedings to which I have referred took place and eventually this petition under sec. 66, cl. (3) of the Act was filed before this Court.

It is quite clear from the record and indeed it is also frankly admitted by the Senior Government Pleader that no notice as contemplated by sec. 23, cl. (2), was served before the assessment was made on the 15th October 1923. It was submitted by the learned Vakil that this point was not taken in the Courts below and that the question now raised was not "a question of law arising out of such orders" as contemplated by sec. 36, cl. (2), inasmuch as this question is not found referred to, in

the judgment of the Assistant Commissioner.

We think this would be too narrow a view to take of the provision of that section.

The question raised is a question which challenges the very foundation of the assessment and we think, it arises upon the proceedings adopted in the case.

We are of opinion therefore that we are not satisfied of the correctness of the Commissioner's decision refusing to refer the case under cl. (2) of sec. 66 of the Act and therefore we direct that the Commissioner do state the case as prayed for and refer it to this Court."

At this stage of the proceedings we do not wish to say more than is absolutely necessary to state for the matters now before us. All that we intend to say is that the decision of the Commissioner dated the 19th March 1924 is not correct in that he refused to refer the case to this Court under sec. 66, cl. (2) of the Act.

The costs of this Rule will abide the result and we assess them at five gold mohurs.

SUHRAWARDY, J.—I agree.

N. G.

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 809 OF 1923.

SUHRAWARDY, J.

PAGE, J.

1924,

Heard,

21, January.

Judgment,

22, January.

F. D. BELLOY,
Petitioner,

v.

T. ELKE, Opposite
Party.

Calcutta Rent Act (III of 1920, B. O.), sec 15, application for standard rent made by tenant, if becomes inoperative when he ceases to be a tenant—New tenant, if a necessary party to the proceeding—Civil Procedure Code (Act V of 1908), Or. 1, r. 9, dismissal for non-joinder of parties.

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A tenant applied for standardisation of his rent, but before the application came on for hearing he was ejected from the premises in pursuance of a decree of the Calcutta Small Cause Court. Subsequently the Rent Controller dismissed the application for fixation of standard rent on the ground that the applicant was no longer a tenant of the premises:

Held—That there is nothing in the Act which provides that the application shall become inoperative, although properly made in the first instance, because subsequent to the making of the application but before the rent was standardised, a change of tenant took place. The words "tenant, if any" in sec. 15, cl. (4), indicate that it is possible that when the time comes for the Rent Controller to give notice of his intention under the Act one of the parties may have ceased to be either a landlord or a tenant.

The Act does not make it obligatory upon the applicant for standardisation of rent to make all persons interested in the litigation parties to the proceeding except the landlord, and this view finds support from sec. 15, cl. (4) of the Act which provides that the Rent Controller shall duly consider any application received by him from any person interested. The new tenant, if he so chooses, may make an application to the Rent Controller to be heard at the time of the hearing of this case. Further, Or. I, r. 9, C. P. C., provides against the dismissal of a case for want of proper parties.

This was a Rule granted on the 20th July 1923 against the order of the Rent Controller (B. Ganguli, Esq.), dated the 6th July 1923.

The facts are briefly as follows:—The Petitioner was a tenant under the Opposite Party and in October 1922 ap-

plied to the Rent Controller for standardisation of his rent. On the 30th June 1923, the Petitioner was evicted under a decree of the Calcutta Small Cause Court, dated the 14th May 1923. On the 6th July 1923 the Petitioner's application for standardisation of his rent was dismissed on the ground that he had ceased to be a tenant. Against this order the present Rule was issued.

Babus Mohendra Nath Roy and Lalit Mohon Sanyal for the Petitioner.

Babu Bepin Chandra Mallick for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

CHITRAWARLY, J.—In this Rule we are asked to revise the order of the Rent Controller, dated the 6th July 1923 in Standard Rent Case No. 673 of 1922 dismissing the application of the Petitioner under sec. 15 of the Calcutta Rent Act III of 1920. The facts are that the Petitioner was a tenant under the Opposite Party in respect of premises No. 24, Royd Street for six months from the 5th August 1922. On the 31st October 1922 the Petitioner applied to the Rent Controller to have the standard rent fixed. The case was adjourned from time to time and it took eight months to come to a hearing. On the 30th June 1923 the Petitioner was evicted under a decree of the Calcutta Small Cause Court. That decree was passed on the 14th May 1923 on the ground that the tenant had not paid rent and was an insolvent. On the 6th July 1923 the Petitioner's application under the Rent Act was dismissed. The ground upon which the application has been dismissed is that the Petitioner having ceased to be a tenant in respect of the premises for which he had applied for standardisation of the rent, the case could not

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go on. No authority has been cited for this view, but the learned Rent Controller has felt himself bound by a certain ruling of the President of the Improvement Trust Tribunal who under the Act has been vested with revisional authority over the Rent Controller.

Under the Act a tenant is empowered to apply to the Rent Controller to have the standard rent of a premises fixed. It is conceded by the learned Vakil for the Opposite Party that there is nothing in the Act which indicates that the proceeding under it comes to a determination as soon as the relationship of landlord and tenant between the parties has ceased. But it is argued that in consideration of the general scheme of the Act it must be so. I am unable to accede to the proposition. I find on a close scrutiny of the Act nothing in it to justify the dropping of a proceeding which has been started regularly under the Act, because one of the parties was not at the date of the hearing occupying the position which he did at the commencement of the case. In my opinion, when a case has been regularly started, there must be some direct provision in law to disqualify from being carried to the end. Reference has been made to certain provisions of the Act. Sec. 8 has been referred to as indicating that when there is an enhancement of rent on the application of the landlord he cannot recover it until after the expiration of one month after the landlord served on the tenant a notice in writing of his intention to increase the rent. I do not think that this provision lends support to the contention of the landlord. Then reliance has been placed upon sec. 14 which provides that when a tenant has overpaid the landlord and then rent is subsequently reduced he may recover the amount from the landlord and may deduct it from any rent payable with-

in six months. It is contended that this indicates that the relationship of landlord and tenant must continue even after the Rent Controller has fixed the rent. It may be so, but that section provides that this is one of the modes of recovering money paid to the landlord more than what was due to him, as it is especially mentioned that this remedy is without prejudice to any other method of recovery. A person who has ceased to be a tenant has under the general law a right to recover any overpayment made to the landlord.

In support of my view reference may be made to sec. 15, cl. (4) which says that before exercising any of the powers conferred upon him by this Act the Controller shall give notice of his intention to the landlord and tenant if any. The words "if any" indicate that it is possible that when time comes for the Rent Controller to give notice of his intention under the Act one of the parties may have ceased to be either a landlord or a tenant.

It is also argued on behalf of the Opposite Party that the application before the Rent Controller was not maintainable inasmuch as the new tenant who was brought on the premises after the Petitioner had left it ought to have been made a party because any decision in this case will be binding upon him. I do not see much force in this contention. The Act does not make it obligatory upon the applicant for standardisation of rent to make all persons interested in the litigation parties to the proceeding except the landlord; and this view finds support from sec. 15, cl. (4) of the Act which provides that the Rent Controller shall duly consider any application received by him from any person interested. The new tenant, if he so chooses, may make an

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application to the Rent Controller to be heard at the time of the hearing of this case. I may also refer in this connection to the provisions of Or. 1, r. 9, C. P. C., which provides against the dismissal of a case for want of proper parties.

I may add that a copy of this Rule was also served on the Rent Controller and he has submitted his observations. He seems to be now of opinion that he was not right in dismissing the case. He has, however, followed a decision of the President of the Tribunal which he considers to be binding upon him. He has asked us to express an opinion as to how far he is bound by the ruling of the President. In this case it is not necessary for us to decide that question.

In the result this Rule should, in my opinion, be made absolute, the order of the Rent Controller dated the 6th July 1922 set aside and the case sent back to him for a re-hearing according to law. Costs will abide the result. I assess the hearing fee in this Court at two gold mohurs.

PAGE, J.—I am of the same opinion. On the 30th October 1922 the Petitioner applied to the Rent Controller that the rent of the premises of which he was then a tenant might be standardised under sec. 15 of the Calcutta Rent Act. On the 19th June 1923 the hearing of the application was adjourned until the 6th July 1922. Meanwhile on the 14th May, a decree was passed by the Court of Small Causes ejecting the Petitioner from the premises and on the 30th June, he vacated the premises. When the case was called for hearing on the 6th July 1923 the Rent Controller dismissed the application on the ground that the applicant was no longer tenant of the premises. The question which we have to determine is whether or not he had jurisdiction to

make this order. The determination of this issue does not appear to me to present any real difficulty. It is true that an application for standardisation of rent under sec. 15 must needs be made by a landlord or by a tenant of the premises in question. In this case the application was made by the tenant. There is nothing in the Act which provides that the application shall become inoperative, although properly made in the first instance, because subsequent to the making of the application, but before the rent was standardised a change of tenant has taken place. In this case it would not appear upon the evidence as placed before us that the Petitioner had any right to recover the difference between the rent which he had paid and the standard rent which under the application might be assessed, because the last payment of rent which was made by the Petitioner was in February 1923 in respect of the period ending with the 31st January 1923 and under sec. 14, sub-sec. (1) of the Act, it is provided that "where any sum has after the commencement of the Act been paid on account of rent, being a sum which is by reason of the provisions of this Act irrecoverable, such sum shall at any time within a period of six months from the date of payment be recovered by the tenant by whom it was paid from the landlord receiving the payment." But we are invited to decide this issue irrespective of the rights which accrued or may accrue under the Rent Act to the Petitioner.

In my opinion, under circumstances such as those in this case the Controller is under an obligation to grant a certificate certifying the standard rent; and for this reason that, if in such circumstances the Rent Controller does not proceed to certify the rent and neither the landlord

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nor the subsequent tenant applies for standardisation under s.c. 15, no standard rent will be fixed, and a tenant who might have applied, while still a tenant, for a certificate of standardisation because he was desirous of recovering rent overpaid which was irrecoverable under the Act, would be deprived of an opportunity of making a claim to recover that rent overpaid, because no standard rent in fact was fixed. On the other hand, it is urged on behalf of the Opposite Party that, if a person who at the time when he made the application for standardisation was a tenant, but who before the certificate was issued by the Controller had ceased to be a tenant, was entitled after he had ceased to be a tenant to call upon the Rent Controller to fix the rent, the result might be that the tenant of the premises at the time when the rent was standardised would have no voice or opportunity of pleading before the Tribunal facts he thought material for the purpose of standardisation of the rent. In my opinion, there is no substance in this contention, because under sec. 15, sub-sec. (4) of the Act the Rent Controller "before exercising any of the powers conferred on him by this Act shall give notice of his intention to the landlord and tenant, if any, and shall duly consider any application received by him from any person interested within such period as shall be specified in the notice." It would be open to this application for the present tenant, if he elected so to do, to apply to the Rent Controller to be heard on the question as to what was the right sum to be fixed for the standard rent. In these circumstances, it seems to me that if the contention of the Opposite Party was held to be valid, injustice might result to persons who were tenants at the time when they made the application for standardisa-

tion of rent, whereas, if the Rent Controller in such circumstances as those prevailing in this case were to continue the proceedings and to certify standard rent, no hardship, so far as I can see, would result to anybody. In these circumstances, in my opinion, this Rule should be made absolute in the sense which my learned brother has stated.

J. N. R. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.

LORD SHAW.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMEER ALI.

1924,

Heard, 17 and

18, March.

Judgment, 7, April.

THE MIDNAPUR
ZAMINDARY CO.,
LD., Appellant,

v.

NARESH NARAYAN
Roy and ors.,
Respondents.

Occupancy right, if may be acquired by co-sharer or ijaradar or tenants under them—Purchase of pre-existing occupancy holding by co-sharer, effect of—Extinguishment of occupancy right—Exclusive user of joint land by co-sharer, if ouster of other co-sharers—Right of latter to compensation—Compensation or mesne profits—Partition, ultimate remedy—Symbolical possession, delivery of—Effect on limitation—Limitation Act (IX of 1908), Art 142—Issue left open by trial Court, expressly decided as being necessary to decree in appeal Court—Decision, if res judicata—Question as to whether issue was necessary, if may be considered in later suit.

Where lands in India are held in common by co-sharers in proprietary right, each co-sharer is entitled to cultivate, in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers

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from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands.

No co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them.

ROBERT WATSON AND CO. v. RAM CHAND DUTT (1) referred to.

If a co-sharer purchases any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished.

In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have and in Bengal a middleman cannot obtain as a middleman a right of occupancy himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman.

MIDNAPUR ZAMINDARY COMPANY v. NARESH NARAYAN ROY (2) referred to.

Where a co-sharer in execution of a decree for recovery of joint possession against another co-sharer had possession delivered to him under sec. 264 of the Code of Civil Procedure of 1882 by the usual modes of sticking bamboos and the beating of drums and by proclaiming aloud

in Bengal, in the presence of a number of persons in the vicinity, the terms of the decree and the party for delivery of possession and then, the judgment-debtor remaining in actual possession, sued the latter for partition and separate possession within twelve years of the delivery of such symbolical possession, the suit was not barred by Art. 142 of the Limitation Act.

In the decree made in this suit the direction of the trial Court for recovery from the Defendants of mesne profits for three years prior to the suit to date of delivery of possession, &c., was varied by substituting for it an order that the Defendants should pay compensation to the Plaintiff for the exclusive use by them or their tenants of the lands in suit from the date possession was delivered to the Plaintiff under the previous decree until partition was effected and possession of lands falling to Plaintiff's share was delivered to Plaintiff.

In the previous suit for joint possession the Defendant having set up exclusive jote right, an issue thereon was raised, but Plaintiff having waived the question, the trial Court held that it was unnecessary to decide whether Defendants had the jote right claimed. On appeal, the Defendant insisted on the Appellate Court trying the issue and the Appellate Court being of opinion that the decision of the issue was necessary determined it against the Defendants and though in the Appellate decree no reference was made to the alleged jote right of the Defendants, it affirmed the decree of the trial Court for recovery of joint possession by the Plaintiff:

Held, in the present suit—That the Court ought not to assume that the Appellate Court in the previous suit discussed a question which was irrelevant to the case.

(1) L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890).

(2) L. R. 48 I. A. 55: s. c. I. L. R. 48 Cal. 460 (1920).

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and then granted no relief in respect of it, but rather that it discussed and negatived the alleged tenancy right and intended to, and did, give a decree which should give effect to its findings thereon.

That if the Court then held the decision of the issue necessary and, did decide it as such, then whether it did so rightly or wrongly, the decision would be as much res judicata as the final determination of the issue on the merits.

This was an appeal (No. 87 of 1923) from a decree of the High Court at Calcutta, dated the 17th January 1921, which affirmed a decree, dated the 19th August 1915, of the Subordinate Judge's Court at Nadia.

The first Respondent as Plaintiff instituted this suit in August 1912 asking for a declaration that the Defendant Company had not the jote right claimed by them and praying for partition and mesne profits.

The previous history of the estate and the litigation connected with it is set out at length in the judgment of the High Court as follows:—

"The *char* to which this appeal relates has had a chequered history. The land was resumed by Government in 1828, and the first settlement was made in 1840. It was found to comprise an area of 36,652 bighas, and out of this area, 23,498 bighas were accretions to seven mouzahs—Khairtola, Baliadoba, Chaipara, Babadiar (Bhabhandadiar), Majhdiar, Koldiar and Nayadiar, while the remainder formed accretions to twelve mouzahs, of which it is necessary to mention only two—Ramkrishtapur and Poolberia. The Rajas owned the entire interest in the last twelve mouzahs, while in the other seven mouzahs they owned half and the Chowdhuries of Mathura-

pur owned the other half. When the settlement was made, there were two malias formed, Nos. 814 and 815. No. 814 consisted of half the land of the seven mouzahs in which the Putia Raj and the Mathurapur Chowdhuries were joint owners plus the land that had accreted to the twelve mouzahs owned exclusively by the Raj, and No. 815 of the other half of the seven mouzahs. The settlement was made with the Putia Raj of No. 814, and with the Chowdhuries of No. 815.

When that settlement expired in 1860, it was found that thirteen out of the nineteen mouzahs had been washed away, and that the area remaining to No. 814 was 6,989 bighas, and to No. 815, 4,880 bighas.

In 1870 the area had been further reduced; the area was found to be only 4,592 bighas, and half of this was settled as No. 814 with the Raj, and the other half as No. 815 with the Chowdhuries.

In 1879 proceedings for a fresh settlement were begun. The area was then found to be 4,021 bighas, afterwards raised to 5,763 bighas, forming part of mouzahs Majhdiar, Kokliar and Baliadoba. Again this area was settled, half as No. 814 and half as No. 815, and as Messrs. Watson & Co., the predecessors-in-interest of the Appellant Company, had bought two annas of the proprietary interest in No. 814 from the Raj, the settlement was made with them and the Raj jointly.

Shortly after the settlement had been made it was found that the river had thrown up a very large new area, which on measurement proved to be as much as 18,750 bighas. This area was formed into a new estate, numbered 3,514, and was settled with Messrs. Watson & Co., as the persons in actual occupation of the land,

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although it was recognised at the time, as it is conceded now, that the area actually formed parts of the original estates, Nos. 814 and 815. Claims to settlement were made by the Raj and by the Chowdhuries, but they were rejected on the ground that Watson & Co. were actually in possession. This settlement was for a term of seven years, to expire on the same date as the settlements of Nos. 814 and 815.

In 1891 the Chowdhuries and the Rajas instituted suits in the Court of the Subordinate Judge about this estate No. 3,514. The suits were numbered 5 and 6 respectively of 1891. As the present appeal does not touch the Chowdhuries' estate, it is enough to say that their suit followed the same lines as that of the Rajas. The Rajas' plaint gave a brief history of the *char*, and then set out that the revenue authorities had come to a wrong conclusion in holding that they were not in possession of an area of 13,020 bighas; it asserted that the Rajas were in possession until November 1889 when Watson & Co., on the strength of the decision by the Board of Revenue, entered into possession. The area was made up of half the land found to belong to mouzahs Koldiar, Majhdia, Baliadoba, Chainpara, Khairtola, with the area given up to Watsons by the Collector (namely, 1,558 bighas odd), and the whole of the land found to belong to Ramkrishnapur and Poolberia, the two villages among the twelve, of which the names were given at the beginning of this judgment. A remark was added to the plaint that Watsons owned a share of 3 a. 13 g. 1 k. 1 kr. in the towzi No. 814.

The cause of action was given as having arisen in November 1889 when the Plaintiffs said that Watsons entered into unlawful possession.

The prayers in the plaint were (a) for a declaration that the land in suit formed part of towzi No. 814; (b) for a declaration that as the land was in possession of the Plaintiffs until the time of dispossession, the Plaintiffs were entitled to get settlement from the Collector; (c) for a decree directing that the Plaintiffs should be put in possession; (d) for mesne profits from the date of dispossession until the date of recovery of possession.

The suit was decreed in Plaintiffs' favour in May 1894; on appeal it was remanded for the Secretary of State to be made a party, and it was again decreed in August 1897. The Defendants again appealed, and this Court decided the appeal in favour of the Plaintiff on 30th May 1899, but its decree was not signed until 20th March 1900.

Meanwhile the term of the settlements made in 1887 had come to an end. The reduced estates, Nos. 814 and 815, were settled as before for ten years. A similar term was proposed for No. 3,514, but as the civil suits were pending the Commissioner ordered that it should be settled from year to year, and this was done until 1900, when in consequence of more land being added, a fresh settlement was made again with Watson & Co., to expire in 1909, on the same date as the settlements of Nos. 814 and 815. In the Collector's proceedings reference is made to the pending suits, and the settlement was on condition that if the results of the civil suits be known at any time during the period, the terms of the settlement will at once be modified accordingly.

It appears that no steps were taken by the Putia Raj to enforce the decree until 3rd February 1902, when execution proceedings were instituted in the Court of the Subordinate Judge. As the result of those proceedings a Commissioner

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appointed, and he went to the *cher* and purported to deliver possession to the decree-holders in August 1902 and September 1903. The decree-holders did not deposit the fees required for a Commissioner to determine mesne profits.

In November 1903 the Raj filed a petition before the Collector about the settlement of towzi No. 3,514; the petition alludes to notices requiring the Raj to take settlement, and to a previous petition asking for the settlement of No. 3,514 to be made along with towzi No. 814 'according to the final decree of the Honourable High Court,' and objecting to the tenants and officers of Watson & Co. being entered at lower sums than those actually paid. This petition was ordered to be filed.

It is not clear what happened after this, but in August 1904 proceedings began before the Collector for the amalgamation of those parts of towzi No. 3,514 which had been declared by the High Court to belong to towzi Nos. 814 and 815 with their parent estates, and eventually in April 1905 the Board of Revenue ordered that half of the areas found in the mouzahs of Majhdia, Koldia, Chainpara, Baliadoba and Khairtola, and the entire areas found in Ramkrishnapur and Poolberia should be amalgamated with towzi No. 814. In May 1906 a *kabuliyat* was executed in respect of towzi No. 814 by Mr. Gregson, who then had bought Watson & Co.'s interest, and by various members of the Putia Raj family. Similar *kabuliyats* were executed on 22nd July 1910 and 9th February 1912. It may be noted here that in these two *kabuliyats* the Midnapur Zamindary Company appears in place of Gregson. At the time of executing the second of these *kabuliyats* the Plaintiff put in a petition saying that he did not waive his right to ques-

tion an order passed by the Collector as to Watson's jote rights in the lands.

The order complained of was passed in 1909. In 1908 proceedings were begun for a new settlement; while they were in progress settlements from year to year were made, and the *'kabuliyat'* of 22nd July 1910, just mentioned, relates to one of those settlements. In the course of those proceedings an application was filed on behalf of the present Plaintiff whose estate was then in the Court of Wards. The application was aimed at an entry in the settlement record to the effect that the Midnapur Zamindary Company had jote rights in the land. The Assistant Settlement Officer quoted a passage from the judgment of this Court in the suit of 1891, and said that in view of that decision he could not show the Company as having jote rights, but as the Company was in possession he must show it as in possession. The Company then appeared to the Collector of Nadia, and the Collector Mr. Ezekiel held that the Assistant Settlement Officer had misapplied the judgment of this Court, and directed that the Company should be entered as tenants with occupancy rights. The Manager of Ward's Estate wanted to appeal, but the Collector of Rajshahi, to whom he was subordinate, did not allow him to do so. Mr. Ezekiel's order was dated 20th September 1909.

After the conclusion of the settlement, a *kabuliyat* was executed by the Company, and the Plaintiff and other members of the Raj family for a term expiring on 31st March 1920, as already mentioned.

On 8th August 1912, the Plaintiff filed the suit from which this appeal arose. He alleged that the High Court decree was executed and possession given. 'But,' to use the language of the plaint, 'the Plaintiffs have not in reality got pos-

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session of the decreed lands in proper order even in spite of their having obtained possession aforesaid and the Defendant Company have illegally and without any right been still holding possession of the whole of the decreed lands on the ground of their having obtained the property by transfer from Messrs. Watson & Co.' It then refers to the recording by the Collector of the alleged jote right of the Defendants after and notwithstanding the decision of this Court, which was held to be applicable only to the estate of affairs existing when it was given. It accordingly asks that it may be declared that the Defendant Company have not the jote right alleged by them, for partition, and for a decree giving him direct possession of the share to which he is entitled on partition free of the alleged jote right after ejectment of the Defendant Company. The latter does not now contest the suit in so far as it is one for partition of the proprietary right in the lands in suit. The Company asserts a tenancy right, and denies that the Plaintiff is entitled to any such declaration or possession of the land free of such alleged tenancy as is claimed."

The Subordinate Judge passed a decree substantially as prayed in the plaint but held that "the Defendant Company will be liable for mesne profits to the Plaintiff in respect of the lands decreed in suit No. 6 for three years prior to the date of this suit down to the date of delivery of possession to him or till the expiration of three years from the date of the final decree, whichever event may first occur"

On appeal the High Court (Woodroffe and Walmsley, JJ.) affirmed the decree of the Subordinate Judge. The Defendant Company appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant Company.
Messrs. Duane, K. C. and Wallach for the 1st Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Defendants, the Midnapur Zamindari Company, Limited, which will be hereafter referred to as the Midnapur Company, against a decree, dated the 17th January 1921, of the High Court at Calcutta, which affirmed a decree, dated the 19th August 1915, of the Subordinate Judge of Nadia, by which the claim of the Plaintiff, Kumar Naresh Narayan Roy, in Suit No. 557 of 1912, had been decreed with costs. The other parties to the litigation are Rani Hemanta Kumari Debi and the Secretary of State for India in Council, who are Defendants and Respondents, but they have not appeared and are not represented in this appeal.

The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Nadia on the 8th August 1912, by the Plaintiff, who is of the Putia Raj family, and who claimed a decree for the partition of certain lands in which he and the Midnapur Company were co-sharers, a declaration that the Midnapur Company had no jote rights in any of the lands of which he sought partition, and a decree for possession after partition by ejectment of the Midnapur Company, and other reliefs. . . .

By the written statement of the Midnapur Company it was denied that the Plaintiff was entitled to a decree for partition. The right of the Plaintiff to a decree for partition is not now disputed. Partition is the remedy which a co-owner has if he and the other co-owners cannot agree as to

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how the lands which they hold in common should be managed. See *Robert Watson and Co. v. Ram Chand Dutt* (1).

There were two, and, in the opinion of their Lordships, only two, substantial defences, if proved, put forward by the Midnapur Company to the Plaintiff's suit. The first of these defences was that the Plaintiff had not been in possession within twelve years of the 8th August 1912, of the lands in question in which he alleged that the Midnapur Company had no jote rights, and, consequently, that his claim to eject the Midnapur Company from those lands was barred by the limitation of Art. 142 of the First Schedule to the Indian Limitation Act, 1908. The other substantial defence, if made out, was that the Midnapur Company held jote rights in the lands in question. These two defences their Lordships will consider later. There were two other matters which were put forward by the Midnapur Company in the assertion of their claim to jote rights in the lands in question. One of them was an order which was made on 20th September 1909, by Mr. Ezekiel, the Collector, that the Midnapur Company should be recorded in the settlement papers as tenants with rights of occupancy. That order applied to the lands now in question and was not appealed from. It was made in the course of a new settlement from year to year. The other matter to which their Lordships allude was the contention that the Plaintiff was estopped from challenging the right of the Midnapur Company to jote rights by a *kabuliyat* of the 9th February 1912, to which he was a party, and by which the Plaintiff had undertaken to respect the recorded rights of raiyats and others. These latter two defences were carefully considered by the High Court in

its judgment in this suit, and their Lordships agree with the High Court that they do not afford defences to the claim of the Plaintiff.

The evidence as to the rights of the parties was carefully considered by the Subordinate Judge who tried the suit, and the High Court agreed with him in all material matters. The history of the lands in question, which are *char* lands in the alluvial plains of the river Padma, and of how those lands have from time to time been dealt with by the Government, by the Plaintiff, and by the Midnapur Company and their predecessors-in-title, including Robert Watson and Co., has, so far as is material, been very fully and most carefully stated in the admirable judgment of the High Court of Sir John George Woodroffe and Hugh Walmsley, JJ., and with the conclusions expressed by those learned Judges their Lordships agree. They will, however, refer to some other matters which in their opinion bear upon the case, and will then state what is their conclusion as to the two defences which, if proved, would be substantial defences to the claim of the Plaintiff to eject the Midnapur Company.

The lands in suit are comprised in an estate which has been periodically settled under Reg. 2 of 1819. As has been mentioned, they are *char* lands. The proprietary interest in the lands is admittedly vested in the Plaintiff and the Midnapur Company as co-sharers, who hold the lands in common. Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use

(1) L. R. 17 L. A. 110: s. c. I. L. R. 18 Cal. 10 (1890).

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of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them. Their Lordships may refer on this subject of separate cultivation by a co-sharer of lands held in common to what Sir Barnes Peacock said in delivering the judgment of the Board in *Robert Watson and Co. v. Ram Chand Dutt* (1). He then said:—

“In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons.”

In that case the Board made a declaration that Robert Watson and Co., who were the Plaintiffs, should recover from the Defendant a sum of money, calculated at a specified rate per bigha per year, as compensation for the exclusive use by the Defendant of the bighas which had been occupied by him.

Their Lordships are not certain that the Midnapur Company has in recent

years, if at all, been cultivating any part of the lands in question. If the Midnapur Company has been, in fact, cultivating any of these lands, it cannot by such separate use of the lands have acquired any jote rights in them. Even if the Midnapur Company purchased any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished. The Midnapur Company alleges as a defence to this suit that tenants of the Midnapur Company, who are not tenants of the co-sharers, have acquired under the Midnapur Company jote rights, rights of occupancy, in the lands in suit. Such rights of occupancy, if they existed, would be raiyati jote rights, but a raiyat cannot acquire under sec. 180 of the Bengal Tenancy Act, 1885, a right of occupancy in *char* land until he has held the land for twelve continuous years, and no evidence has been brought to the attention of their Lordships that any raiyat had held any of the lands in suit for twelve continuous years before suit as a tenant of the Midnapur Company, even if a holding of lands by a raiyat under the Midnapur Company, and not under the co-sharers, could confer a right of occupancy on the raiyat as against the co-sharers. In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat, than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. See the judgment delivered by Lord Dunedin in *Midnapur Zamindary Company v. Naresh Narayan Roy* (2). See

(1) L. R. 17 I. A. 110 at pp. 120-21; s. c. I. L. R. 18 Cal. 10 (1890).

(2) L. R. 48 I. A. 55; s. c. J. L. R. 48 Cal. 480 (1920).

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also the cases referred to at p. 116 of the commentary on the Bengal Tenancy Act, 1885, by W. Finucane, and Ameer Ali (Syed), edited by F. G. Wigley, Calcutta, 1904.

Their Lordships return now to the Company's substantial defences to the suit, the first of which is that the suit is barred by the limitation of Art. 142 of the First Schedule to the Indian Limitation Act, 1908. This raises the question as to what was the possession of the lands in question in this suit which the Plaintiff obtained on the 26th July 1902, and the 20th June 1903, under a decree for possession of the High Court at Calcutta of 1899 in a suit No. 6 of 1891, in which the Plaintiff and Robert Watson and Co., who were predecessors-in-title of the Midnapur Company, were parties. It must be remembered that the Plaintiff and Robert Watson and Co. were co-sharers of the lands now in suit, which the Plaintiff and the Midnapur Company hold in common as co-sharers. Robert Watson and Co. had been denying the right of the Plaintiff as a co-sharer in the lands. A Commissioner was appointed to deliver possession to the decree-holders, and he delivered possession under sec. 264 of the Code of Civil Procedure of 1882 by the usual modes of sticking bamboos and the beating of drums, and by proclaiming aloud in Bengali, in the presence of a number of persons of the vicinity, the terms of the decree of the High Court and of the parwana of the Court of the Subordinate Judge of Nadia. In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court. The Plaintiff was not entitled to get possession by ousting his then co-sharers, Robert Watson and Co., from possession of lands which they were en-

titled to hold in common as co-sharers; the possession which the Plaintiff got was a possession of the lands in his proprietary right as a co-sharer. The High Court had declared that there were no jote rights in the lands. The possession which the Plaintiff got in 1902 and in 1903 was within twelve years of the 8th August 1912, and the suit was not barred by the law of limitation.

As to the other material defence which is one of *res judicata*, their Lordships feel that they cannot add anything to what Sir John George Woodroffe and Hugh Walmsley, JJ., said in their judgment on that subject, with which they agree. But to prevent the possibility of any further doubts being suggested at any time on that matter, their Lordships repeat what those learned Judges said. Referring to the litigation which began in 1891, they said:—

"We now pass to the issue of *res judicata*, the facts as to which are as follows:—

"In the plaint in Title Suit 6 of 1891, the Plaintiffs, i.e., members of the Putia Raj family, alleged that the Revenue authorities had been wrong in holding that Watson and Co., and not the Plaintiffs, were in possession of the land that was being settled in 1887, and that Watson and Co., dispossessed them by virtue of the order of the Board of Revenue that the settlement was to be with Watson and Co. They admitted that Watson and Co. owned an undivided share of three annas odd with themselves in the mahal. Their prayers were as follows:—

(a) For a declaration that the land appertained to towzi No. 814; . . .

(b) For a declaration that they were entitled to get settlement from the Collector;

(c) For recovery of possession;

(d) For mesne profits, provisionally estimated at Rs. 1,692.

"The defence was (a) that some of the lands in suit, viz., 1,558 bighas 1 k. 10 ch., had accreted to their estates chur Hogulberia and Niamatpur, as held by the Revenue

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authorities; (b) that the remainder had accreted to their estates Udainagar, Temadia and others; (c) that they had acquired a right by adverse possession; and (d) that the Plaintiffs could not in any event obtain khas possession. Other pleas were raised, but we are not concerned with them.

"It was found that the Plaintiffs' claim was barred as to the 1558-1-10 by adverse possession for twelve years, but that the remainder of the land was an accretion to mahal No. 814, and that the Defendants had not been in adverse possession for the statutory period. These findings of the first Court were upheld on appeal.

"Regarding khas possession an issue was framed as follows:—'Are the Plaintiffs entitled to recover khas possession of the land in suit? Have the Defendants any jotedari right in the land?' But, on December 28th, 1893, the Plaintiffs' pleader made a statement in these words: 'The Plaintiffs claim only a right to the settlement of the disputed land and no other right.' On the same day the Defendants' pleader made a statement, and asserted that, in any event, khas possession could not be given because the Defendants had jotedari right in the land. As a result of the statement made by Plaintiffs' pleader, the learned Judge did not decide the issue. He said: 'The Plaintiffs do not ask for khas possession. Hence it is not necessary to enquire whether the Defendants have a jotedari right in the lands.'

"Watson and Co. preferred an appeal, and raised the question that the Judge had left open, in the eighteenth and nineteenth paragraphs of their memorandum. It will be seen from these grounds that the Appellants who now contend that the decision of the issue was unnecessary, expressly invited this Court to decide it. The eighteenth of their grounds of appeal ran as follows: 'For that the learned Sub-Judge having held that it was not necessary to enquire whether the Appellants have jotedari right in the lands in suit, has erred in giving a decree for possession of the same to the Plaintiffs.' The nineteenth ground was equally explicit and ran: 'For that it should have been held that the Appellants are entitled to hold most of the disputed

lands in jote rights and that the Plaintiffs have no right to eject them from the same without determining their tenancy in the manner prescribed by law.' The point was pressed in argument before this Court, but it was held that there was no evidence in support of the contention.

"The decree that was drawn up in this Court made no express mention of the decision on this point in terms: it affirmed the First Court's decree with modifications intended to remove uncertainties.

"In the present suit the Plaintiff says that the decree was to the effect that the Raj should get possession after ejectment of Watson and Co., that Watson and Co. were ejected and possession delivered. The statement continues: 'But the Plaintiff has not in reality got possession of the decreed lands in proper order even in spite of their having obtained possession in manner aforesaid and the Defendant Company have illegally and without any right been still holding possession of the whole of the decreed lands.'

"The prayers are as follows:—(a) For a declaration that the Company has not, never has had, and never can have, jote rights in the lands covered by the decree in Title Suit No. 6 of 1891; (b) for a partition of those lands and of the land in towzi No. 814 as it was in 1891; (c) for possession of the separate share of 5 a. 16 g. 2 k. 2kr. to be allotted to the Plaintiff by the ejectment of the Defendant Company; and (d) for an account and mesne profits, &c.

"There is no dispute about the identity of the land now in suit with the land of the previous suit.

"Now, had the matter rested where the Subordinate Judge left it, no such question as we have to discuss would have arisen. Whether the suit might and should have been properly determined without entering into the question of the tenancy right as the Plaintiff apparently wished to do, we need not now enquire. For, in fact (as we have seen), the present Appellants directly insisted on the point being tried, and alleged that the First Court should have done so. It was contended before us that whatever the Appellants might have done in this re-

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spect, the issue in fact was not a necessary or proper one to be tried in that suit, and that it is open to us to say so. But we must see first whether this Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much *res judicata* as the final determination of the issue on the merits. If we are of opinion that the Court did so decide, we are not concerned to see whether it did so rightly or not, and indeed cannot do so. Now this is not a case, as not infrequently happens, where incidentally some point is decided which is not necessary, which was not of first-rate importance or especially brought to the notice of the Court. The Plaintiff had excluded the question by the statement of his pleader. The First Court had therefore expressly stated that it could not decide it. The Defendant, the present Appellant, has expressly urged that the Judge was wrong in not deciding this question even though his action was based on the Plaintiff's adviser's statement and he asked this Court expressly to decide it. As the Court did so, it seems to us that we ought to assume not that it did something which was unnecessary, but that in so far as it decided the point raised, it must also have decided that the then Defendant's objection that the point should be tried was a good one and that the issue was one which did arise in the suit.

"Then what did the learned Judges say? Maclean, C. J., after disposing of the question of reformation, sets out the three contentions of the then Defendants and present Appellants, the third of which was that the Defendants are entitled to jotedari right. On this the Chief Justice held that no such rights were anywhere recorded, nor was there any evidence of such rights. It was, he said, for the then Defendants and present Appellants to make out such right, but that they had not succeeded in doing so. Banerji, J., states the contention 'that the Plaintiffs cannot claim khas possession as the Defendants had jotedari rights in the greater part of the lands in suit.' He says that that was part of the defence which it was necessary to consider. He then points

out that the First Court did not consider the question of jotedari right necessary to be determined, and expressly refers to the ground of appeal that the First Court ought to have determined the question of tenancy right, and held that the possession to which the then Plaintiff was entitled was subject to the tenant right of the present Appellants. It is quite clear from the above that the then Defendants' case was present to the mind of the Court. The learned Judge then proceeded to decide it and held that there was no jote right. If the learned Judges had thought the issue unnecessary, they would presumably have said so and not decided it. But they did decide it. Can it be said under these circumstances that the point was not raised, that the Court did not consider it to be a necessary issue and did not impliedly decide that it was necessary and did not decide the issue on the merits? We think the answer is clearly in the negative. Then what of the decree? It is true that it does not expressly refer to the tenancy right, but it gave a decree for possession. What, then, did it intend to give? For the Appellant it is said that all that was given was possession as co-proprietor and that the question whether such possession was free of the alleged tenancy right was left untouched. But if so, what was the necessity of discussing the question in the judgment? We ought not, we think, to assume that the Judges discussed a question which was irrelevant to the case, and then granted no relief in respect of it; but rather that as they had discussed and negatived the alleged tenancy right in the judgment they intended to, and did, give a decree which should give effect to these findings. If so, the learned Judges' decree in effect gave to the Respondents before us a right to the lands in that suit free of the alleged tenancy right claimed. We are of opinion therefore that the issue as to the Appellants' right is *res judicata*."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, but that the decree of the Subordinate Judge be varied by substituting for his order as to mesne profits

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an order that the Midnapur Company is to pay compensation to the Plaintiff for the exclusive use by the Midnapur Company themselves or by their tenants of the lands in suit from the 20th June 1903, until partition has been effected and possession of the lands falling on partition to the Plaintiff has been delivered to the Plaintiff. Such compensation is to be ascertained and assessed in the High Court or in the Court of the Subordinate Judge of Nadia as the High Court may direct, and the Plaintiff's costs, which may be incurred in the ascertaining and assessing of such compensation, are to be paid to him by the Midnapur Company.

Solicitors: *Messrs. Burton Yeates & Hart* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for the 1st Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE BRITISH
RESIDENT IN MYSORE, CIVIL AND
MILITARY STATION OF BANGALORE.]

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1923,
Heard, 29 and
30, October.
Judgment,
30, November.

MOTIBAI HORMUS-
JEE KANGA,
Appellant,
v.
JAMSETJEE HORMUSJEE KANGA,
Respondent.

Indian Succession Act (X of 1865), secs. 48, 49—Will—Testamentary capacity, onus to prove—Case of undue influence or coercion—Onus—Decision to be based on legal testimony and not on suspicion.

The rules for the establishment of the capacity of a testator and the circumstances which would lead to the invalidation of a Will are embodied in secs. 46 and 48 of the Indian Succession Act which

practically embody the principles of the English law on the subject.

The onus of establishing capacity lies on the propounder of the Will, but when a caveator impugns a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish the case.

In matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

TYRRELL v. PAINTON (1) and SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY (2) referred to.

This was an appeal from the decree of the Court of the Resident, dated the 26th April 1922, setting aside an order of the District Judge of Bangalore and revoking a probate granted by him on the 19th December 1921.

That order was made on the application of the Appellant for probate of the Will of her deceased husband Hormusjee Rustomjee Kanga, and against the opposition of the Respondent. The question in the appeal was whether the testator was possessed of testamentary capacity when he executed the Will, or whether he was induced to execute it by the undue influence of the Appellant.

The testator died on the 17th August 1916. The Appellant applied for probate of the Will on the 10th of September. The Respondent put in a caveat on the 27th October and an affidavit in support of it on the 30th of November whereby the proceedings became contested.

The District Judge decided in favour of the Will and ordered probate to issue.

(1) 1894, P. 151.

(2) 11 M. I. A. 44; 7 W. R. 10 (P. O.) (1886).

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The Respondent appealed and the Resident, on the 26th April 1922, allowed the appeal and revoked the probate.

From this decree the Appellant appealed to His Majesty in Council.

Sir George Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellant.

Mr. Thomas Bucknill for the Respondent.

The arguments were directed towards the evidence.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This Appeal arises out of an application by the Petitioner, a Parsee lady named Mrs. Motibai Kanga, in the Court of the District Judge of Bangalore for the probate of a Will which she alleges had been executed by her husband shortly before his death, on the 17th August 1920. The probate was granted by the District Judge, Mr. de Rozario, on the 19th December 1921. His order was, however, reversed by the Resident of Mysore, Mr. Barton, who appears to have exercised, in his official capacity, the Appellate jurisdiction over the Civil Court in Bangalore; hence the appeal to His Majesty in Council.

The testator, Mr. Hormusjee Rustomjee Kanga, resided in Bangalore, and he is described as having been a turf accountant. He became ill on the 2nd August 1920, and his medical attendant, a doctor named Mylvaganam, diagnosed his complaint as malaria; but as he became gradually worse, his wife and friends became anxious and called in two other doctors in consultation with Dr. Mylvaganam. They were of opinion that it was not malaria but septic poisoning, and they prescribed accordingly. The Will is alleged to have been executed in the evening of the 16th August, and was registered

by the Sub-Registrar of the Civil and Military Station, Bangalore, shortly after its execution. From his name (Mr. Burby) the Sub-Registrar appears to be an Englishman. As his evidence, in their Lordships' opinion, is of the utmost importance in the determination of this appeal and is very short in substance, they propose to quote it in full:—

"I am Sub-Registrar of Assurances, C. and M. Station, Bangalore. I was so in August 1920. I remember the 16th August 1920. I was called to the residence of Mr. Kanga and a Will was there given to me for registration. I registered it. Ex. A is the Will. It was signed by Mr. Kanga in my presence unaided. I had no suspicion whatever that anything was wrong with the Will. I satisfied myself that Mr. Kanga was perfectly right in his mind."

He was not cross-examined at all on behalf of the caveator, the eldest son of the deceased, Mr. Kanga. His case was, in the first place, that his father was not competent or in such a condition, mentally or physically, as to make a valid disposition; in the second place, that if it was competently made, it was made under the undue influence of his wife, the Petitioner. The Petitioner is the second wife of the deceased. He appears to have married her in 1917, and it is in evidence that they lived harmoniously and on good terms.

The attesting witnesses to the Will are Aga Abbas Ali, a Mohammedan gentleman residing in Bangalore; a Mr. W. H. Thomson, an Englishman carrying on business in that city; and Dr. Mylvaganam. The facts connected with its execution are testified to by two Hindu gentlemen of the names of Mr. C. Sundara Raja Naidu and Mr. C. N. Suryanarayana Rao; a Parsee of the name of Mr. K. D. Belgaumwala; and a Mr. F. D'Souza, a furniture dealer.

As the deceased became gradually worse,

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it was considered advisable he should execute a Will. It is not clear from the evidence from whom the proposition emanated, but there is nothing to show that it was not with his approval. Mr. Suryanarayana Rao, a prominent pleader of the Bangalore Bar, was asked by Mrs. Kanga to draft the Will. He excused himself on the ground that he was a close friend of the deceased and apprehended a dispute; he would rather it was prepared by some other lawyer. He accordingly introduced Mr. Naidu, another pleader, as a fitting man for the purpose. Mr. Naidu states that he came to the house on the 16th August and obtained Mr. Kanga's personal instructions about the Will. His statement on this point is as follows:—

"Mr. Kanga asked Mrs. Kanga to take some bank-books and title-deeds from an almirah and a chest of drawers. She took out some documents from each and handed them over to Mr. Kanga, who took up the books and documents one after another and gave me instructions: As he gave instructions I took down notes, which I have with me. I first asked Mr. Kanga whom he wished to appoint as executor. He said that his wife, Motibai Kanga, should be the sole executrix."

Mr. Naidu produced the notes of his instructions at the trial. They are short and direct. This witness states further in his evidence that a Mr. Godfrey, to whom the deceased owed some money, was present at the time in the room in which Mr. Kanga was lying, and that there was some discussion between the two regarding the amount of money due; that Mr. Godfrey stated it was something like Rs. 7,000, whilst the deceased said it was not so much but only about Rs. 4,000; and that thereupon he looked into the books, and it was found that he was correct: the amount thereupon was put down in the deponent's notes,

Rs. 4,526. Mr. Naidu's statement regarding a discussion at the time about Rs. 7,000 or Rs. 5,000 is to a certain extent corroborated by Mrs. O'Neill, the nurse who attended the deceased for the last two days of his life, and who was called as a witness for the caveator. She does not remember exactly the details of the discussion, but says the amount spoken of was something between Rs. 4,000 and Rs. 5,000. There can be little doubt that she was referring to the same incident as Mr. Naidu deposes to. This witness (Mr. Naidu) says further, "Mr. Kanga was quite of sound mind when he gave the instructions." After he had taken down the notes he says he made a fair copy, which was completed by 7 or 7.30 p.m. Mr. Kanga signed the Will and shortly after Mr. Burby, the Sub-Registrar, arrived and registered it. In cross-examination with regard to the physical condition of the deceased the witness stated: "His voice was a little weak. His wife was not talking to him in Gujarati: she was fanning him and using an endearing term—the same term right through." And he added: "Neither Mrs. Kanga nor myself made any suggestion to the testator to recall to his mind the various items in my notes." In re-examination he stated that the Will was read over to the deceased twice—once by himself (the witness), the other time by Mr. Burby, the Sub-Registrar. It is to be remarked that the Will itself is simple and short, and not requiring any great mental strain on the part of a sick man to grasp its meaning. Save the preliminary part, which is in ordinary form, it leaves everything to the wife.

Mr. Thomson (who describes himself as a director of the firm of Barton, Son and Co., Ltd.) states that he lived next door to the deceased:—

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"On the 16th August, about 6.30 in the evening, I saw Mr. Suryanarayana Rao and Dr. Mylvaganam in the compound of Mr. Kanga's bungalow. I dropped in to ask how Mr. Kanga was: I had heard Mr. Kanga was down with enteric. I asked the doctor. He said it was some kidney complaint and blood poisoning had set in. I asked him whether Mr. Kanga was in a critical state. He said 'No,' and he might get over it if he were a younger man. At all events, the doctor said, he would last four or five days. Mr. Suryanarayana Rao then asked me whether I would attest Mr. Kanga's Will: he said it was being prepared at the time. I first objected, saying I was a perfect stranger, but afterwards consented. Mr. S. N. Rao represented that I was a disinterested party and I would do. I asked the doctor whether Mr. Kanga was in a fit condition to sign a Will—I meant mentally. Dr. Mylvaganam said 'Certainly' and Mr. S. N. Rao 'Very much so.'"

The next witness to the Will is Aga Abbas Ali, who describes himself as a landholder of Bangalore. The material part of his evidence is as follows:—

"I stepped in at Mr. Kanga's to enquire about his health. I casually dropped in. Mr. Thomson, Dr. Mylvaganam and Mr. Suryanarayana Rao were there. Mr. S. N. Rao asked me to wait, saying I was wanted: he did not say why. I went into the sick room, and then I learnt I was required to attest a Will. The Will was read out to Mr. Kanga. Mr. Kanga signed the Will. The nurse lifted him up. I do not know whether anybody else helped the nurse. The doctor signed first. I don't remember who asked me to sign. After I attested the Will I stayed on. Then the Registrar came. I was in the room when he came. The Registrar read out the Will to Mr. Kanga. He asked Mr. Kanga whether it was right. Mr. Kanga shook his head (nodded?), by which I understood that he thought it all right. The Registrar registered the Will and we all left."

Mr. Suryanarayana Rao's evidence is important. He is a man of position and of twenty-eight years' standing at the Bar

of his province; a prominent pleader in the Bangalore Court and appears to have absolutely no interest in the dispute, and knew the family well. He describes how the Will came to be executed, the condition in which the testator was at the time, and the circumstances connected with its execution. The following passage in his evidence deserves notice:—

"Just after the execution of the Will Mr. Burby came. Somebody went and brought him. After execution and before Burby came the Will was brought to me. I read it and was surprised that no provision had been made for the children, and I expressed myself to that effect to Mr. Abbas Ali and to Mr. Burby and to others. I remarked that it was an unjust Will. Kaiku, the younger son, who understood what we were discussing, began to cry. I felt it and the others also felt it. They asked me to approach Mr. Kanga and ask him to make some provision for the younger boy. Meantime Mr. Burby went in and registered the Will. He was standing by Mr. Kanga's bedside. I then went into the room. Mr. Kanga was lying in bed and appeared to be exhausted. I took up his hand and asked Mr. Kanga how it was he had made no provision for any of his children. He replied, 'My wife will look after everything.' Then I said he might at least make provision for the minor boy. He replied, 'My wife is a good woman. She will look after him.' Then I came out remarking, 'What is to be done? The man is obstinate.' When I put the question he understood me and gave me a rational answer. I cannot depose about his mental state."

Mr. D'Souza and Mr. Belgaumwala gave similar testimony.

Mrs. Kanga in her evidence gives a clear account of what took place from the time the deceased became ill until his death. Her story tallies in every material particular with that told by the other witnesses. She was cross-examined at great length, but nothing appears to have been

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elicited to discredit her testimony. If all this evidence is accepted the validity of the Will would be conclusively established, but Dr. Mylvaganam, although an attesting witness, has given evidence of a character which requires consideration. He states, in fact, that the deceased when he put his signature to the document could not understand what he was doing. He says in one place in his examination-in-chief :—

“I saw him sign. I attested the Will. I was behind him. Mr. Abbas Ali and Mr. Thomson also attested. From his mental and physical condition I did not think that Mr. Kanga was able to make a detailed Will. He was not comatose or imbecile. At times he used to be quite listless and we had to shake him to get a reply.”

He also was present at the time when the Registrar came. In cross-examination, referring to the Will Ex. A., he says :—

“It is a long document. I do not think that Mr. Kanga would have understood all that in his then condition.”

The Judge before whom the evidence was given was apparently astonished at the fact that although Dr. Mylvaganam had attested the Will, he was now giving evidence to the effect that the testator could not have executed it with comprehension. The District Judge accordingly asked him certain questions, to which he makes the following answers :—

“When I attested the Will I thought that the details had been arranged previously. I regarded my responsibility to extend only to the witnessing of the signature. Mr. Kanga did not appear to me to be following the reading of the Will with intelligence. Somebody asked him to sign, saying that his signature was required, and put a pen in his hand. He was lying with his eyes closed, and when he was propped up he was sufficiently alert for the signing. After the signing Mr. Kanga collapsed. On the 16th August I do not think Mr. Kanga would

have been in a fitting state of mind to be able to scrutinise accounts.” At the instance of Petitioner’s counsel: “After the Will was read out I do not remember asking Mr. Kanga why he had left out his son in the Will. To my knowledge there was no conversation with Mr. Kanga after the Will was signed. He was not in a fit state for conversation. I do not remember anybody else asking Mr. Kanga about having left out his son—I do not think so.”

The nurse, Mrs. O’Neill, says that the whole work of opening the iron safe and taking out the books, etc., for the purpose of noting the details in the Will was carried out by Mrs. Kanga; and that Mr. Kanga gave no instructions to the lawyer. She adds that the patient was very weak and his life seemed to be going; he took no interest in what was going on.

Their Lordships do not think it necessary to refer to the nurse’s evidence in detail; it is sufficient to say that her statements are in direct contradiction to all the witnesses on behalf of the Petitioner and even contradicts some of the statements made by Dr. Mylvaganam. Upon this balance of testimony the District Judge came to the conclusion that Mrs. O’Neill could not be relied on, and having regard to the fact that the capacity of the testator had been established by overwhelming testimony and no undue influence had been proved, he made a decree for the grant of the probate to the Petitioner.

On appeal the Resident has set aside the order of the District Judge chiefly, as it appears, on suspicion.

The rules for the establishment of the capacity of the testator and the circumstances which would lead to the invalidation of a Will are embodied in secs. 46 and 48 of the Indian Succession Act (X of 1865) which practically embody the principles of the English law on the subject.

Counsel for the Respondent invited

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their Lordships' attention to what he called the suspicious circumstances in the case: the delay in sending information to the eldest son of the critical condition of the father, the exclusion of the children from the Will; and he relied on the dictum in *Tyrell v. Painton* (1). That case, however, differs in all its circumstances from the present. In this connection it may be useful to refer to the observation of Lord Westbury in the case of *Sreemanchunder Dey v. Gopalchunder Chuckerbutty* (2):—

" . . . in matters of this description " (he was dealing with a charge of fraud in connection with a sale in execution of a decree) "it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony."

It is quite clear that the onus of establishing capacity lay on the Petitioner. It is also clear that if the caveator impugned the Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that case. The evidence, however, that the deceased signed it with full comprehension of its meaning and contents is overwhelming and explicit. It is impossible to suppose that persons like the pleader, Mr. C. N. Suryanarayana Rao, Mr. Abbas Ali, the Sub-Registrar and Mr. Thomson, not to speak of the others, entered into a conspiracy with Mrs. Kanga to foist upon a moribund man a Will which he did not understand and which he signed without comprehension. It is in evidence that the deceased had not been for some time on good terms with his eldest son; it appears also that he had adequately provided for him. The deceased's son-in-law, Mr. Khambata,

who has apparently no interest in the dispute, says that the deceased had full confidence in his wife. Evidently relying on his trust in her, Mr. Kanga left her his whole estate, observing to the persons who were interesting themselves on behalf of his youngest son that she would look after him and do what was necessary. A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition. The evidence, which consists of the testimony of respectable and wholly disinterested witnesses, excludes the hypothesis of its having been obtained by undue influence. Their Lordships refuse to accept the testimony of Mrs. O'Neill and Dr. Mylvaganam. Their conduct does not seem to be consistent with what they stated in Court.

On the whole, their Lordships have come to the conclusion that the order of the Resident must be set aside and that of the first Court restored. The Respondent will pay the costs in the Appellate Court and of this appeal. Their Lordships will humbly advise His Majesty accordingly. But they, at the same time, feel it desirable to say that they fully trust the Petitioner will carry out the wishes of her husband with regard to his minor son. She herself stated in her evidence that she proposed to make a handsome provision for the boy, and their Lordships trust that she will give effect to it.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitor: *Mr. O. A. Cayley* for the Respondent.

G. D. M.

(1) 1894, P. 151.

(2) 11 M. I. A. 44; 7 W. R. 10 (P. C.) (1886).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2011 of 1921.

SUHRAWARDY, J.
GRAHAM, J.
1924,
Heard, 8 and
9, April.
Judgment,
10, April.

KHERODAMOYI DAS,
Plaintiff, Appellant,
v.
HABIB SHAHA,
Defendant, Respondent.

Civil Procedure Code (Act V of 1908), Or. 34, r. 1, non-compliance with the provisions of, effect of—Or 1, r. 9, C. P. C., applicability of, in mortgage suits—Suit to enforce a mortgage—Omission of a debtor from suit—Decree for proportionate share—Splitting up of mortgage debt.

Non-compliance with the provisions of Or. 34, r. 1, Civil Procedure Code is not necessarily fatal to a suit to enforce a mortgage. The provisions of Or. 1, r. 9 is applicable to a mortgage suit as well as to any other suit.

HAR CHANDRA ROY v. MAHUMED HUSEIN (2) *relied on.*

BASIRUDDIN BISWAS v. DEBENDRO NATH BISWAS (1), SHAHA SAHEB v. SADASHIV (3), SHEOTAHAL OJHA v. SHEODAN RAI (4) and SANWAL SINGH v. GANESH LAL (5) *referred to.*

Where a person having a share in the equity of redemption has not been made a Defendant, there should be a decree proportionate to the shares of the persons actually made Defendants.

HARI KISSEN BHAGAT v. VELIAT HOSEIN (6) *followed.*

SANWAL SINGH v. GANESH LAL (5) *dis-sented from on this point.*

This was an appeal preferred on the

29th of September 1921 against the decree of the Subordinate Judge, 1st Court of Zillah Midnapur (Babu Haripada Majumder), dated the 1st of June 1921, reversing the decree of the Munsif, 2nd Court at Tamluk (Mahammad Ibrahim Hosain), dated the 23rd December 1919.

The facts of the case will appear from the judgment.

Babu Sarat Chandra Khan for the Appellant.

Babu Santosh Kumar Pal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SUHRAWARDY, J.—The only question involved in this appeal is whether the suit was maintainable in view of the fact that the Plaintiff had not brought on the record the heir of one of the mortgagors.

The suit was for the enforcement of a mortgage bond executed by Defendant No. 1 and one Moiboo Sah who died before the date of institution of the suit. The suit was brought against the Defendant No. 1 and one Abirjan Bibi who was described as the widow and heir of the deceased mortgagor Moiboo Sah. It subsequently transpired that the name of the widow was not Abirjan Bibi but Asiran Bibi. The first Court held that there was a *bonâ fide* mistake on the part of the Plaintiff in giving the name of the widow as Abirjan and decreed the Plaintiff's suit. On appeal the learned Subordinate Judge held that before instituting the suit the Plaintiff was aware that the name of Moiboo's widow was Asiran and not Abirjan and that she had intentionally for some purpose known to her described her as Abirjan. He found that it was not a case of *bonâ fide* mistake and that the estate of one of the mortgagors, Moiboo Sah, was not represented in the suit. He next proceeded to consider

(1) 12 C. W. N. 911 (1908).

(2) 25 C. W. N. 594 (1920).

(3) I. L. R. 48 Bom. 575 (1918).

(4) I. L. R. 28 All. 174 (F. B.) (1905).

(5) I. L. R. 35 All. 441 (1918).

(6) I. L. R. 30 Cal. 755 : s. c. 7 C. W. N. 723 (1908).

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whether in the absence of one of the mortgagors the suit was maintainable or bad for defect of parties, and held that the entire suit failed since all the mortgagors or persons interested in the equity of redemption had not been made parties.

Against that decision the Plaintiff has preferred this appeal, and it is urged on her behalf, first, that the finding of the learned Subordinate Judge that the estate of Moiboo was not represented in the suit is erroneous and secondly, that conceding the finding on the first point to be correct the Court below erred in law in holding that the entire suit failed for want of representation of Moiboo's estate.

With regard to the first point we are unable to accept the contention of the learned Vakil for the Appellant that the question is purely one of fact and the learned Subordinate Judge has found on the evidence that the Plaintiff was actuated by some motive in intentionally misnaming the widow and that when she applied for the substitution of the widow by her correct name the suit was barred as against her.

The second question that is raised is of some importance. Or. 34, r. 1, C. P. C., lays down that "all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage." The only exceptions to the rule are to be found in the explanation added thereto which relieves a puisne mortgagee from the necessity of making the prior mortgagee a party to the suit, and provides that a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. This explanation makes it clear that in all other cases save those excepted all the persons interested in the equity of redemption should be joined as parties. The Code does not say

what would be the effect of not joining all the parties to the suit. On this point there has been considerable divergence of opinion. Under the old Code the view generally accepted was that in view of the wording of sec. 85 of the Transfer of Property Act which has now been replaced by r. 1, Or. 34, C. P. C., the whole suit ought to fail if the Plaintiff did not join as parties all the persons interested in the equity of redemption. The same view has also been adopted in some cases under the present Code.

Some change was, however, effected in the law relating to defect of parties by the enactment of Or. 1, r. 9, C. P. C., and it has been argued with some degree of force that Or. 1, r. 9, being of general application qualifies the provisions of r. 1, Or. 34, inasmuch as no provision is made in that order regarding the effect of non-joinder in a mortgage suit. This view is strengthened by the wording of Or. 34, r. 1, which begins with the words "subject to the provisions of this Code." It may fairly be argued that Or. 1, r. 9, is one of the provisions to which Or. 34, r. 1, is subject. It cannot now be disputed, though there was formerly some difference of opinion on the point that the omission to make a puisne mortgagee or subsequent transferee of the mortgaged property party to a mortgage suit is not fatal to the suit. See the case of *Basiruddin Biswas v. Debendro Nath Biswas* (1) decided under the old law. The puisne mortgagee is as much a person interested in the right of redemption as a mortgagor or the heir of a mortgagor. We see no reason why a distinction should be drawn between the case of a puisne mortgagee and an heir of a mortgagor. The view which we are disposed to take is that a mortgage suit in which all the

(1) 12 C. W. N. 911 (1908).

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persons interested in the equity of redemption have not been joined need not necessarily fail. The provisions of Or. 1, r. 9, appear to be just as applicable to a mortgage suit as to any other suit. We do not wish to lay down as a general rule that in all cases a suit need not fail by reason of non-joinder of necessary parties. In using the expression "necessary parties" we do not desire to make any distinction between necessary parties and proper parties as has been attempted in several cases. The view that finds favour with us was adopted in a very recent case of this Court, *Har Chandra Roy v. Mahumed Huscin* (2). In that case the suit was brought by the mortgagee against the representatives in interest of the original mortgagor. The Defendants pleaded that all the heirs who were in the enjoyment of the property left by the mortgagor had not been made parties to the suit and that consequently the suit should be dismissed for non-joinder of parties. The issue framed on these pleadings was—"Is the suit bad for defect of parties?" The first Court held on the evidence that a widow of the mortgagor named Alimannessa and a daughter had not been brought on the record and concluded that as all the representatives of the mortgagor were not parties, the suit could not be maintained. On appeal the same view was held and the appeal dismissed, the learned Judges (Mookerjee and Fletcher, JJ.) holding that the Plaintiffs were at least entitled to a decree for a proportionate share of the mortgage money as against the Defendants who were on the record. The same view was adopted in the case of *Shaha Saheb v. Sadaship Supdu* (3). There the mortgagor who was a Mahomedan died

leaving as his heirs a widow, two daughters and a brother. After his death the mortgagee sued the widow and the daughters for the sale of the mortgaged property but did not join the brother as a party to the suit. It was held that the entire suit ought not to fail, because of the defect of non-joinder, and that a decree could be made for the sale of the right, title and interest of the widow and daughters only. The facts of the present case are indistinguishable from those of the above two cases. The Allahabad High Court at one time consistently held that the omission of an heir of a deceased mortgagor would invalidate the whole suit. But the recent decisions of that Court seem to be in agreement with the view which has been adopted by this Court—*Sheotahal Ojha v. Sheodan Rai* (4) and *Sanwal Singh v. Ganesh Lal* (5). The only objection which can be urged against this view is that it violates the principle that a mortgage debt is indivisible. It has been held, however, that in special circumstances a mortgage debt can be split up. See the case of *Hari Kissen Bhagat v. Veliat Hossein* (6).

In the view of the law which we have taken we think that this appeal ought to succeed partially.

In some cases it has been held that every part or item of the property mortgaged is liable for the whole mortgage debt, and on the strength of the case of *Sanwal Singh v. Ganesh Lal* (5) it is argued that whatever money may be found due to the Plaintiff from the first Defendant ought to be declared as a charge on the entire property mortgaged. We are not prepared to accept the view

(4) I. L. R. 28 All. 174 (F. B.) (1905).

(5) I. L. R. 35 All. 441 (1913).

(6) I. L. R. 30 Cal. 755: s. c. 7 C. W. N. 723 (1903).

(2) 25 C. W. N. 594 (1920).

(3) I. L. R. 43 Bom. 575 (1918).

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that has been expressed in the Allahabad case and we think that we should adopt the course taken in the case of *Har Chandra Roy v. Mahumed Husein* (2).

The result, therefore, is that the decrees of the Courts below are set aside and the case remanded to the trial Court in order that that Court may make a mortgage decree in favour of the Plaintiff against Defendant No. 1 proportionate to the share of that Defendant in the mortgaged properties at the date of the suit.

The Plaintiff is entitled to her costs of this appeal. The costs of the lower Appellate Court will be borne by each party, and the costs of the Court of first instance will be at the discretion of that Court.

GRAHAM, J.—I agree.

S. N. B.

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 236 OF 1924.

WALMSLEY, J.
MUKERJI, J.
1924,
Heard, 1 and
5, August.
Judgment,
18, August.

KHIRODE KUMAR •
MUKERJI, Appellant,
v.
KING-EMPEROR.

Jury—Verdict of guilty on charge of criminal breach of trust without being able to ascertain the amount embezzled and recommending lightest punishment on that ground—Conviction on such verdict, legality of—Criminal Procedure Code (Act V of 1898), sec. 322 (2)—Effect of the amendment—Sec. 303 (1)—Duty of Judge to put questions to jury to ascertain the scope and import of verdict—Indian Penal Code (Act XLV of 1860), sec. 408—Criminal breach of trust by clerk or servant—Elements constituting the offence—Necessity of definite finding of a definite sum embezzled.

Where on a charge of criminal breach of trust under sec. 408, I. P. C., the jury returned a verdict of guilty but recom-

mended the lightest punishment on the ground that the amount misappropriated was much less than that stated in the charge and the Sessions Judge accepting the verdict convicted the accused:

Held—That the conviction could not stand on such a verdict.

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must therefore be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction.

The verdict in question was not a simple verdict of guilty or not guilty on the whole matter covered by the charge but a special or qualified verdict to ascertain the exact scope and import of which it was the duty of the Judge to ask the jury such questions as were necessary under sec. 303 (1), Cr. P. C.

The object of the amendment of sec. 222 by the introduction of sub-sec. (2) was not to amend the Penal Code but merely to alter the procedural law so as to get rid of technical difficulties in framing a charge, viz., (1) where there was a running account and the prosecution were unable to put their hands on a specific item out of which the particular sum was embezzled or to which it was attributable and (2) where the amount said to have been embezzled was made up of many items, the joinder of which contravened the provisions of sec. 234, Cr. P. C.

This was an appeal preferred on the 15th May 1924 against the conviction under sec. 408, I. P. C., and sentence of three years' rigorous imprisonment passed by Mr. K. K. Sen, Additional Sessions

KHIRODE KUMAR MUKERJI v. KING-EMPEROR.

Judge of Khulna, agreeing with the unanimous verdict of the jury on the 6th March 1924.

The facts of the case will appear from the judgment.

Mr. K. N. Chaudhuri, Counsel and Babus Satindra Nath Mukherji and Kunja Behary Mukherji for the Appellant.

Babu Debendra Narain Bhattacharji for the Crown.

Babu Profulla Kamat Das for the Complainant.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—The Appellant Khirode Kumar Mukerji was tried by the Additional Sessions Judge of Khulna with the aid of a jury on a charge under sec. 408, I. P. C. The charge was to the effect that between Jaistha 1329 and Baisakh 1330 the accused committed criminal breach of trust in respect of a sum of Rs. 7,434. That figure was arrived at upon a calculation which is to be found set out in the learned Judge's charge to the jury. The total amount collected by the accused was said to be Rs. 16,290-14 as., consisting of 16 sums of money. The amount of Government revenue paid by the accused was Rs. 7,868-14 as. 9 p. Rs. 889-9 as. was sent by the accused to the proprietors and the accused was entitled to Rs. 407 as the stipulated amount of pay for the year. Deducting the last three items from the amount of collections the balance left was Rs. 7,125-6-3 p. To this was added Rs. 311 being the cash in hand at the close of the previous year and this gave a total of Rs. 7,436-6-3p.

The jury returned a unanimous verdict of guilty but recommended the lightest punishment consistent with justice as in their opinion the amount mis-

appropriated by the accused was much less than the amount stated in the charge. As to the amount embezzled they were not unanimous and they said they were not able to ascertain it definitely, but the majority of them were of opinion that it might be a thousand rupees or so out of the amount mentioned in the charge. The learned Judge agreed in the verdict. He, however, was of opinion that the amount embezzled was not a thousand rupees or so but nearly rupees five thousand. He accepted the verdict and convicting the Appellant under sec. 408, I. P. C., sentenced him to undergo rigorous imprisonment for three years. Hence the appeal.

The question is whether upon such a verdict the conviction can stand.

On behalf of the Crown reliance is placed upon the provisions of sec. 222, sub-sec. (2) of the Code of Criminal Procedure, as justifying a verdict of this nature. It is said that the law permits a charge being framed in respect of a general deficiency in accounts and even if the jury are unable to find what particular amount has been embezzled, if they are satisfied that there is a general deficiency, so long as the amount of the deficiency is a part of the amount stated in the charge, they may bring in a verdict of guilty and the Court is entitled to act upon the verdict. In support of this proposition reliance is placed on the case of *R. v. Lambert* (1).

Now, the object of the amendment made by the introduction of sub-sec. (2) to sec. 222, Cr. P. C., was "not to amend" the Penal Code, but merely to get rid of a technical difficulty in framing a formal document, viz., the charge." By this amendment the procedural law was altered to meet two difficulties. Under

(1) 2 Cox. C. C. 300 (1847).

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the law as it stood before, there was very great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specific item out of which the particular sum was embezzled or to which it was attributable. The other difficulty was what was experienced in the case of *Queen-Empress v. Purnotam Dass Morarjee* (2). In that case there was a charge of embezzlement of Rs. 9,168-6 as which might have been made up of many hundred items. Under sec. 234, Cr. P. C., it was not allowed to have more than three offences of the same kind, and so the charge could not legally stand. The law on these two points was altered and altered for the better. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Indian Penal Code.

As to the case of *R. v. Lambert* (1), it is no doubt an authority for the proposition that an indictment for embezzlement might be supported by proof of a general deficiency of moneys that ought to be forthcoming, without showing any particular sum received and not accounted for. There is on this point under the English law a conflict of judicial opinion, which perhaps it is not possible to reconcile [see *R. v. Grove* (3), *R. v. Moah* (4) and *R. v. King* (5) for the one view, and *R. v. Lloyd Jones* (6), *R. v. Chapman* (7) and *R. v. Wolstenholme* (8) for the

other]. The words of the statutes under which the above-mentioned cases were decided are widely different from those of the statutes with which we are concerned and they can have no application here. As Martin, B., observed in the case of *Reg. v. Moah* (4): "If there have been decisions of the Courts upon the statutes, we are bound by those decisions, but I protest against the idea that a number of cases decided years before upon another statute can be any guide to us in interpreting the particular statute before us."

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must therefore be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction. The verdict of the jury read in the light of their explanation suggests that they found that the accused had succeeded in accounting for the whole with the exception of about a thousand rupees.

The verdict so returned by the jury was not a simple verdict of guilty or not guilty on the whole matter covered by the charge but a special or qualified verdict to ascertain the exact scope and import of which it was the duty of the learned Judge to ask the jury such questions as were necessary. He should have endeavoured to ascertain how they arrived at the amount of "about a thousand rupees or so" which in their opinion the accused was guilty of having embezzled. His omission to put questions to the jury in this respect has deprived him of the oppor-

(1) 2 Cox. C. C. 309 (1847).

(2) 1 L. R. 24 Cal. 193 (1896).

(3) 7 C. & P. 635 (1837).

(4) 7 Cox. C. C. 60 (1856).

(5) 12 Cox. C. C. 73 (1871).

(6) 8 C. & P. 288 (1838).

(7) 1 C. & K. 119; 1 Cox. C. C. 47 (1843).

(8) 11 Cox. C. C. 313 (1869).

(4) 7 Cox. C. C. 60 (1856).

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tunity of finding out whether the said amount or any part of it was included within the figure which he himself arrived at, so as to determine whether he really agreed with the verdict or not. The omission has also created a difficulty which stands in the way of our deciding whether the verdict was a proper one or not; for we do not know upon what materials the verdict is founded or what it really means. Under sec. 303 (1), Cr., P. C., the Judge is always entitled to ask the jury such questions as are necessary to ascertain what their verdict is; and in a case like this it was his duty to question them.

In the view that I take of this matter I do not think it necessary to hear the appeal further. I would set aside the conviction and sentence passed upon the Appellant and direct that he be discharged. It will be open to the prosecution, should they so desire, to proceed afresh against the Appellant in respect of such gross sum or specific item or both as he may be charged with, in accordance with the provisions of the law.

The Appellant will be discharged from his bail.

WALMSLEY, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD ATKINSON.	VENKATA
LORD SHAW.	SUBHADRAYAMMA
LORD BLANESBURGH.	JAGAPATI GARU,
SIR JOHN EDGE.	Appellant,
MR. AMBER ALI.	v.
1924,	POOSAPATI
Heard, 10, 13, 14 and	VENKATAPATI RAJU
17, March.	GARU and ors.,
Judgment, 5, May.	Respondents.

Contract, validity of—Agreement to charge fruits of litigation with moneys advanced for prosecuting

it—Fruits derived from compromise, if bound—Champerty and maintenance, law of, if applicable in India—Money borrowed by trustee or beneficiary with trustee's concurrence to prosecute suit to preserve property—Lender's lien on same—Agreement, if relates to existing or non-existing property—Subsisting agreement, if binds property not existing at its date when it comes into existence—Contract, when terminates upon breach—Ambiguous contract, construction of—Reference to surrounding circumstances.

R claimed to be the owner in absolute vested interest of a zemindari, subject to the life interest of C. C having set up title as adopted son of the former owner—which if established would exclude R—R instituted a suit for establishment of his claim against C, but being in want of money to finance the litigation settled the property in suit in trust on P in favour of himself and two other beneficiaries with authority to manage the property and conduct litigations and manage them in such a way as he might think fit for the preservation of the properties. R and P with the concurrence of the other beneficiaries subsequently entered into an agreement with the Rajah of T, under which the Rajah offered to advance money for the prosecution of the suit on terms and conditions agreed to by the former, of which the following are material:—

“(a) We shall not compromise with the Defendant or file razinamah or withdrawal without your consent.

“(b) It is agreed that if Mr. K. A., Vakil, advises us that it would be better for us to compromise we should agree to it and compromise or withdraw the suit.

“(c) Moreover, out of the moveable and immoveable properties that may be obtained by such compromise, etc., we shall pay to you the principal money advanced by you with interest at Re. 1 per cent. per mensem from the respective dates.”

After about Rs. 93,000 had been so ad-

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vanced by the Rajah. R failed to furnish accounts and vouchers demanded by the Rajah under the terms of the agreement, whereupon the Rajah without repudiating the agreement (as he might have done) stopped advancing further sums. R treated the agreement as terminated and subsequently compromised the suit, in result of which he and his co-beneficiaries received 2½ lacs of rupees:

Held—That the agreement was a subsisting one, since a party to a contract cannot put an end to it by committing a breach of it, the other party not having repudiated it as he might have done.

That the agreement was perfectly legal, being one by the Plaintiffs to the suit to assign to the Rajah parts of the fruits they might acquire in an action at law and the law of champerty or maintenance not being applicable in India.

That there is no distinction on this point between the fruits of an action which the Plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour.

GLEGG v. BROMLEY (1) referred to.

That the agreement related to existing and not non-existing things and was entirely different in its nature and character from one assigning a mere expectancy.

That even if the money given to the Plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence at the date of the compromise, decree, the agreement, being a subsisting one, attached to the things so coming into existence subsequently.

That upon a true construction of the agreement the consent of the Rajah or the Vakil was a condition precedent only when it was possible for them to give it

and not when that became impossible, and the fact that in the circumstances the Rajah did not consent to the compromise did not prevent the agreement from attaching to the money received under it.

In the construction of written or printed documents, it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.

Regarding the provisions of the trust deed, held, that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it or some of it to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, and in the event of the suit being successful would have been entitled to a lien on the property gained for the sum advanced. If the trustee, not having money of his own, available, borrowed money from a third party for the said purposes and actually used it to promote those purposes, then, in case the litigations were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. Also, if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit from a third party for the above purposes and so applied it, then, in the event of the litigation being successful, the person who advanced the money would be equally entitled, standing in the shoes of the settlor, to a lien on the property preserved for the trust by the outlay.

This was an appeal from a decree of the High Court at Madras, dated the 21st

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March 1918, which reversed a decree of the Subordinate Judge of Vizagapatam, dated the 6th December 1915.

The Appellant's claim in the present litigation arose out of two agreements made by the late Rajah of Tuni with Ramachandraraju who was a relation of the late Maharajah of Vizianagram, and claimed to be his heir.

Ramachandraraju instituted suit No. 18 of 1903 in order to substantiate his title to the Vizianagram estates, but prior thereto he executed a trust deed, settling the property to which he claimed to be entitled as heir of the deceased Maharajah, in trust for himself and Respondents Nos. 5 and 6 to this appeal.

The 1st Respondent was the original trustee by this deed.

The two agreements mentioned above were dated respectively the 22nd May 1906 and 14th August 1907. Both these agreements were concluded in order to enable the Respondents to prosecute their claim to the Vizianagram estates and provided that the Rajah of Tuni should advance funds for the litigation and receive a portion of the estate on its successful termination.

In pursuance of these agreements money was advanced and the litigation concluded in a compromise decree, dated the 12th March 1913, whereby a substantial sum was paid to the Respondents.

The Appellant was the widow of the Rajah of Tuni and she instituted the present suit to recover the sum of Rs. 1,68,629 and to obtain a declaration of charge on the money received by the Respondents under the compromise decree. The Subordinate Judge decreed the suit in the Appellant's favour and gave her the declaration asked for. The High Court on appeal reversed the decree of

the Subordinate Judge and dismissed the suit with costs.

Messrs. Upjohn, K. C., DeGruyther, K. C. and Nargisnham for the Appellant.—Under the Trust Deed of 1903 the trustee had wide powers of management and was empowered to do anything he "may think fit for the preservation of the properties." His powers would therefore include the right to obtain money to finance the litigation which should establish the settlor's title.

Sec. 36, Trusts Act II of 1882.

When a trustee has power to make advances and by agreement a third person makes those advances, that third person is entitled to be indemnified. The Appellant is accordingly entitled to a lien on the trust funds for the amount of the advances.

Re Johnson : Shearman v. Robinson (2), *Todd v. Moorhouse* (3) and *Leslie v. French* (4).

On the evidence the Subordinate Judge was right in his finding, contrary to that of the High Court, that the Appellant's husband did not break the contract. The Rajah was not furnished with vouchers showing how the money was disbursed and in the absence of such vouchers he was justified in refusing further advances. The breach of the 1907 agreement was made by the settlor but the Rajah of Tuni did not treat that breach as a repudiation of the contract, and the agreement of August 1907 is still binding.

Mr. Kenworthy Brown for the Respondents Nos. 1, 5, and 6.—In the present case there was no application to the trustee for permission nor did the trustee empower the settlor to charge the property, a factor which distinguishes it from

(2) L. R. 15 Ch. Div. 548, 552, 553 (1880).

(3) L. R. 19 Eq. 69 (1874).

(4) 23 Ch. Div. 552 (1883).

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Todd v. Moorhouse (3) and *Leslie v. French* (4).

The Appellant has no right to a lien. The agreement was not an agreement for a loan but a mere speculation. The parties embarked on a co-adventure to get something out of the Vizianagram estate.

A vendor has no lien unless he performs his part of the agreement.

Bhobosoondree Dassce v. Issur Chunder Dutt (5).

There was a breach of the agreement by the Rajah of Tuni in failing to provide funds for the litigation. That breach deprived the Respondent of his chance of getting the whole property and it must similarly deprive the Appellant of any share of the money obtained by the compromise.

The Appellant can have a lien only by virtue of cl. 12 of the agreement of August 1907, i.e., by equitable assignment. A breach has been committed by the prospective assignee prior to the coming into existence of the fund and that breach destroys his claim.

[LORD BLANESBURGH referred to *Per-forming Rights Society v. London Theatre of Varieties* (6).]

If this was an agreement for loan it was purely executory on both sides and rested on contract only.

If by his own breach the Appellant is prevented from obtaining a decree for specific performance he is also prevented from obtaining any benefit from the equitable assignment.

Wallis v. Smith (7).

On the construction of the contract the Appellant had no right to repayment of

his advances. He was only entitled to a share in the property, if recovered.

Mr. Upjohn, K. C., in reply.—Even if there has been a breach of the 1907 agreement the Appellant is entitled to recover under the 1906 agreement which still remained in force.

[LORD ATKINSON.—That is a new point which we cannot consider unless we have before us all the facts that would have been raised had the point been raised before the lower Courts.

Connecticut Fire Insurance Co. v. Kavanagh (8) and *The "Tasmania"* (9).

The evidence of the parties could throw light on this and we do not possess that evidence.]

Even assuming a breach of the 1907 agreement by the Appellant she is still entitled to a decree for the amount of her husband's advances and if entitled to such a decree she is entitled to it under the 1907 agreement as a charge on the funds of the compromise.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—The suit out of which this appeal has arisen was instituted in the Court of the Subordinate Judge of Vizagapatam on the 4th April 1913 by the Plaintiff—the present Appellant—the widow of the Rajah of Tuni, deceased, who died in the year 1911, against the six Respondents named to recover the sum of Rs. 1,68,629 and to obtain a declaration that this sum was well charged upon a certain sum of money received by the Respondents, under a certain decree, dated the 12th March 1913, styled a compromise decree, made in a suit No. 18 of 1903, and also for payment of three thirty-seconds of what remained of the

(3) L. R. 19 Eq. 69 (1874).

(4) 23 Ch. Div. 552 (1883).

(5) 11 B. L. R. 36; 18 W. R. 140 (P. C.) (1872).

(6) [1924] A. C. 1.

(7) 21 Ch. Div. 243 (1882).

(8) L. R. [1892] A. C. 473, 480.

(9) L. R. [1920] A. C. 263.

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sum received under such compromise after payment of the sum of Rs. 1,68,629. The Subordinate Judge, on the 6th December 1915, made a decree in favour of the Appellant, the Plaintiff in the suit, for the sum of Rs. 1,91,058, and also made the declaration asked for to the effect that this sum was well charged on the sum paid to the Respondents in pursuance of the compromise decree. The learned Subordinate Judge decided against the Appellant on the other matters claimed, and no appeal has been taken by her against this decree on these latter matters. An appeal was, however, taken by the Defendants to the High Court of Judicature at Madras. That Court pronounced a decree, dated the 21st March 1918, reversing the decree of the Subordinate Judge and dismissing the Appellant's suit with costs. From this latter decree, the Appellant has appealed to this Board.

The original suit No. 18 of 1903 was decided by the first Court against the Respondents Nos. 2 to 4 in 1908, and they preferred an appeal to the High Court, which was numbered Appeal No. 114 of 1909.

In 1913 a compromise petition was filed in the above Appeal No. 114 of 1909, in the High Court, and on the 12th March 1913, a decree was passed in accordance with the compromise by which the 1st Respondent in this appeal was to receive a sum of Rs. 2,50,000 on behalf of and for the benefit of all the Respondents, the 2nd Respondent was to receive an annuity of Rs. 2,400, Respondents Nos. 3 and 4 were to receive an annuity of Rs. 866-10-8 each, and the 1st Respondent was to get a house for and on behalf of all the Respondents.

Since the admission of this appeal the Appellant and Respondents Nos. 3 and 4 have entered into a compromise which has

been recorded, and by an Order of His Majesty in Council leave was given to withdraw the appeal as against these Respondents Nos. 3 and 4 and to proceed as against the other Respondents on the terms, that even if the Appellant should be successful in this appeal, costs in the Courts below should not be claimed by her against the Respondents Nos. 3 and 4. This appeal is accordingly now proceeded with against Respondents Nos. 1, 5 and 6 alone.

On the hearing of the appeal before this Board, Counsel on behalf of the Appellant abandoned all claim for a decree against any of the Respondents of a personal nature, and also abandoned all claim to a decree for payment of three thirty-seconds of the sum received on the compromise, and has confined the relief he asks for to having it declared that a sum of Rs. 92,000 with the accruing interest thereon, at the rate specified, is well charged upon the sum of 2½ lakhs received by the Respondents in the compromise. Though this is the sole relief asked for, the facts upon which the Appellant depends are of a somewhat complicated nature, and must unavoidably be unravelled at some length in order to be adequately weighed and considered and the correct conclusion drawn from them. The Maharajah of Vizianagram, who owned an estate of that name, died on the 22nd May 1897, having made a Will by which he devised this estate to one Raja Chitti Babu for life. This devisee may for convenience sake be styled the tenant for life, as he would be in England, though that is not, in strictness, according to Indian law, his true position. The testator made no disposition of the absolute interest in his estate. As to that he died intestate. Ramashandraraju, Respondent No. 2, claimed to be the heir of the deceased Maharajah, as his nearest

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agnate, and by the joint operation of the Hindu law and the Maharajah's Will claimed to be entitled to the absolute interest on the aforesaid estate subject to the life interest of the so-called tenant for life. He was confronted, however, with this difficulty in asserting his claim, namely, the fact that the mother of the deceased Maharajah contended falsely, as Ramachandraraju alleged, that she had adopted the tenant for life as the son of her deceased son, and that this adoption defeated Ramachandraraju's title, as it undoubtedly would have done, if the adoption was validly made. In this state of things Ramachandraraju resolved to assert his title, and thus, to test in a Court of law the validity of the alleged adoption of the tenant for life.

He was, however, a poor man. He apparently realised that the suit would be an expensive one, and that it would be absolutely necessary for him to induce some persons to advance to him the money necessary and sufficient to prosecute the suit. To effect this purpose he took a step, the object of which is not very apparent and the result of which has undoubtedly proved embarrassing. The day before he instituted the suit to establish his title, namely, on the 12th July 1903, he executed a deed of trust, by which, after reciting the death of the Maharajah, the making of his Will, the devise to the tenant for life, the pretended adoption by the testator's mother, and alleging that it was necessary for him to take proceedings, he appointed Poosapati Venkatapati Raju Garu, (hereinafter referred to as the original trustee), trustee of all the property in which he, Ramachandraraju claimed to have a vested interest in remainder as heir of the deceased Maharajah in trust to administer the fifteen-sixteenths of the same for his, the settlor's, own benefit,

and one-sixteenth of the same for the benefit of two persons named, namely, Respondents Nos. 5 and 6 in the present suit.

There is nothing to show that these two latter beneficiaries were in any way connected with the settlor or had any claim upon his bounty. The provision thus made for them was, as far as can be seen, a voluntary gratuitous gift. It is plain that the property thus put in trust by this deed was all the property the settlor would have been entitled to as heir of the deceased Maharajah had there been no adoption of the tenant for life, or had that adoption been invalid. Each one of these three beneficiaries, the settlor and Respondents Nos. 5 and 6, had interests in the litigation identical in character though not in equal value, in this sense that each would gain his share if the suit should succeed, and each would lose everything if it should fail. In addition, powers were, by the trust deed, conferred upon the trustee and upon the settlor respectively, which were both wide and important. The words conferring them run thus :—

"Therefore you (i.e., the Trustee) should not only manage the trust property subject to the arrangements I may make regarding the consideration for your trouble, etc., and other matters, but also full authority is given you to conduct suits, etc., either jointly with me or separately, and to manage it in such a way as you may think fit for the preservation of the properties."

Having regard to this last provision it is clearly the view of their Lordships that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it or some of it to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that

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the alleged adoption never took place or was invalid and that therefore the settlor was the lawful heir of the deceased Maharajah, and in the event of that suit being successful would have been entitled to a lien on the property gained for the sum advanced. And their Lordships further think that if the trustee, not having money of his own available, borrowed money from a third party for the purposes above mentioned and actually used it to promote those purposes, then, in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. Their Lordships are further of opinion that if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit, from a third party for the purposes above mentioned and so applied it, then, in the event of the litigation being successful, the person who advanced the money would be equally entitled standing in the shoes of the settlor to a lien on the property preserved for the trust by his outlay.

The contemplated suit was, on the 13th July 1903, commenced in the District Court of Vizianagram. Its number in that Court was O. S. No. 18 of 1903. The Plaintiffs in it were the original trustee and the three beneficiaries, namely, the settlor as to fifteen-sixteenths of the trust property and Respondents Nos. 5 and 6 as to one-sixteenth of it. These three beneficiaries were the absolute owners in equity of the trust estate if the adoption proved invalid. The relief prayed for was (1) that it might be declared that the settlor, as the nearest heir of the late Maharajah, was entitled to the vested remainder in the estate of Vizianagram after the demise of the present zemindar

(*i.e.*, the tenant for life). The settlor and these two beneficiaries were therefore in the position of joint adventurers in this litigation, in which success would bring much gain for each, and failure absolute and complete loss to each. The efforts these adventurers made to obtain the necessary funds to prosecute the suit, of which they themselves were entirely destitute and were unable to supply, are detailed by the witness Lakshmi, the private secretary of the Rajah of Tuni, from whom the necessary funds were ultimately obtained. The evidence of this witness, which, save as to one matter to be mentioned presently, is practically uncontradicted, is of the utmost importance. He said a body of people came to have an interview with the Rajah of Tuni, his master. That the original trustee, the settlor, and two beneficiaries, Respondents Nos. 5 and 6, and the two sons of the settlor, were members of this body, that they asked the Rajah of Tuni to help them in the suit O. S. No. 18, 1903, in the Vizagapatam District Court, that they represented that other persons who had promised to assist them had failed them, that a vakil then named (since deceased) had told them that the settlor had a good case, represented that unless the Rajah of Tuni advanced money to finance the suit the settlor would lose it, and that if he succeeded in the suit the Rajah of Tuni would gain as well as the whole Kshatriya community. That the original trustee and Respondents Nos. 5 and 6 joined in making these requests, they were asked to sign the (*sic*) agreement. The trustee said the second Defendant (*i.e.*, settlor) was a poor man, that he was Plaintiff in the suit, that they were conducting the litigation for him; that fearing that he might collude with the Vizianagram estate, they got the trust deed, and

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so (i.e., in consequence) the settlor only must enter into the agreement and that a draft of Ex. A (i.e., the agreement of the 22nd May 1906) was produced, but the witness does not know who drew it. These two beneficiaries, Respondents Nos. 5 and 6 in the present suit, filed, on the 21st July 1913, two written statements. They are identical in terms. They both deny that they had anything to do with the negotiations which lead up to the agreement of the 22nd May 1906, or with those which lead up to that of the 14th August 1907. As to the first of these negotiations, they do not specifically deny a single statement deposed by the witness Lakshmi, who knew them all, the original trustee, the settlor, his two sons, Nos. 3 and 4, as well as Nos. 5 and 6 and said they all came to his master in a body.

Nos. 5 and 6 do not assert they did not interview the Rajah of Tuni on the occasion named. They do not deny that advances of money were prayed for from the Rajah and obtained, nor explain how it was that as the advance of money to conduct the suit just instituted would, if successful, have secured to them one-sixteenth of the trust estate, they took no part in the negotiations to obtain the necessary money to finance their own suit. They were not examined as witnesses in the suit out of which this appeal has arisen. They were important witnesses if their allegations were true. It appears to their Lordships that there is only one rational explanation of their absence from the witness chair, namely, their well-grounded fear of cross-examination. If their statements be true, the evidence of Lakshmi must be a wicked and deliberate concoction. Their Lordships do not think it is that. They think it is a truthful account of what took place in his presence; they accept it and rely

upon it, while they look upon the statement of Nos. 5 and 6 in reference to the negotiations, out of which the agreement of the 22nd May 1906 sprang, as wholly unreliable.

Upon this supposition it is well to consider what was in reality the true nature and effect of the arrangement come to by all the parties concerned on the occasion of this visit to the Rajah of Tuni. The suit recently started dealt with the whole trust property. The negotiation to have such a suit financed necessarily dealt with the whole trust property. The settlor could, *prima facie*, by signing the agreement for himself alone only bind his own interest in the trust property. That would not have sufficed, and therefore when, of the three beneficiaries only one signed the agreement designed to affect the whole trust property and by its very terms did so, this one must, in the circumstances already detailed have signed it not only for himself, in his own right, but as agent, accredited in that behalf, of his co-beneficiaries. In all the transactions which succeeded, the advancing of the money, the accounting for the money, and the direction of the steps to be taken in the suit, the two beneficiaries do not appear to have taken any independent or active part. From May 1906, onward, the settlor was regarded as the manager, the *dominus litis* in the whole business. He was never removed from his position, his authority to act as the agent of his co-beneficiaries never questioned or withdrawn. These two co-beneficiaries of the settlor make, in their written statements, the case that they are not parties to the agreement of the 22nd May 1906 or that of the 14th August 1907, and are therefore not bound by either. If by this they mean that they have not each by his own hand signed and thus executed them, it is

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true; but if it means that those agreements were not signed by the settlor as the accredited agent of his co-beneficiaries and on their behalf, it is in their Lordships' view quite untrue. As this point was never made until over Rs. 100,000 had been advanced by the Rajah to finance the suit, in which they were co-Plaintiffs, it is in addition dishonest.

The original trustee, Poosapati Venkatapati Raju, died during the progress of this suit No. 18, 1903, and his nephew, the present Respondent No. 1, was by a deed, dated the 17th December 1906, appointed a trustee in his place, and accordingly added as a Plaintiff in that suit.

It was contended by Mr. Upjohn on behalf of the Appellant that the agreement of the 14th August 1907, was not a substitution for the earlier agreement of the 22nd May 1906, but a supplement to the latter. It is therefore necessary to examine the provisions of both to determine whether the earlier agreement is superseded by the second or only added to by it. The parties to the first are the Rajah of Tuni of the first part and the settlor and his two sons, Respondents Nos. 3 and 4, of the second part. The word "we" is used throughout this agreement as well as throughout that of the 14th August 1907, to indicate, it appears to their Lordships, all the Plaintiffs in the suit, not merely the settlor and his two sons, the executing parties to the agreement in each case. The Rajah by the earlier agreement undertook to advance at most Rs. 1,50,000 to finance the suit started by the settlor, O. S. No. 18, 1903, in consideration for which, if the suit should be successful, three-sixteenths of the moveable and immoveable property in dispute should by sale deed be conveyed to him, the Rajah. Should the whole of this sum not be needed for, or not be actually applied to financing the

suit in the lower Court, the unexpended balance should be deposited with a person interested in both the Rajah and the settlor to be spent by the latter in financing the suit in the Appellate Court on appeal from the District Court.

Then follows a paragraph, No. 3, clearly providing that the Rajah was not to be bound to advance the large sum of one lakh for the above-mentioned purpose, but that if he did not want to spend the money claimed to conduct the suit in all the three Courts, he should only be bound to advance Rs. 50,000 for the prosecution of the suit in the original Court and was not to be bound to spend anything more than that. A further provision then followed to the effect that though the Rajah might only finance the suit in the original Court and should refuse to make further advances, and they (*i.e.*, the Plaintiffs) should be obliged to get financial help elsewhere and conduct the appeals themselves, they should, as soon as they should get possession sell to the Rajah by means of a sale deed, only one-third of the property agreed to be sold to him (*i.e.*, one-third of three-sixteenths), namely, one-sixteenth of the property recovered by the Rajah's conducting the suit in all the Courts and would put the Rajah in possession of the same. It is then further provided that should the Rajah not like to take this sale deed they and their heirs should be bound to pay the Rajah the amount spent in the lower Court with interest at 2 per cent. per mensem from the date of the judgment of that Court, on the security of the property proposed to be sold to him. It was evidently contemplated by the Plaintiffs in the suit and the parties to the agreement, that the suit might be compromised, while it was in the Appellate Court, as in fact it subsequently was, and accordingly elaborate provisions

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are introduced into the agreement dealing with that event and purporting to fix and determine what the rights of the respective parties should be, if the contemplated compromise should take place.

The first provision is to the effect, that should this compromise take place while the Rajah was spending money financing the suit, then *prima facie* the Plaintiffs should pay to him the sums so spent by him with interest at 1 per cent. per mensem from the respective dates at which the said sums were spent. It is then provided that these sums should be derived out of the moveable and immoveable property obtained by the Plaintiffs from the compromise, and further that out of the remnant which should remain of the moveable and immoveable property after deducting the principal and interest so paid, the parties designated should be bound to give the Rajah a three thirty-second share. Here are introduced some immaterial and, for the purpose of the matter criticised, irrelevant provisions, and then follow the clauses, which it may be best to quote, *in extenso* :—

"It is agreed that we should not compromise or withdraw this suit without your consent; that, in case you think that, under the then existing circumstances, it is better to compromise, we should consent to it; that, when we represent to you that it is better to compromise, you should consent to it; and that out of the amount that may be got in the said compromise we should pay you the amount advanced by you with interest at 1 per cent. per mensem from the respective dates of advance of the several sums and also give you three thirty-seconds of the property remaining after deducting the aforesaid." It is further agreed that, soon after the suit is disposed of, we should execute documents in your favour as per all the above-mentioned terms and that, as soon as we get possession of the property, we should put you in possession of the pro-

perty as per those documents. We and our heirs are bound by the aforesaid conditions and we execute this agreement with our free consent."

The Rajah then made the advances necessary for financing this suit. In the agreement of the 14th August 1907, it is stated he had advanced sums up to Rs. 71,500 in all, yet it is contended by Respondents Nos. 5 and 6 in their written statements that they are not liable for, nor is their share of any property liable to be charged with, any portion of this sum given to their own agent to finance their own suit, which it is inconceivable, they did not know had been so advanced and applied. If the agreement of the 14th August 1907 only supplemented but did not supersede the earlier one of May 1906, it may well be that under the latter the Rajah would have been entitled, in the event of the suit being successful, to a lien on the property recovered in the successful suit. This point does not appear to have been specifically raised in this appeal and need not be dealt with. The sum of Rs. 71,500 so advanced was found to be insufficient for the prosecution of the suit O. S. No. 18 of 1903, and a second agreement, dated the 14th August 1907, between the settlor and his two sons, Respondents Nos. 3 and 4 and the Rajah of Tuni was entered into by which the Rajah undertook to advance a sum not exceeding Rs. 200,000 for its further prosecution.

This agreement contained many special provisions with which it is necessary to deal at some considerable length for reasons which will presently appear. In it after reciting at considerable length some of the steps which had already been taken in the suit, the insufficiency of the advances and the kindness of the Rajah in undertaking to advance two lakhs of rupees including the sum of Rs. 71,500 which he

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had already, under the previous agreement, advanced, it is provided that as soon as the financed suit was decided in favour of the Plaintiffs in that suit, they, the Plaintiffs, would in addition to the three-sixteenths portion of the property recovered in the suit already agreed to be sold to him, sell to him another one-sixteenth, making together one-quarter of that property, and also a garden and a strip of quarry land therein described. It is then further provided that in respect of the monies portion of these two lakhs, advanced from time to time, detailed receipts of the vakils' day fees, etc., printing, stamps, house rents should be furnished to him, the Rajah, that is, as regards the whole of the balance accounts of receipts and expenses it should be furnished to him for the sums so ascertained, and for which sum receipts should be given by the settlor, and that with respect to the money that might again be required the Rajah should, at the request of the settlor, advance the money, looking into accounts and getting detailed vouchers for money spent, and then settle accounts without giving room for any disputes.

By the figures mentioned in para. 2 of the agreement it is shown that a sum of Rs. 87,500 was then due to the Rajah, and it is again provided that out of the balance remaining after deducting this sum, the Plaintiffs should on the receipt of the settlor receive the sums required thereafter for the expenses in the original Court on furnishing to the Rajah as above stated accounts of receipts and disbursements of the money already received by the settlor, and further that the Rajah, on the rendering to him of the debtor and credit accounts as stated, would within a week of his being applied to for money required for the suit pay the same.

In paragraph three of the agreement

there are further provisions for the advance of money to finance the suit in the Appellate Court on accounts being rendered in the manner thereinbefore described. There is then a provision that if a decree in the suit should be given in favour of the Plaintiffs one-quarter of the property for which the decree would be passed should by sale deed be conveyed to the Rajah.

And then come the three paragraphs dealing with a compromise of the suit upon the construction of which the High Court have mainly, if not entirely, founded the judgment, and decree appealed from. These paragraphs run thus—

"10. We shall not compromise with the Defendant, or file razinamah or withdrawal without your consent.

"11. It is agreed that, if Mr. Krishna-swami Ayyar, High Court Vakil, who is working on our behalf in this suit advises us from the then existing circumstances of this suit, that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.

"12. Moreover, out of the moveable and immoveable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at Re. 1-0-0 (one rupee) per cent. per mensem from the respective dates, and out of the moveable and immoveable properties that remain after so giving away (to you) we shall at once execute and give you a proper sale-deed and place in your possession three thirty-seconds of a share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail. This agreement is executed with our whole-hearted consent."

(Signed)

POOSAPATI RAMACHANDRA RAJU.

POOSAPATI RAMA RAJU.

POOSAPATI BUCHI APPALA RAJU *alias*
ACHARYA RAJU.

This agreement and the previous one of 1906 are, in the main, constructed on

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similar lines. The maximum sum to be advanced under the first was Rs. 1,50,000 and that under the second Rs. 2,00,000, but the distinguishing feature of the second is that strict accounts of the sums advanced and spent are to be kept, receipts given for those sums when received, all disbursements duly vouched, advances of further sums required and asked are only to be made when those receipts and vouchers have been given. There is nothing whatever to indicate that the entire trust property as distinct from the settlor's share of it is not dealt with. Nothing to suggest that the authority already conferred upon the settlor by the negotiation out of which the first agreement to act in the matter of obtaining funds to finance the pending action had been either limited or revoked. In the absence of any provision indicating that result it must, in their Lordships' view, be held that this authority was continued. Death has been very busy with the chief actors in this business. Krishnaswami, the vakil mentioned in the attestation clause, died in the year 1911, as did also the Rajah of Tuni who is succeeded and represented by his widow. The settlor died immediately after the forwarding of the appeal to this Board and he is succeeded by his two sons. The widow, according to her counsel, does not claim that the sum of Rs. 92,000 due to her is a debt due on a loan. Neither does she claim to get specific performance of any contract giving her any property obtained by the compromise. She merely claims a lien on the sum of Rs. 2,50,000 paid under the compromise, for the sum of Rs. 92,000 for principal with interest on the sum she and her husband have advanced to finance the suit. This amount is admitted to be due. The Rajah of Tuni, seeing from such accounts as were furnished to him

that very large sums, as he thought extraordinarily, large sums, had been paid to two vakils engaged for the Plaintiffs in the suit No. 18 of 1903, objected to those items, and contended that these vakils had promised to act gratuitously, and that the sum paid should be recovered by action at law. He was proved to be wrong in this. It was shown that these vakils had not undertaken to work for nothing, but in addition to this he insisted that these alleged disbursements should, like every other disbursement, be vouched. In making this demand, he was, in their Lordships' view, perfectly justified by the terms of the agreement of 1907.

The Dewan of the Rajah of Tuni wrote to the settlor a letter dated the 19th January 1908, stating that from the last credit and debit account sent by the latter on the 6th instant and from the like accounts sent earlier, it was seen that a sum of Rs. 10,450 was entered as day fees to Mr. R. Ry. Bhupatiraju Raju and another sum of Rs. 2,165 was entered as fees to his brother contrary to the original arrangement, and that this sum should be recovered and expended for the future costs of the suit. It is then added: "In your credit and debit accounts you have not given details regarding some items. I shall write a letter soon about them. As soon as further money is required I shall send it as if this account of credits and debits had been settled." On the 28th January 1908, the Rajah writes by this same Dewan the promised letter to the settlor. It deals with numerous items of the debit and credit accounts furnished by the latter, covering the period from May 1906 to January 1907, and dealing with an expenditure of Rs. 49,017-10-7, including a sum of Rs. 85,000 entered as given for pleaders' fees and lodging expenses, house rents, typing charges, costs of

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stamps, amounts deposited in Court, interest said to have been paid by the settlor, expenses of clerks, &c. After this enumeration the following passages are to be found in the letter :—" You have not, as per your agreement, yet sent the receipts and vouchers in token of the said sum having been paid to and received by the Madras vakils (already named). Please send the receipts and vouchers at once. You have also not given details regarding the amounts debited under lodging expenses and other sundry expenses, salaries, stamps, typing charges and rents. Please write details as to what period they were paid for and for what items they were paid and to whom they were paid."

A number of items including the vakils' fees appearing in the second credit and debit account for the period from January to August 1907, are specifically mentioned, and it is expressly stated that the settlor has not sent receipts and vouchers from the persons to whom the sums mentioned are in the accounts stated to have been paid, and that unless the settlor sends these receipts and vouchers it is not possible for the Rajah of Tuni to settle the settlor's account of credits and debits, and that, moreover, he has not given details of the sums taken credit for. A number of small items are then dealt with and the settlor is informed that unless he furnishes details of these sums and receipts for them it is not possible to include them in the credit and debit account and to settle that account. The accounts covering the period from August 1907 to the end of December of that year including credits and debits for a sum of Rs. 36,141-0-8 are then dealt with.

Credit is taken in this account for a sum of Rs. 27,000 stated to have been paid to the vakils already named. It is complained that vouchers are not sent for

these alleged payments. The same applies to many named sums for which no details or vouchers have been given. Then came the following passages :—

" Therefore, not only should you immediately send us the receipts and vouchers for vakils' fees and other items in respect of the three accounts of credits and debits, but also you should immediately furnish us with details for the items which bear no details. Though we had often requested your officials to furnish us with details, vouchers and receipts for the sums debited and though they promised to do so they have not as yet sent the same.

" Though we had sent monies from time to time owing to confidence in you and on account of the urgent telegrams sent by you and your men for money stating that the suit will be spoiled, without your furnishing us then and there full particulars for the items in your credit and debit accounts and without sending us the receipts and vouchers for the several items, you have not sent us up to date proper explanation for the items of credit and debit. This is not proper."

These demands made by the Rajah through his Dewan are not extravagant or unreasonable in their nature. They are not only those which he was by the letter of his agreement of the 14th August 1907, entitled to make, but such as according to business methods and practices he would be entitled to make in any business transaction such as he had embarked upon.

On the same date, the 28th January 1908, a letter is written to the settlor on behalf of the Rajah of Tuni by apparently another Dewan referring to the credits taken for the sums paid to the two vakils, and winding up thus :—

" If, before you spend this money, you give proper particulars for such of the items as regards which no details were given or with regard to which there are disputes in the credit and debit accounts sent by you, and also send receipts and vouchers for the remaining items, namely, fees for Madras

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vakils, etc., we shall verify them, and if we find them correct and proper; we shall send money if any more money is still wanted for the purpose of this suit.

“Please to consider.”

On the 14th February 1908, the settlor replies to the Rajah's frequent demands for vouchers. In justice to the settlor the pregnant and important portions of this letter are set out, especially that portion of it dealing with his excuse or rather justification for not furnishing to the Rajah the vouchers demanded. After praising himself for the way he has conducted the litigation, and dwelling upon the difficulties he, the writer, had to encounter, he writes:—

“While such is the case and while not even a half of the amount agreed to be expended for the suit has yet been spent and while you are liable yet to pay the entire amount for the expenses of the suit (and though the arrangement is that you should not fail to spend the amount required for expenses in this Court, and though you are fully aware of the fact that, in the event of your failing to do so, the agreement would be cancelled, you have, without sending money when required by us, written this letter concocting false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and debit and receipts bearing my signature have been sent. You need not question about accounts settled already nor is there any necessity for it. The last explanation and credit and debit accounts have been already sent. Without questioning it then, you are questioning it now entertaining something in your mind. If you wish to know the details hereof, I have no objection. Everything is clear from the accounts already furnished. When credit and debit accounts have been sent under my signature and on my responsibility I do not see proper reasons for the transaction being stopped.”

This really means that no vouchers

should be required or are needed for any items of expenditure entered in the credits and debits accounts he has seen fit to forward. It does not appear to their Lordships that matters of business are ordinarily conducted with such *uberrima fides* in accounting parties; but however that may be it is not the manner in which, by the letter and spirit of the agreement of the 14th August 1907, the Rajah was entitled to have their business conducted and in which the settlor was to conduct it. The letter winds up thus:—

“If you do not send money I shall take it that the agreement has not been acted up to and make other arrangements and conduct the suit as far as possible. Therefore I have made this fact known to you.

“Please to consider.”

The vouchers demanded were in fact never sent to the Rajah of Tunj. This letter, in their Lordship's view, amounts to a refusal to send them, coupled with an intimation that if money be not sent, though they should not be furnished in the first instance, he, the settlor, would treat the contract of the 14th August 1907, as at an end and make other arrangements. The settlor was by the terms of this contract bound to send vouchers of his disbursements whether demanded by the Rajah or not. The course he adopted amounted to a distinct breach of that contract, a violation of the obligations it imposed upon him. On the 21st February 1908, the Rajah of Tunj replied to this letter of the 14th of that month. His reply contains the following passages:—

“We think that, having received so much money from us, you have, with some evil intention, written to us thus when the matter is about to terminate. According to the terms of the agreements you should furnish us with proper vouchers, receipts and accounts for the total sum of about one lakh and odd sent to

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you previously. By merely stating that you have written and given explanations already and that you have sent receipts to the effect that you have received the sums sent to you from time to time, you cannot be deemed to have acted according to the terms of the agreement. You have acted in violation of the terms of the agreement and the oral conditions and in an unbusinesslike way. We are even now ready to send to you future money for just and necessary expenses."

The Rajah of Tuni never was furnished with even these vouchers. Not having been furnished with them he did not advance any more money to the settlor. He was, in their Lordships' view, amply justified by the provision of the agreement of 1907 in taking that course. The settlor being bound to furnish these vouchers, the Rajah might, if he wished, have taken this refusal to do so as a repudiation by the settlor of his contract, and have elected to treat the contract as at an end, but he did not do so; on the contrary he states explicitly in this last letter that if the vouchers justifiably demanded were not sent and on examination found correct, he would not send any more money which might be needed for the conduct of the suit. The agreement of the 14th of August 1907 has not been put an end to, it still exists. It is hardly necessary to point out that a party to a contract can not put an end to it simply by committing a breach of it. The High Court had apparently supposed that this agreement no longer existed and were led into error thereby, since the Rajah never elected to treat the settlor's breach as a repudiation of the contract terminating it, as he might have done.

The only remaining point to be dealt with is the construction put at pages 299 and 300 of the record on the last three paragraphs of the agreement of the 14th

of August 1907. The judgment of the High Court runs thus:—

"The real difficulty arises from the use of the words 'moveable and immoveable properties obtained by such compromise' in cl. 12 of Exhibit B 1. In cl. 9 a right is given to a twelfth of the property in case the whole of the expenses for the litigation in the first Court is borne by the lender. The clause says: 'It has been agreed that you should without fail meet all the expenses incurred in the original Court.' Then comes cl. 10 which prohibits any compromise without the consent of the lender. Cl. 11 stipulates for an enforceable compromise in case Mr. Krishnaswami Ayyar gave his assent to it. Then follows the expression in cl. 12 which we have quoted. The words 'such compromise' can only refer to a compromise to which either the Plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Ayyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two causes. The argument that although a compromise may be otherwise brought about, it was open to the Plaintiff's husband to have accepted such a compromise because the provision for his assent and for Mr. Krishnaswami Ayyar's advice was for his benefit, does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan, in order that the lien may fasten upon the compromise amount, it must have relation to the two contingencies provided for in the agreement. The specific property or the identifiable property on which the lien is sought to be attached is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned vakil for the Respondent that the mere fact that only Rs. 93,000 out of the contemplated 2 lakhs was advanced would not derogate from the lien if it otherwise existed. . . . But as we pointed out, the identi-

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of the property is wanting as cl. 12 creates a charge only on property secured by a compromise effected in one of the two ways suggested in the previous clauses. In this view our conclusion is that on lien was created over the money given by the Plaintiff's husband. The theory that a lien on specific property would attach itself to the substituted property contemplates that the contract creating the original lien subsists. Granting for argument's sake that the lien on the compromise amount contemplated in cls. 10 and 11 will fasten itself upon the new compromise amount, the fact that before that compromise was affected, the parties had broken off relations would render this impossible."

The High Court treat the agreement embodied in paragraph 12 of the agreement of the 14th August 1907, as one of those agreements dealing with property which at the time the contract was made was non-existent, which might never come into existence, but which, when it did come into existence would be operated upon by the agreement made before it existed. Their Lordships are not at all convinced that is the true view to take of this agreement of 1907 which must be considered as a whole. The main purpose and objects of its provisions are to finance a suit brought to establish title to an existing thing, an estate extending over a large portion of the earth's surface.

The point in controversy was not the existence or non-existence of that thing, but which of two adverse claimants was entitled to a vested interest in it, subject to a life estate in one of them. The fruits of success in this action which would be gathered in by a decree would be this vested remainder. The fruit of it which would be gathered in by a compromise might be something different, but in essence the same. What the agreement really does is to provide that the fruit, may be either moveable

or immoveable property, shall be divided in certain shares between the parties to the agreement. The terms of the compromise might have been that one half, or some other portion of the trust property, had to be given to the Defendant by the Plaintiffs, or that jewels which had been the property of the Defendant for years might be given to the Plaintiffs: the two lakhs of rupees that he has given might all then have been in existence and in the Defendants' possession for years. No proof was given that the tenant for life was not possessed of this 2½ lakhs of rupees, kept in his safe or packed in his money bags long before the year 1907. On the face of cl. 12 its language points rather to existing things than to non-existing things, and the agreement embodied in it is entirely different in its nature and character from an agreement assigning for a certain sum what, for instance, some relative might leave a contracting party, but who might never leave him anything whatever. In India, of course, champerty or maintenance is not illegal. In *Glegg v. Bromley* (1), Mr. Justice Parker, as he then was, stated the law upon this point, as was his custom, with great clearness and precision. In that case, according to the head-note, one Mrs. G. was Plaintiff in an action against one H. for false representation. She was also Plaintiff in an action for slander against Lady Bromley. She was at the time greatly indebted to her husband, and she executed in his favour a deed of assignment whereby, after reciting that he had requested her to give him further security, which she had agreed to do, she assigned to him, "all that the interest sum or premises that she is or may become entitled under or by virtue of any verdict, compromise or agreement which

(1) [1893] 1 K. B. 489, 490.

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she may obtain or to which she may become a party in or consequent upon the said action [*i.e.*, *Glegg v. Bromley* (1)] or otherwise howsoever, under or by reason of the same to hold the same subject to redemption on payment of the money due to him." Both actions proceeded, that against H. resulting in a verdict for the Defendant, with costs amounting to £218. That against Lady Bromley resulted in a verdict for the Plaintiff Mrs. G. for £200 with costs. H. then took garnishee proceedings against Lady Bromley to attach this sum of £200, and Mrs. G.'s husband also claimed it under his assignment. It was held that the assignment was not an assignment of a mere expectancy or of a cause of action, but was an assignment of property, that is, of the fruit of an action as and when recovered, and that it was consequently not void under 13 Ez. c. 5.

There is no distinction, and can be no distinction on this point, between the fruits of an action which the Plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour. At page 490 Mr. Justice Parker is reported to have said :—

"It is to be observed that an equitable assignee of a chose in action whether it is legal or equitable could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was in the view of the Court property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property they stand, I think, on a totally different footing. Nothing passes even in equity until the property comes into present existence. Only when this happens can the assignment attach and an interest pass Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the pur-

(1) [1912] 3 K. B. 472.

pose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty."

In their Lordships' view the agreement, embodied in paragraph 12 of the agreement of the 14th August 1907, is an agreement by the Plaintiffs to assign to others part of the fruits they may acquire in an action at law and therefore perfectly legal. Besides if even the money given to the Plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence at the date of the compromise decrees the agreement of 14th August 1907, which is still in existence, not terminated as the High Court erroneously supposes, attaches to the things so coming into existence subsequently.

It is not very clear what the High Court means by the words "identity of the property" in the last of these passages. If the consent to the compromise by the two persons named in paragraph 12 of the agreement had the effect of transfusing into the property the parties might receive under it some quality, or attached to it some quality, then this language might be appropriate enough, but obviously their consent, if given, could not have any such effect. The property mentioned in paragraph 12 is of a universal and not of a special character.

The words are "moveable or immoveable property" which may be obtained by such compromise. That includes almost every conceivable kind of property, and the words of this paragraph would be satisfied if half the estate sued for, or another estate or the jewels of the tenant for life deposited in his safe, and the money packed in his money bags had been awarded under the compromise.

In the construction of written or printed documents it is legitimate in order to

VENKATA SUBHADRAYYAMMA, JAGAPATI GARU v. POOSAPATI VENKATAPATI RAJU GARU.

ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. The litigation which was to be compromised was instituted in the year 1903. It had hung fire for four years when this agreement of the 14th August 1907 was executed. The decision of the case in the original Court was not made till the year 1908. The appeal to the High Court was not lodged till the year 1909, and the compromise was not decreed till the 12th May 1913. The Plaintiffs in the suit and presumably their vakil knew all about these delays. The Rajah of Tuni, when he became a party to the agreement of 22nd May 1906, must have also become aware of the negotiations out of which that agreement sprang and by the agreement itself of these delays; unless these persons were all devoid of intelligence they must, thus forewarned, have anticipated that somewhat similar delays might occur in the future, and yet they are by the High Court taken to have provided expressly and with clearness that, unless the Rajah of Tuni if not the vakil also lived long enough to be able to consent and to consent to the compromise referred to in the clause, no compromise could be arrived at.

For in paragraph 10 it is expressly provided that the Plaintiffs in the suit will not make any compromise "without your consent" which means of course the Rajah of Tuni's consent. In their Lordships' view, having regard to the above-mentioned fact, the construction of these three cls. 10, 11, and 12 of the agreement of the 14th August 1907, which would make the giving of the consent of the Rajah of Tuni, and of the vakil named, a condition precedent which must

be performed before any compromise could be validly made, is not their true construction. Both these men died in the year 1911. Having regard to the uncertainty of human life, which contracting parties when providing for possible future events must be presumed to bear in mind, it would be unbusinesslike and indeed irrational, if not absurd, for the parties, in August 1907, to have entered into such a contract as the High Court have construed this contract to be. Whereas it would be quite businesslike, quite rational and perhaps prudent for them to have entered into it if the things required to be done under it should only be required to be done where it was possible to do them. In their Lordships' view it is reasonably certain that parties to this agreement intended that this is what it should mean, and that therefore a term must be implied to exist in it, to the effect that the consent mentioned should be given when possible, and that the giving of consent of the Rajah himself to a compromise accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it. Their Lordships are therefore of opinion that the decree appealed from was erroneous and should be reversed with costs and the decree of the Subordinate Judge should be restored and they will humbly advise His Majesty accordingly.

The first, fifth and sixth Respondents must pay the costs of the appeal.

*Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Chapman, Walker and Shephard* for the Respondents Nos. 1, 5 and 6.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 13 OF 1922.

SANDERSON, C. J.
CHAKRAVARTI, J.
1924,
8, April.

AMBIKA CHARAN
BARUA, Petitioner,
Appellant,
v.
NARESWARI DASI and
anr., Objectors,
Respondents.

*Handwriting, comparison of, as mode of proof—
Judgment of trial Court granting probate of Will,
set aside in appeal merely on comparison of signa-
tures—Propriety of procedure adopted.*

*The Appellant propounded a Will in the
Court of the Munsif who granted probate
on a consideration of the evidence and the
circumstances of the case. The District
Judge set aside the judgment of the Mun-
sif simply on a comparison of signatures
without considering the oral evidence or
the probabilities of the case :*

*Held—That the case was not properly
tried by the District Judge and his judg-
ment was liable to be set aside.*

*Value of comparison of handwriting as
mode of proof discussed.*

This was an appeal preferred on the 23rd August 1922 against a decree, dated the 2nd August 1921, of the Additional District Judge of Zillah Assam Valley Districts (O. Martin, Esq.), reversing a decree, dated the 24th February 1921, of the Munsif of Gauhati (Srijut Jogendra Nath Barua).

The facts of the case will appear from the judgment.

Babu Narendra Kumar Bose for the Appellant.

Dr. Jadunāth Kanjilal for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This is a second appeal against a judgment of the learned

District Judge of the Assam Valley Districts, setting aside the judgment of the learned Munsif who by his judgment granted probate to the Petitioner, who is the Appellant before us.

The Petitioner's case was that one Juddharam Kakoti executed a Will on the 23rd of June 1919 which is marked Ex. A in these proceedings and then on the 28th of June in the same year executed another Will which is marked Ex. I in the present proceedings; and the Petitioner asked for probate of the last Will of the testator who died on the 3rd of July 1919. The present proceedings were instituted on the 29th of November 1919.

The proceedings were contested by Nareswari, the testator's widow, and Someswari, one of his daughters.

The learned Munsif who tried this case in the first instance, as it was possible under the rules prevailing in Assam, went fully into the evidence adduced in the case, and pointed out that the Will under consideration was merely a supplement to the earlier Will, and under the circumstances of the testator, was a reasonable one in that it provided maintenance for all the dependent members of his family and made a fair division of the properties between the daughters, and the learned Munsif also relied upon the testimony of the witnesses who supported the Will.

On appeal, the learned District Judge set aside the judgment of the learned Munsif.

It appears that the learned District Judge did not discuss either the oral evidence or the probabilities of the case, but simply relied upon what appeared to him to be a signature on the Will as a mere "tracing forgery" of some other signature of the testator.

On appeal, it was contended by the learned vakil who appeared for the Ap-

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pellant that the judgment of the learned District Judge was erroneous in law in that it set aside the judgment of the Munsif which was, as I have already indicated, based on the entire evidence in the case without considering the evidence adduced in the case.

It seems to me that the contention of the Appellant is well-founded.

It has been pointed out in several cases that a "comparison of handwriting is at all times as a mode of proof hazardous and inconclusive," and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts."

"A comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution." The observations which I have quoted are to be found in the case of *Sarojini Dasi v. Haridas Ghosh* (1). The learned District Judge here had not the advantage of any expert evidence on the subject. He merely relied upon his impression as to the nature of the signature. Then again the learned District Judge gave entirely the go-by to the oral evidence adduced in the case.

Under these circumstances I think that the case has not been properly tried on the evidence and that the learned District Judge was not justified in setting aside the judgment of the Munsif without even referring to the points upon which the learned Munsif's judgment was based.

Dr. Kanjilal who appeared for the Respondents pointed out that if we did not accept the judgment of the learned District Judge as correct the result would be that the case should be sent back to the

District Judge for retrial. I think that this is the right course to be followed in the present case.

The result, therefore, is that the appeal is allowed, the judgment of the lower Appellate Court is set aside, and the case is sent back for retrial of the appeal in view of the observations made by me in this connection.

The Appellant is entitled to his costs in this appeal—hearing fee, two gold mohurs.

It is needless to point out that the criminal proceedings fall through.

SANDERSON, C. J.—I agree.

S. C. M.

(CIVIL REVISIONAL JURISDICTION.)

• RULE NO. 345 OF 1924.

GREAVES, J.	}	RAJANI KANTA BAG,
CHAKRAVARTI, J.		Petitioner,
1924,		v.
Heard, 1, July.		RAJABALA DAS,
Judgment, 2, July.		Opposite Party.

Partition suit—Value of entire property and not of the share claimed determines jurisdiction of Court—Partition suit, valuation of, for purposes of jurisdiction and court-fee—Suits Valuation Act (VII of 1887), sec. 8—Court Fees Act (VII of 1870), sec. 7, para. v, and Sch. II, Art. 17, cl. vi—Partition suit, frame of—Determination of title in partition suit—Civil Procedure Code (Act V of 1908), sec. 115—Interlocutory order—Revision—Refusal of jurisdiction upon erroneous interpretation of statutory provisions.

A plaint was filed in the Court of a Subordinate Judge in which the Plaintiff alleged that he was entitled to a four annas share of certain joint family properties and was in possession of the same but a cloud having been cast upon his title he prayed, on establishment of his title, for partition of the properties which he valued at Rs. 2,500 and paid a court-fee of Rs. 20 for partition and ad valorem court-fee upon the four annas share of the properties under partition. The Defen-

(1) I. L. R. 40 Cal. 235; s. c. 26 C. W. N. 113; 34 C. L. J. 382 (1921).

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dants objected to the trial of the suit on the ground that the value of the suit both for jurisdiction and court-fees was, under sec. 8 of the Suits Valuation Act, triable by a Munsif. The Subordinate Judge gave effect to the Defendants' contention and returned the plaint to be filed in the proper Court. On appeal by the Plaintiff, the District Judge upheld the order of the Subordinate Judge. Against the order of the District Judge, Plaintiff moved the High Court under sec. 115 of the Civil Procedure Code and obtained the present Rule:

Held—That sec. 8 of the Suits Valuation Act had no application but Art. 17, cl. vi of the Court Fees Act was applicable, and that the suit was triable by the Subordinate Judge and he erroneously refused jurisdiction to try the suit. The order of the Subordinate Judge as affirmed by the District Judge was set aside, and the suit was directed to be tried by the Subordinate Judge.

In a suit for partition it is the entire value of the property which determines jurisdiction and not of the share which the Plaintiff claims in the property.

BIDHATA RAI v. RAM CHARITER RAI (1), KIRTY CHARAN MITTER v. ANATH NATH DEB (2) and LALA BHUGWAT SAHAY v. PASHUPATI NATH BOSE (3) referred to.

The mere fact that in a suit for partition a question as to the title of the Plaintiff is raised and it is necessary to determine such a question before a partition can be directed would make no difference to its being a partition suit.

MOHENDRA CHANDRA GANGULY v. ASHUTOSH GANGULY (4) referred to.

A Plaintiff can in a partition suit if necessary establish his title and his right to joint possession and then if his title is good, demand in the same suit possession, not joint possession, but possession by partition:

Held—That the suit as framed in the present case being one in which the Plaintiff asserted that he was in possession, it was clearly a suit for partition.

Where an ad valorem court-fee is paid under sec. 7, para. v of the Court Fees Act the jurisdiction of the Court according to sec. 8 of the Suits Valuation Act would be the same as the valuation for the court-fees. That would be so where the suit is of a simple character and of the character contemplated by that section of the Court Fees Act. But where the suit is not a simple suit contemplated by that section but is a suit for partition then the article applicable is Art. 17, cl. vi of the Court Fees Act.

Ordinarily the High Court in revision does not interfere with interlocutory orders in a suit but would interfere in a fit case.

YATINDRA NATH CHOUDHURY v. HARI CHARAN CHOUDHURY (6) referred to.

Held—That the order of the Subordinate Judge in this case resulted in his refusal to entertain and try the suit and although a preliminary question as to whether the Court had jurisdiction or not was a question which had to be determined by interpreting certain sections of the Court Fees Act and the Civil Courts Jurisdiction Act, still the result of the decision made upon a misapprehension of the true effect of the statutory provisions being either exercise or refusal of jurisdiction, the High Court was entitled to interfere in revision.

(1) 12 C. W. N. 87 (1907).

(2) I. L. R. 8 Cal. 757 (1882).

(3) 10 C. W. N. 564 (1906).

(4) I. L. R. 20 Cal. 762 (1893).

(6) 20 C. L. J. 426 (1914).

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A Judge cannot assume as a matter of law that which in fact has no existence in law and to give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of the statute deprive himself of the jurisdiction which properly belongs to him and if he refuses jurisdiction, the High Court may interfere.

SHEW PROSAD BUNGSHIDHAR v. RAM CHUNDER HARIBUX (7) and THE MAHA-RAJAH OF BURDWAN v. APURBA KRISHNA ROY (8) referred to.

This was a Rule granted on the 24th March 1924 against an order of the Subordinate Judge of Howrah, dated the 5th January 1924, as affirmed by the Additional District Judge of Howrah on appeal dated the 3rd March 1924.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and Apurba Charan Mookerjee for the Petitioner.

Babu Baranashibasi Mukherjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This Rule was obtained by the Plaintiff calling on the Defendants to show cause why an order of the Subordinate Judge of Howrah, dated the 5th of January 1924, affirmed in appeal by the District Judge on the 3rd March 1924, should not be set aside or any other order should not be passed by this Court as to this Court may seem fit. The facts out of which this application arises are these.

The Plaintiff in the plaint filed by him

(7) I. L. R. 41 Cal. 328 (1913).

(8) 15 C. W. N. 872 (1911).

alleged that he was entitled to a four annas share of the family properties along with some of the Defendants. The Plaintiff further alleged that he was in possession but that a cloud had been thrown upon his title on account of a certain suit previously instituted and also on account of an erroneous record in the record-of-rights. The Plaintiff on establishment of his title prayed for partition of the family properties which he valued at Rs. 2,500. The Plaintiff paid court-fee of Rs. 20 for partition and also paid *ad valorem* court-fee upon the four annas share of the property under partition. It appears that the Defendants objected to the trial of the suit by a Subordinate Judge on the ground that as the value of the suit both for jurisdiction and for court-fees was, under sec. 8 of the Suits Valuation Act, the same, it was triable by a Munsif and not by a Subordinate Judge. The learned Subordinate Judge gave effect to that contention of the Defendants and directed that the plaint be returned to be filed in the proper Court. There was an appeal by the Plaintiff but on appeal the order of the Subordinate Judge was upheld. Then the Plaintiff moved this Court for revision of the order. It was contended by the learned vakil for the Petitioner that as this was a suit for partition the jurisdiction of the Court should be determined by the value of the entire property and not by the value of the share claimed in the suit. It is quite clear that ordinarily a suit for partition is triable by the Court which is competent to try a suit valued at the entire value of the property and not the subject-matter of the share which is to be partitioned. It is not necessary to quote many cases on this point. The case of *Bidhata Rai v. Ram Chariter Rai* (1), the case of *Kirty*

(1) 12 C. W. N. 37 (1907).

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Charan Mitter v. Anath Nath Deb (2) and the case of *Lala Bhugwat Sakay v. Pashupati Nath Bose* (3) are authorities which show that it is the entire value of the property which determines jurisdiction and not of the share which the Plaintiff claims in the property. Now, if it were a simple suit for partition there could be no question that the suit would be triable in the present case by the Subordinate Judge, and more specially so, as the plaint as it was presented by the Plaintiff contained a clear statement that the Plaintiff was in possession of the property. But it appears in the present case on the objection of the Defendants a question was raised as to whether it was a simple suit for partition or whether it was a suit really for a declaration of the Plaintiff's title and also his rights to joint possession and then a suit for partition when such title and possession are established. The mere fact that in a suit for partition a question as to the title of the Plaintiff is raised and it is necessary to determine such a question before a partition can be directed would make no difference to its being a partition suit. In the case of *Mohendra Chandra Ganguly v. Ashutosh Ganguly* (4) it was held, to quote the words of their Lordships, "It may be that to decide the question, what property is in the possession of one member as member of a joint family, other questions will have to be tried; but if the Plaintiff is entitled to have the property partitioned upon a ten rupee stamp, the fact that the enquiry will be a long and difficult one does not affect the question of the stamp that will have to be paid for it." But it seems to us that in the present case, the Plaintiff had to

establish his title and had to establish his right to joint possession, which was denied, before he could seek partition of the property in suit. In that case the position would be as was laid down by their Lordships in the case of *Kirty Charan Mitter v. Anath Nath Deb* (2) that the Plaintiff would be bound to pay *ad valorem* court-fee upon the value of the share that he claimed. Sir Richard Garth, C. J., in delivering the judgment of the Court said as follows:—"If the Plaintiff's suit had been to recover possession of, or establish his title to, the share which he claims in the property, he must have paid an *ad valorem* stamp fee upon the value of that share. But as I understand, he is already in possession of his share, and all that he wants is, to obtain a partition, which is merely, as explained by the learned Judges in the case of *Rajendra Lall Gossami v. Shama Charan Lahooray* (5), to change the form of his enjoyment of the property, or in other words, to obtain a divided, instead of an undivided, share." Here as I have already stated the suit as originally framed was one in which the Plaintiff asserted that he was in possession of the property. Therefore, the plaint, as framed, was clearly one for partition and was unquestionably triable by the Subordinate Judge. It was on the Defendants' plea that the Plaintiff was not in possession and that it was really an attempt to establish title and then to obtain possession by partition, the Plaintiff has paid court-fee *ad valorem* on the value of his share. Therefore it seems to us that so far as the court-fees are concerned all that could possibly be demanded has been paid by the Plaintiff. Then a question arises whether the case is to be tried

(2) I. L. R. 8 Cal. 757 (1882).

(3) 10 C. W. N. 594 (1906).

(4) I. L. R. 20 Cal. 768 at p. 765 (1893).

(2) I. L. R. 8 Cal. 757 (1882).

(5) 4 C. L. R. 418 (1879).

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by the Subordinate Judge or by the Munsif. In our opinion, the Munsif would have no jurisdiction to entertain the suit so far as the claim for partition is concerned. It has never been doubted that a Plaintiff can in a partition suit, if necessary, establish his title and his right to joint possession and then if his title is good, demand in the same suit possession, not joint possession but possession by partition. If this is so, the jurisdiction of the Court would be determined by the value of the entire property which is sought to be partitioned. It was contended by the learned vakil showing cause as has also been held by the Courts below that where an *ad valorem* court-fee is paid under sec. 7, para. v of the Court Fees Act the jurisdiction of the Court according to the Civil Suits Valuation Act, sec. 8, would be the same as the valuation for the court-fees. That undoubtedly would be so, where the suit is of a simple character and of the character contemplated by that section of the Court Fees Act. But where the suit is not a simple suit contemplated by that section but is a suit for partition, then the article applicable would be Art. 17, cl. vi. Therefore, in a case like this, in our opinion, sec. 8 of the Suits Valuation Act has no application. We think, therefore, that the learned Subordinate Judge erroneously refused jurisdiction to try the suit. The learned vakil for the Opposite Party argued that assuming that the Subordinate Judge and the District Judge were wrong it is not a case in which we should interfere in our revisional jurisdiction. We think that it is a fit case in which the Court not only ought to but should interfere in revision. It may be conceded that ordinarily this Court does not interfere with interlocutory orders in a suit. But the cases

show that in a fit case this Court would interfere. In the case of *Yatindra Nath Choudhury v. Hari Charan Choudhury* (6), Mr. Justice Mookerjee in dealing with an objection similar to the one now raised by the learned vakil said as follows:—"We may add that it was faintly suggested on behalf of the Opposite Party that this Court is not competent to grant relief, even if satisfied that the order of the Subordinate Judge is erroneous and unjust. We are not prepared to take such a restricted view of the jurisdiction of the Court to grant relief in the exercise either of our revisional powers or the power of superintendence vested in this Court by the Indian High Courts Act, 1861. Instances are by no means rare where in very exceptional cases this Court has interfered and set matters right by the reversal of interlocutory orders" and their Lordships referred to a number of cases in support of that view. But in the present case there is a further distinction in favour of our interference in these proceedings. It appears that the result of the decision of the learned Subordinate Judge resulted in his refusal to entertain and try the suit and although a preliminary question as to whether the Court has jurisdiction or not was a question which had to be determined by interpreting certain sections of the Court Fees Act and of the Civil Courts Jurisdiction Act, still the result of that decision is either exercise or refusal of jurisdiction. In this view, I am supported by clear authority in the case of *Shew Prosad Bungshidhar v. Ram Chunder Haribux* (7), where Mr. Justice Woodroffe in the course of his judgment at p. 341 said as follows:—"Reference has also been made on this

(6) 20 C. L. J. 426 at p. 423 (1914).

(7) I. L. R. 41 Cal. 323 (1913).

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point to a decision; *The Maharajah of Burdwan v. Apurba Krishna Roy* (8). This was also a case of refusal to exercise jurisdiction and all that the Court held was that it was immaterial that such refusal was made upon a misapprehension of the true effect of the statutory provision on the subject. This appears to me to be obvious. The decision rests on the well-known principle that a Judge cannot assume as a matter of law that which in fact has no existence in law and to give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of the statute deprive himself of the jurisdiction which properly belongs to him and if he refuses jurisdiction in such a case the High Court may interfere, whether the question has been rightly or wrongly decided by him." This is exactly the case here. The Courts below, as I have already stated, upon an erroneous interpretation of the provision of the Court Fees Act and also Civil Courts Jurisdiction Act, came to a wrong conclusion that the suit was not triable by the Subordinate Judge. We think, therefore, that this is a case in which this Court should interfere and accordingly we make this Rule absolute with costs, set aside the orders of the Subordinate Judge as affirmed by the District Judge and direct that the case be tried by the Subordinate Judge in accordance with law.

We assess the hearing fee in this Rule at two gold mohurs.

GREAVES, J.—I agree.

H. C. S. Rule made absolute.

(S) 15 C. W. N. 872 (1911).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD PHILIMORE.

LORD BLANESBURGH.

LORD DARLING.

SIR JOHN EDGE.

MR. AMEER ALI.

1924,

Heard, 7 and 8, April.

Judgment, 13, May.

THE IMPERIAL
TOBACCO COM-
PANY OF INDIA,
LTD., Appellants,
v.

ALBERT BONNAN
AND BONNAN &
Co., Respondents.

Trade marks—Sale of foreign goods by purchaser under correct description—Sole importer of such goods, if and when may object when no protecting covenant—False description, basis of right of action—Law applicable in India

There being no Trade Marks Act in force in India, the ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods apply.

It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness, so that if goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

But, in the absence of a protecting covenant, there is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer.

The manufacturer or his lawful successor cannot reasonably claim that he can stop a trader to whom goods have been lawfully sold under a particular description and by whom they have been lawfully bought under that description from re-selling them under the same description—in the absence, at any rate, of anything

THE IMPERIAL TOBACCO COMPANY OF INDIA, LTD. v. ALBERT BONNAN & BONNAN & Co.

to show that the time, place or circumstances of the resale imported some representation that the goods were other than what they were.

This was an appeal (No. 142 of 1923) from a decree of the High Court at Calcutta, dated the 10th April 1923, affirming a decree, dated the 18th July 1922, of the said Court in its Original Civil Jurisdiction.

The litigation was concerned with the sale in India of Wills' Gold Flake cigarettes.

The Respondents who had purchased genuine Wills' Gold Flake cigarettes from surplus stores sold by the British Army Canteen Authorities offered these cigarettes for sale in India.

The Appellant Company sought to restrain the sale and instituted this suit praying for an injunction. They based their claim to relief on two grounds—

viz. :—(1) a proprietary title to the exclusive use in India of the trade mark, trade name and descriptions, appearing on the labels and wrappers in which the cigarettes were issued for sale;

and (2) a title based on reputation acquired as an importer.

Pearson, J., dismissed the Appellant Company's suit with costs and his decree was confirmed by the High Court (Sander-son, C. J. and Richardson, J.) on appeal.

The judgments of the lower Courts are reported in full in I. L. R. 50 Calcutta, p. 762.

Messrs. Clauson, K. C., Maugham, K. C. and Sebastian appeared for the Appellant Company.

Mr. Hyam appeared for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—Before the year

1901, the Company known as W. D. and H. O. Wills, Limited, had begun to manufacture a particular cigarette which got to be known as Gold Flake or Wills' Gold Flake, and which soon acquired a considerable reputation.

In the year 1910, W. D. and H. O. Wills, Limited, and various other companies became amalgamated into one Company called the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and the whole business of W. D. and H. O. Wills, Limited, with its good will and trade marks was assigned to the Imperial Tobacco Company (of Great Britain and Ireland), Limited. In September 1902, this last-named Company made an agreement with a Company called the American Tobacco Company, by which it was agreed that the American Tobacco Company should confine its trade to the United States and certain islands, and that the Imperial Tobacco Company (of Great Britain and Ireland), Limited, should confine its trade to Great Britain and Ireland, and that these two Companies should form a third to be called the British American Tobacco Company, Limited, which should confine its trade to the rest of the world not included in the territories of the two first Companies. And accordingly the British American Tobacco Company, Limited, was incorporated; and to it the other two Companies assigned their business, good will and trade marks outside their respective territories; and mutual covenants were entered into by the three Companies confining their trades to their respective territories.

At some date not specified in the record, a Company called the British American Tobacco Company (India), Limited, was incorporated to act as distributors in

THE IMPERIAL TOBACCO COMPANY OF INDIA, LTD. v. ALBERT BONNAN & BONNAN & Co.
 India for the British American Tobacco Company, Limited.

By an agreement made the 1st September 1910, between the British American Tobacco Company, Limited, of the 1st part, the British American Tobacco Company (India), Limited, of the 2nd part, and the Appellant Company of the 3rd part, it was agreed that the Appellant Company should buy the good will, business, rights and other assets of the British American Tobacco Company, Limited, in India and certain other territories, with brands, trade marks, trade names, formulæ and recipes, and the sole right and title to use in that territory the name of the British American Tobacco Company, Limited, and the names of all firms and companies which it had acquired, and also the good will, business rights and assets of the British American Tobacco Company (India), Limited. This agreement, however, was not perfected by an assignment. By an indenture, dated the 11th April 1922, and made between the British American Tobacco Company, Limited, and the Appellant Company—but to which the other Company was not a party—the British American Tobacco Company, Limited (so far as it was concerned) performed its agreement by assigning all the premises comprised in the agreement to the Appellant Company.

The Gold Flake cigarettes in question were sold at one time in tins of fifty cigarettes and afterwards in packets of stiff paper, each containing ten cigarettes. On the broad flat top of the packets appeared in bold letters, words showing that they were Gold Flake cigarettes and the name of W. D. and H. O. Wills, Bristol and London; and on the back with a number of medals, there was an inscription in the following words:—

“Every genuine package of Gold Flake

Cigarettes has the signature thus: W. D. and H. O. Wills.”

On one of the ends of the packet—if they were packets to be sold in India by the Appellant Company—appeared in very small print:—

“This label is issued by the Imperial Tobacco Co. of India, Ltd. Registered Trade Mark. Successors in India to W. D. and H. O. Wills Cigarettes, made in England.”

If they were manufactured by the British American Company for sale elsewhere, the words, in lettering of the same small size, were:—

“Established by W. D. and H. O. Wills, Bristol and London, British American Tobacco Co., Ltd. Registered Trade Mark. Bristol, London, Liverpool and Virginia. Successor. Made temporarily in the U.S.A.”

No reliance was placed in argument by either party upon the difference in the two inscriptions at the ends of the packets.

The only other difference between the packets to be used in India and those to be used elsewhere was that the paper for the Indian packets was of somewhat stouter material so as to afford a better resistance to damp.

Packets with this distinctive appearance and these trade marks were manufactured by the British American Tobacco Company, Limited, and imported and distributed by the British American Tobacco Company (India), Limited, from about 1902 till the date of the agreement in 1910; after which date they were imported and distributed by the Appellant Company. The manufacture was carried out by the British American Tobacco Company, Limited, at first in England, afterwards temporarily in the United States of America.

In the year 1921 the Respondent Bon-

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nan purchased about 21½ millions of Gold Flake cigarettes, surplus stores sold by the British Army Canteen authorities, the sale being subject to the condition that they were not to be re-sold in the United Kingdom. These cigarettes had been sold, in the first instance, to the British Canteen authorities by the British American Company, Limited. After so acquiring them the Respondent Bonnan formed the Respondent Company, and the Respondents shipped a large quantity of these cigarettes to India and offered them for sale there. Thereupon on the 11th May 1922, the Appellant Company brought a suit in the High Court at Calcutta, claiming an injunction to restrain the Respondents from selling these cigarettes in India.

There being no Trade Marks Act in force in India, the case for the Appellant Company was rested upon the ordinary rights of every trader to protect his property and to prevent attempts by other traders to avail themselves of his reputation to pass off their goods as his own.

The issues which were settled were accordingly addressed to these points, the more important being those numbered (1), (2), (5) and (8), which are as follows :—

“(1) Does the get-up of the cigarettes described in para. 7 of the plaint denote to purchasers in India that such cigarettes are imported by the Plaintiff Company?

“(2) Will the sale by the Defendant Company of cigarettes in such get-up deceive the purchasers into the belief that the cigarettes have been imported by the Plaintiff Company?

“(5) Is the Plaintiff entitled as against the Defendants either by reason of such importation or by reason of such purchase to prevent Defendants from selling cigarettes with such get-up though they have in fact been manufactured by the British American Tobacco Company?

“(8) Are Plaintiffs entitled to protect

their right by injunction irrespective of consideration mentioned in the first two issues?”

The case was then heard upon oral evidence by Pearson, J., who found on these issues against the Appellant Company and dismissed the action; and his decree was affirmed on appeal by Sanderson, C. J., and Richardson, J. It is from this affirmation that the present appeal has been brought.

At the trial some evidence was given on behalf of the Appellant Company in order to show that it had a reputation as the sole vendor in India of Gold Flake cigarettes and that the Respondents were trading upon this reputation. It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness; and if therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

But the evidence offered by the Appellant Company was met and in the opinion of the learned Judges displaced by the evidence given on behalf of the Respondents.

Thus Pearson, J., said :—

“I find, therefore, upon this part of the case that the reputation of the brand of Gold Flake cigarettes in India is the reputation of the maker and not of the Plaintiff Company as importers. The reputation originated in the days of Messrs. W. D. and H. O. Wills, the original manufacturers, and the efforts of the Plaintiff Company have been directed not to creating or acquiring (if such a thing is possible) an importer's reputation for themselves in the brand, but in maintaining and developing the reputation of the brand as a manufacturer's brand. The issues, therefore, dependent upon this

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finding are answered in favour of the Defendant."

And Sanderson, C. J. :—

"There is no necessity for me to refer to the evidence in detail, for I agree with the learned Judge's finding of fact. In my judgment the sole representation made by the Plaintiffs' user of the covering of the cigarettes was a representation that the cigarettes were the Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills. There is no evidence to justify the alleged representation (on which the Plaintiffs relied) that cigarettes, bearing the said wrapper or covering, had come through a particular channel or had been imported by the Plaintiffs. In the same way the Defendant by using the wrapper or covering was merely representing the cigarettes as Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills, viz., the British American Tobacco Company. This was a perfectly true representation, and the Defendant was in no way passing off or attempting to pass off the cigarettes sold by him as the Plaintiffs' goods."

And finally Richardson, J. :—

"Moreover, the learned Judge, Pearson, J., before whom the case came in the first instance, has found, and, in my opinion, on the evidence rightly and conclusively found, that up to the date of the suit the Company had acquired no independent reputation as importers. Nor do they use any distinctive importers' mark."

Their Lordships see no reason to review these concurrent findings. Indeed they were not invited to disturb them as findings of fact; but it was suggested that the learned Judges had arrived at them as mixed findings of fact and law and in so doing had erroneously applied the law.

Another way of putting the case for the Appellant Company was suggested by Counsel, which was to treat the first issue as wrongly stated. It ought, it was said, to have run as follows: "Does the get-up

of the cigarettes denote the Plaintiffs' goods?" But even if the Appellant Company were to be allowed so to remodel the issue, its case would not be further advanced. The Appellant Company has still, as it was admitted, to show that the Respondents are selling goods, not the production [or introduction] of the Appellant Company, in such a way as to lead customers to believe that they are the goods which the Appellant Company has introduced or marketed.

And the answer is two-fold: (1) It is an immaterial accident that these particular wares had from 1910 onwards been brought into India by the Appellant Company and the Appellant Company only, if the Appellant Company got no reputation in consequence: (2) The Respondents are doing nothing to mislead customers and are breaking no covenants.

In truth, as was observed during the course of the argument, all the business about acquiring title from the British American Tobacco Company, Limited, or the British American Tobacco Company (India), Limited, which latter was never perfectly acquired [see *Performing Right Society, Limited v. London Theatre of Varieties, Limited* (1)] is beside the question. No trade mark or trade reputation of either of these Companies is infringed. The right on which the Appellant Company is seeking to rely is something which it claims to have earned for itself since 1910; and this right, as the learned Judges have found, it has failed to establish.

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer. It is not likely to be a

THE IMPERIAL TOBACCO COMPANY OF INDIA, successful business operation, 'unless in some exceptional case. This is just such an exceptional case. The British American Tobacco Company, Limited, might, when they sold this large consignment to the British Army Canteen authorities, have required an undertaking that they should not be resold in India or to any one who could lawfully resell in India. This it appears not to have done; and then there arose the question of the disposal after the war of this large surplus stock.

The Respondents, being unhampered by covenant, are selling goods manufactured by the British American Company as being what they are, namely, Wills' Gold Flake cigarettes, manufactured by that Company. There is no untruth and no attempt to deceive. The Appellant Company says that all genuine Wills' Gold Flake cigarettes sold in India must be their goods. It may be answered that this has been so in times past as a mere matter of fact, and because the Appellant Company was protected by a covenant with the manufacturers; but not because it had a title to a monopoly which it could enforce against strangers to the covenant.

The claim of the Appellant Company is that it can stop a trader, to whom goods have been lawfully sold under a particular description and by whom they have been lawfully bought under that description, from reselling them under the same description. Such a claim sounds extravagant. It might, however, possibly be maintained, if it could be shown that the time, place or circumstances of the resale imported some representation that the goods were other than what they were. But in this case there is no such time, place or circumstance.

It is not as if the Respondents were attempting to pass off as Wills' Gold

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Flake cigarettes stuff not manufactured by the lawful successors in title of W. D. and H. O. Wills. Any such attempt would be at once restrained at the suit of the lawful successors; and in India and for India the Appellant Company would be the lawful successors.

There is nothing in the judgments in the Courts below or in the opinion which their Lordships are now expressing to give countenance to the idea that the ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods do not apply in India. But the cigarettes now in dispute are the genuine articles, lawfully acquired from the lawful manufacturers; and as such the Respondents may sell them.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor: Mr. Fred. F. MacNaghten for the Appellants.

Solicitors: Messrs. Sandersons & Orr, Dignam for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OGDH.]

LORD SUMNER.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

. 1923,

Heard, 4, 5 and

7, June

Judgment,

3, July.

LAL RAM SINGH and
ors., Appellants,
v.

THE DEPUTY COMMISSIONER OF PARTABGARH, Respondent.

Hindu Will—Construction—Bequest to designated person and his "heirs and representatives"—Words of limitation and not purchase—Absolute grant, not limited by attempt to limit his power of disposition—Estate governed by primogeniture—Gift to son—Property, if self-acquired property of donee, when

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same was self-acquired property of donor—Mitakshara law what, and if applied—Oudh Estates Act (I of 1869, before amendment by Act III of 1910), sec. 15—Gift to son, not immediate successor, effect of.

H, an Oudh Taluqdar, whose estate, being in list 2 as defined by the Oudh Estates Act I of 1869, devolved according to the custom of the family on or before the 13th February 1856 upon a single heir, made, prior to the passing of the amending Act III of 1910, a settlement of the estate, under which in the events which happened, his second son who was not his immediate successor and his heirs and representatives were to succeed to the estate, without power to interfere in any way with all except 6 villages during the life-times of persons named:

Held—That the disposition in question operated under sec. 15 of the Act of 1869 to take the estate out of the special limitations of descent provided by sec. 22 of the Act, notwithstanding that the donee was a person in the line of succession.

GHULAM ABBAS KHAN v. AMATUL FATIMA (1) followed.

That the disposition should be construed ut res magis valeat quam pereat: the words "heirs and representatives" were words of limitation and not purchase, and the donee got an absolute estate in reversion, the last clause being inoperative as an attempt to derogate from the grant previously made of an absolute estate or as a mistaken description by the donor of the legal consequences of the grant.

Quære:—Whether, in a Mitakshara family, property which in the father's hands is self-acquired is, when bequeathed to the son, ancestral or self-acquired property in the son's hands.

Conflict of opinion in the High Courts in India adverted to.

(1 L. R. 48 I. A. 135: s. c. I. L. R. 43 All. 297 (1921).

Held—That the donee under the settlement took the property as self-acquired property which he could dispose of by Will, inasmuch as at the date of the settlement the property was subject to the Oudh Estates Act of 1869 and would have descended to a single heir in accordance with that Act and not according to Mitakshara law or to those whom that law would designate as heirs.

This was an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 4th April 1919, which affirmed a decree of the Court of the Subordinate Judge of Mohanlalganj, dated the 20th May 1916.

The subject-matter of the suit is Taluqa Rampur Kaithaula and the dispute concerns the succession thereto.

The suit was instituted by Babu Narain Singh (since deceased and represented in the appeal by the present Appellants) against Raja Awadesh Singh, a minor, represented by the Respondent, as manager, Court of Wards.

The material facts and the decisions of the lower Courts thereon are set out in the judgment of the Judicial Committee.

The Subordinate Judge decided in favour of the Respondent and dismissed the suit, and an appeal from his decision was dismissed by the Court of the Judicial Commissioner. Against the decree of the Appellate Court the Plaintiffs obtained special leave to appeal to His Majesty in Council.

Sir Gco. Lowndes, K. C. and Mr. Kenworthy Brown for the Appellants.—The Respondent's case throughout was based on an alleged custom of male lineal primogeniture. That custom was negatived by the Appellate Court but they found in favour of the Respondent on the ground that he obtained title under the settlement of 30th October 1871 and the Will of

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18th June 1888. Neither of these documents was properly receivable in evidence, and the Respondent was not entitled to rely on any defence based on them, more particularly because no such defence was taken before the trial Court.

The provision in the settlement that Lachman Singh and his heirs and representatives should succeed to the estate as provided by sec. 22 of Act I of 1869 was invalid, being an attempt to set up an order of succession not recognised by Hindu Law.

The *Tagore* case (2) and *Rajindra Bahadur Singh v. Raghubans Kunwar* (11).

If Lachman Singh had a vested interest under the deed, it terminated on his death in 1888 and he had no testamentary power in regard to it.

Tarakeswar Roy v. Shoshi Shikareshwar Roy (12), *Kristoromoni Dassee v. Norendro Krishna* (13) and *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhury* (14).

The limitations should be accepted so far as they are valid but should be rejected when they contravene the law, the result is that Lachman would take merely a life estate.

If, however, Lachman acquired an indefeasible title to the estate, the same was ancestral partible property over which he had no right of testamentary disposition.

Muddun Gopal v. Ram Buksh (3), *Hazari Mall v. Abaninath Adhurya* (4), *Tarachand v. Reebram* (5), *Nagalingam v. Ramachandra* (6), *Jugmohandas v. Sir Mangaldas Nathubhoy* (7), *Nanabai v. Achratbai* (8), *Farsotom v. Janki Bai* (9) and *Rameshar v. Musammat Rukmin* (10).

Mitakshara, Ch. 1, sec. 4, sub-secs. i, vi, xxviii.

Messrs. DeGruyther, K. C., Wallach and Dube for the Respondent, who were directed to confine their argument to the question whether Lachman could dispose by Will of the estate vested in him, submitted that the cases do not go further than suggesting that a father can indicate his intention as to whether property should be ancestral or not. Here there is a distinct indication that the property should not be held as ancestral but as though it were self-acquired.

The custom of the estate shows it to be impartible and it would descend as such.

Narindur Bahadur Singh v. Achal Ram (15), *Janki Pershad Singh v. Dwarka Pershad Singh* (16) and *Ghulam Abbas Khan v. Amatul Fatima* (1).

A right of alienation invariably attaches to an impartible estate.

Sartaj Kuari v. Deoraj Kuari (17) and

- (2) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (P. C.) (1872).
- (11) L. R. 45 I. A. 154; s. c. 18 C. W. N. 131 (1918).
- (12) L. R. 10 I. A. 51; s. c. I. L. R. 9 Cal. 952 (1883).
- (13) L. R. 16 I. A. 29; s. c. I. L. R. 16 Cal. 383 (1888).
- (14) L. R. 5 I. A. 139; s. c. I. L. R. 4 Cal. 23 (1878).

- (1) L. R. 48 I. A. 135; s. c. I. L. R. 43 All. 297 (1921).
- (3) 6 W. R. 71 (1863).
- (4) 17 C. W. N. 280 (1912).
- (5) 3 Mad. H. C. R. 50 (1866).
- (6) I. L. R. 24 Mad. 429 (1901).
- (7) I. L. R. 10 Bom. 528 (1886).
- (8) I. L. R. 12 Bom. 122 (1886).
- (9) I. L. R. 29 All. 354 (1907).
- (10) 14 Oudh Cases 244 (1911).
- (15) L. R. 20 I. A. 77; s. c. I. L. R. 20 Cal. 649 (1893).
- (16) L. R. 40 I. A. 170; s. c. I. L. R. 35 All. 391; 17 C. W. N. 1029 (1913).
- (17) L. R. 15 I. A. 51; s. c. I. L. R. 10 All. 272 (1888).

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Bajinath Prosad Singh v. Tej Bali Singh (18).

If Hanwant Singh had died intestate Lachman would have got nothing because the entire estate would have gone to Rampal; the conclusion therefore is that Lachman took the property not as ancestral but as self-acquired property.

Further the terms of sec. 15 of Act I of 1869 preclude the property from being ancestral property.

It only comes out of the Act because of sec. 15 and if the section applies it must apply for all purposes.

Reference was made to Mayne's Hindu Law, para. 275.

Sir Geo. Lowndes, K. C., in reply.—Sec. 14 of the Act must be read with sec. 15. Sec. 15 provides for the elimination of all taluqdari conditions if there is a transfer to an outsider, *Ghulam Abbas Khan v. Amatul Fatima* (1). Mere succession under sec. 22 (11) does not affect this so

that cases under sec. 22 (11) are not pertinent.

To succeed, the Respondent must show that all self-acquired property goes to the eldest son, but that case has never been set up.

It has never been contended that there is a custom that self-acquired property is impartible.

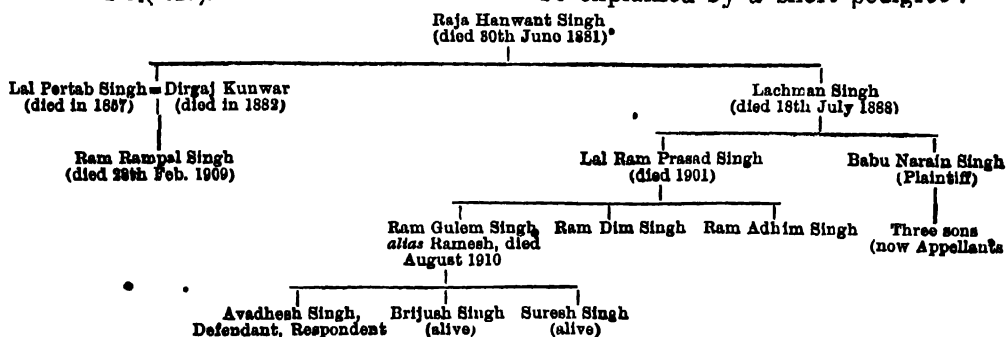
The Respondent must prove the actual custom which he alleges.

Property given by a father to his son cannot be other than ancestral because the gift is detrimental to the father's estate.

A reference to the texts shows that the law as laid down by the Calcutta High Court is correct. Mayne's Hindu Law, para. 276.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The dispute in this case concerns the succession to a taluqdari estate in Oudh, which at the time of the confiscation was held by one, Raja Hanwant Singh, the ancestor of all the parties. Their position would best be explained by a short pedigree:—



Narain Singh, the original Plaintiff, is dead, and his three sons take his place as the present Appellants. The Defendant-Respondent, being a minor, is represented by the Deputy Commissioner as manager of the Court of Wards.

The occasion for the dispute arose upon

the death of Ram Rampal Singh in 1909, on which occasion Ram Gulem Singh claimed the estate and procured mutation of names in his favour. He did not live long and was succeeded by the minor, whose interest is represented by the manager of the Court of Wards. In 1913

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the Plaintiff Narain Singh brought the present suit to dispossess him.

The estate is one of those governed by the Oudh Estates Act, 1869 and is in list 2, defined by the Act as "A List of the Taluqdars whose estates according to the custom of the family on and before the thirteenth day of February 1856, ordinarily devolved upon a single heir."

Hanwant Singh before he received his *sanad* had executed a deed of gift in favour of his grandson, Rampal Singh, of all his properties, except six villages. Disputes having arisen as to the nature and operative effect of the gift, the Raja, on the 16th May 1871, filed a suit against Rampal Singh in the Court of the Deputy Commissioner of Sultanpur, praying for a declaration of his absolute proprietary right, notwithstanding the execution of the deed of gift.

The grandson appeared and defended the suit; and thereupon a compromise was arrived at, which was embodied in an agreement between the parties, which again was confirmed by a decree of the Court. In compliance with that agreement Hanwant Singh executed an instrument which may not inappropriately be called a settlement. This document provided that Hanwant Singh should for his life be the proprietor in possession of one of the taluqdari estates. He was to have no power to make a Will, sale or transfer affecting the estate beyond his life-time. Rampal Singh was to have another estate similarly for his life only. On the death of Hanwant, Rampal was to have the whole of the taluqdari estates, but again for his life only, except that he had power to make a certain provision for his widow or widows, sons and daughters.

If Rampal Singh predeceased Hanwant

Singh, Dirgaj Kuar, mother of Rampal Singh, was to have Rampal's estate for her life. If both she and Rampal Singh died in the life of Hanwant Singh, Hanwant was to have the absolute proprietary right with the power of making a Will, sale or transfer in accordance with the authority given by the Act of 1869. If, on the other hand, the order of deaths was that Hanwant Singh died first, and then Rampal Singh, in that event the mother was to be owner of the whole taluqdari estate for her life with similar restrictions. Then came the last limitations which are the important ones in this case. The actual settlement was drawn up and executed in Urdu, and the official translation of this paragraph is as follows:—

7. That on the death of the last three persons, *i.e.*, Raja Hanwant Singh, Raja Rampal Singh and Dirgaj Kuar, the mother of Raja Rampal Singh, Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs and representatives shall succeed to the entire Rampur Kaithaula estate, as provided by sec. 22 of Act I of 1869. But the said Babu Lachman Singh shall not interfere in any way with the said *ilaga*, besides the six villages which he has received under sec. 8, during the life-time of Raja Rampal Singh and his mother, Dirgaj Kuar.

As the pedigree shows, Hanwant Singh died first, then the mother, then Lachman Singh, and lastly Rampal Singh, upon whose death it became necessary to determine who succeeded to the reversion. Rampal Singh seems to have died without leaving a son, but if he had left sons, they would have been excluded.

Now sec. 15 of the Act of 1869 provides as follows:—

"If any Taluqdar or Grantee shall heretofore have transferred or bequeathed or if any Taluqdar or Grantee or his heir or legatee shall hereafter transfer or bequeath

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to any person not being a Taluqdar or Grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a Taluqdar or Grantee."

This transaction took place before the amending Act of 1910; so that a transfer to a person who is not the immediate successor, even though that person be in the line of succession, operates to take the estate out of the special limitations of descent. The principle has been finally established by the case of *Ghulam Abbas Khan v. Amatul Fatima* (1).

In these circumstances the original Plaintiff Narain Singh, the father of the present Appellants, claimed to succeed to the whole estate under the Mitakshara law of the Benares School, or alternatively under a Will executed by Lachman Singh; and the original Defendant Gulem Singh *alias* Ramesh set up as defences that the deed of settlement was invalid, that the Plaintiff was estopped under the principle of *res judicata*, that the estate was impartible, that he was the heir according to the custom of the tribe or family, which he said was the custom of lineal primogeniture, that the alleged Will of Lachman Singh was fictitious, and that in any event, Lachman Singh had no power to dispose of the taluqdari estate by Will. Fortunately, for him, though he did not rely upon it at the time as a defence, he introduced among the documents which he filed, a Will of Lachman

Singh in his favour. In the event, he got a decision from the Subordinate Judge in his favour on the points of *res judicata* and the family custom of lineal primogeniture—the Subordinate Judge further holding that the Plaintiff had not proved that Will of Lachman Singh on which he relied.

The case then came on appeal to the Court of the Judicial Commissioner. Here the learned Judges agreed with the Subordinate Judge that the Will upon which the Plaintiff relied had not been proved. But they disagreed with him in his decision as to *res judicata* and the family custom, which latter they held not to be proved. Nevertheless, they decided in the Defendant's favour because they held, contrary to his original submission, that Lachman Singh could validly dispose of his property by Will, he having according to their views, an absolute estate in reversion and not a life estate only. Having thus allowed the Defendant to reverse his original position to so large an extent, they, as it seems to their Lordships, very properly gave him a decision without costs.

On appeal to this Board the heirs of the original Plaintiff, while not abandoning their father's position that he was entitled as next heir either to Hanwant Singh or to Lachman Singh to the whole property, have also put forward a claim that the two sons of Lachman Singh were both of them heirs, and that they, as representing one of these sons, should have half the property.

Now, for this purpose they had to abandon the original case, which was that Lachman Singh could dispose of the property by Will and had disposed of it in their father's favour. On the contrary they now say that he had only a life estate

(1) L. R. 46 I. A. 135; see I. L. R. 48 All. 297 (1921).

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and could not, in any event, pass the property by Will.

In this tangle of claims and defences, it appears to their Lordships that the points which now remain to be decided are these :—

1. What estate or interest did Lachman Singh take under the settlement? If he took only a life estate, then the reversion descended to the heir or heirs of Hanwant Singh. If he took an absolute estate, then—

2. Had he the power to dispose of it by Will?—and this question raises a new point which was not discussed in the Courts below. If he could not dispose of it by Will, then—

3. Who are his heirs? In connection with this point, it would have to be decided whether the estate in Lachman's hands was partible or impartible.

Now as to the first point, it was strongly contended on behalf of the Appellant, that the right way to read cl. 7 was to read it as an endeavour to fix the course of succession in the line prescribed by sec. 22 of the Act of 1869, though the effect by virtue of sec. 15 would be to take the estate out of the Act; and that, therefore, this was an attempt to create an order of succession unknown to the common law and unwarranted by the Act, which has been decided to be impossible by the judgment in the *Tagore* case [*Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (2)], and by various subsequent decisions.

It followed (so the argument proceeded) that the limitations were good so far as they gave Lachman a life estate, but that everything after this must be rejected as contrary to law, and that therefore the

reversion to the estate after the death of Lachman remained undisposed of.

It was also submitted that the point might be put in this way: the grant of a life estate to Lachman would not—supposing him to be out of the line of succession—necessarily operate under sec. 15 as a destruction of the special taluqdari entail, and the settlement would anyhow be effective so far as it granted that life estate, but the transfer of the absolute ownership would operate under sec. 15, to break the taluqdari entail, and would therefore subject the property to the ordinary Hindu law of inheritance to which the taluqdari entail would be repugnant, and that therefore the further limitation by reference to sec. 22 of the Act would be invalid and inoperative. Another suggestion was that the clause should be read as giving a life estate to Lachman and then the reversion to his heirs, who being unborn persons, could not take under Hindu law.

The words in cl. 7 are undoubtedly difficult of construction; but their Lordships, in dealing with an instrument of this kind carrying out a decision of the Court, ought to take for their guidance the rule that, if possible, such a document should be construed, *ut res magis valeat quam pereat*.

On the whole, their Lordships are disposed to accept the construction which the Subordinate Judge and the Court of Appeal put upon this clause of the settlement. In the first place, they think that to borrow a phrase from the English law of real property, the words "heirs and representatives" are to be treated as words of limitation and not of purchase, that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life estates

(2) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377 (P.C.) (1872).

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which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequences does not affect the grant which he has made. They think, therefore, that Lachman received an absolute estate in reversion.

The next point for consideration is whether Lachman could dispose by Will of the estate which was vested in him. This depends upon the question whether it was to be deemed ancestral property or self-acquired property. On this point their Lordships have little assistance from the Courts below. It could not have been considered by the Subordinate Judge, because the Respondent was not then relying on Lachman's Will. It probably was not argued before the Court of Appeal because counsel for the Appellant had so little opportunity of addressing himself to this new point. But the Court of Appeal, though without giving any reasons for it, did incidentally state its opinion that the property was self-acquired property.

It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest made by a father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddun Gopal v. Ram Buksh* (3), when it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall Babu v.*

Abaninath Adhurjya (4). In Madras, upon the whole, the view seems to be, that the father can determine whether the property which he has so bequeathed, shall be ancestral or self-acquired, on the principle of *cujus est dare ejus est disponere*, but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. See *Tarachand v. Reebram* (5) and compare it with *Nagalingam v. Ramachandra* (6) and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jugmokandas v. Sir Mangaldas Nathubhoy* (7) and *Nanabai v. Achratbai* (8). At Allahabad the decision was that such property is self-acquired. See *Parsoom v. Janki Bai* (9). Finally, in Oudh in the case of *Rameshar v. Musammat Rukmin* (10), after a review of all the cases, it was held that :

Where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death.

If the criterion were to be the intention of the father when he makes the gift, there is nothing to indicate that Hanwant Singh desired to make the estate ancestral property in the hands of Lachman. His expression of opinion or desire, whichever it may be, that the property should still

(4) 17 C. W. N. 280 (1912).

(5) 31 Mad. H. C. R. 50 (1886).

(6) I. L. R. 24 Mad. 429 (1901).

(7) I. L. R. 10 Bom. 528 (1883).

(8) I. L. R. 12 Bom. 122 (1886).

(9) I. L. R. 29 All. 354 (1907).

(10) 14 Oudh Cases 244 (1911).

(3) 6 W. R. 71 (1863).

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be governed by the Act of 1869 would indicate the contrary view; because under the Act each holder of the estate has a power to give it or will it away. If, on the other hand, Hanwant should be treated as having intended the legal consequences of his acts, he had brought the estate under sec. 15; and then the argument urged by Counsel for the Respondent founded on the words at the end of that section by which property is to be regulated by the rules which would govern succession to it, if the transferee or legatee had bought it, would have to be considered.

But their Lordships deem it unnecessary to pronounce upon these points. 'It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes, this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case.

The principle upon which it is contended that such property should be deemed ancestral property, is that the son is only getting by his father's Will that which, but for the Will, he would have received by descent according to the Mitakshara law. Now before Hanwant Singh made the settlement, the property was subject to the Act of 1869 and would have descended to a single heir in accordance with that Act, and would not have descended according to Mitakshara law or to those whom that law would designate as heirs. The principles, therefore, of Mitakshara law—if that law be as the High Court of Calcutta has thought and the Appellant contends—would not apply to regulate the descent. Lachman, therefore, took the property as self-acquired property and could dispose of it by Will.

It becomes, therefore, unnecessary to consider who would be the heir or heirs of Lachman if he had died intestate.

In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. Watkins and Hunter* for the Appellants.

Solicitor: *The Solicitor, India Office*, for the Respondent.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 3166 OF 1923.

C. C. GHOSE, J.	}	KIRAN CHANDRA BOSE
1924,		v.
25, August.		DUTT & Co.

Lease of mortgaged property by mortgagor after institution of mortgage suit, if binds mortgagee—Mortgagee, if entitled to recover rent from lessee even if he had paid rent in advance to lessor—Power of mortgagor to grant leases—Lis pendens—Transfer of Property Act (V of 1882), sec. 52.

N mortgaged premises No. 5, Schalch Street to G. G instituted a mortgage suit to enforce the mortgage. On the 21st September 1921 Plaintiff was appointed Receiver of the mortgaged premises but was directed not to take possession till the end of November 1921. On the 7th December 1921 N granted a lease of the mortgaged premises to the Defendant for 5 years and as a condition precedent for the execution of the lease took 17 months' rent in advance. On the 16th May 1922 the Plaintiff gave notice of his appointment asking the Defendant firm to pay rent to him. On the 24th September 1922 the Plaintiff served a further letter of demand on the Defendant firm. The Plaintiff instituted the suit for the recovery of Rs. 3,150 as rent of the premises from Jaistha 1329 B. S. (15th May 1922) to the end of Kartick 1330 B. S. (16th November

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1923). The Defendant firm contended that they had no notice of the appointment of the Plaintiff as Receiver till the 24th September 1922 and that they had paid in advance 17 months' rent of the premises, viz., Rs. 2,975 to the mortgagor and two further sums of Rs. 816-14 and Rs. 198 on account of the mortgagor, and claimed deduction of the said several sums and deposited the balance of Rs. 210-2 in Court:

Held—That the lease is affected by the doctrine of *lis pendens* embodied in sec. 52 of the Transfer of Property Act.

Held further—That payment of rent in advance after the institution of the suit on the mortgage and by virtue of a lease granted by the mortgagor after the execution of mortgage is not binding upon the mortgagee or on the Plaintiff as Receiver of the mortgaged properties.

Payments made by tenants to a mortgagor after a mortgage but before notice of it, must, in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due before notice of the mortgage; but where a lessee has prepaid to his lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee who neglects to make proper enquiry of the lessee who is in possession, the mortgagee cannot recover any part of the rent reserved by the lease.

DE NICHOLLS v. SAUNDERS (3), COOK v. GUERRA (4), GREEN v. RHEINBERG (5), DANIELS v. DAVISON (6) and LORD ASHBURTON v. NOOTON (7) referred to.

(3) L. R. 5 C. P. 589 (1870).

(4) L. R. 7 C. P. 182 (1872).

(5) 104 L. T. 149 (1911).

(6) 16 Ves. 249 (1809).

(7) [1915] 1 Ch. 274 at pp. 290, 291 (1914).

Held also—That a mortgagor has very limited power of granting leases after the execution of a mortgage.

DOB v. MAISEY (1) and GIBBS v. CRUIKSHANK (2) referred to.

The facts of the case were these:—One Nalin Chandra Shaw mortgaged the premises No. 5, Schalch Street together with his other properties to one Gopiram Bhotica. Thereafter the mortgagee filed a suit against the mortgagor to enforce the mortgage and in that suit the Plaintiff was appointed Receiver of the mortgaged properties on the 21st September 1921, but the Plaintiff was directed not to take possession till the end of November 1921. On the 7th December 1921 the mortgagor granted a lease of the said premises No. 5, Schalch Street to the Defendant firm for a period of 5 years at a monthly rent of Rs. 175 and as a condition precedent for the execution of the lease, the mortgagor took an advance of 17 months' rent, viz., Rs. 2,975. On the 16th May 1922 the Plaintiff gave notice to the Defendant firm of his appointment as Receiver of the said premises and asked them to pay the arrears of rent and also the accruing rent to him in respect of the same. On the 24th September 1922 the Plaintiff served a further letter of demand on the Defendant firm. The Plaintiff instituted this suit for the recovery of Rs. 3,150 being the rent of the said premises from the month of Jaistha 1329 B. S. (15th May 1922) to the end of Kartick 1330 B. S. (16th November 1923).

The defence was that the Defendant firm had no notice of the Plaintiff's appointment till the 24th September 1922 and that the Defendant firm had paid 17 months' rent, viz., Rs. 2,975 in advance as the condition precedent for the execu-

(1) 8 B. & Cr. 787 (1823).

(2) L. R. 3 C. P. 454 (1873).

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tion of the lease on the 7th December 1921. The Defendant firm were willing to pay to the Plaintiff whatever was due to him after deducting the said sum of Rs. 2,975, and two further sums of Rs. 816-14 and Rs. 198 paid by the Defendant firm on account of the lessor. The Defendant firm deposited the balance of Rs. 210-2 in Court, and denied the Plaintiff's claim to any further sum.

Messrs. S. N. Banerjia and H. C. Mozumdar for the Plaintiff.

Messrs. S. C. Bose and J. C. Hazra for the Defendant firm.

The JUDGMENT OF THE COURT was as follows:—

C. C. GHOSE, J.—The Plaintiff, who is the Receiver appointed in Suit No. 1109 of 1921, is in possession of premises No. 3, Schalch Street in the town of Calcutta, whereof the Defendant firm are the tenants occupying a portion at a monthly rent of Rs. 175. The present suit is one for arrears of rent from the month of Jaistha 1329 B. S. up to the end of Kartik 1330 B. S., both inclusive, amounting to Rs. 3,150.

In their written statement the Defendant firm state that the demised portion of the said premises is held by them under a registered lease, dated the 7th December 1921, granted by one Nalin Chandra Shaw, who is the mortgagor, of whose properties the Plaintiff is the Receiver, for a period of five years, commencing from the 17th November 1921, with a further option of two years, at a monthly rental of Rs. 175, and that as a condition precedent for the execution of the said lease, the said mortgagor took an advance of 17 months' rent, viz., Rs. 2,975. The Defendant firm further state that under the said lease the landlord was to pay all municipal taxes, but

that there having been failure to pay the same they had been obliged to pay a sum of Rs. 816-14 on account of municipal taxes, for which they are entitled to get credit. They state further that they are willing to pay whatever may be due and owing to the Plaintiff after deducting from his claim the said two sums and a further sum of Rs. 198 referred to in para. 3 of the written statement.

It appears from the evidence adduced in this case that on the 25th August 1919, one Nalin Chandra Shaw executed a mortgage of certain properties, including premises No. 3, Schalch Street, in favour of one Gopiram Bhotica for Rs. 2,00,000. The mortgagee instituted a suit, being Suit No. 1109 of 1921, to enforce his mortgage. In that suit the Plaintiff was appointed on the 21st September 1921 Receiver of the mortgaged properties. The Receiver was not to take possession till the end of November 1921. On the 7th December 1921, there was the registered lease granted by Nalin Chandra Shaw, which has been referred to above, and also as indicated above there was an alleged payment of 17 months' advance rent from Aghrayan 1328 to Chaitra 1329 B. S. On the 16th May 1922 the Receiver served a notice upon the Defendant firm asking them to pay the arrears of rent. This demand was followed by a further demand on the 14th September 1923. On the 10th October 1923, the Defendant firm wrote a letter to the Plaintiff alleging the payment of the said advance rent. On the 11th October 1923, the Plaintiff's solicitor wrote to the Defendant firm claiming payment of the arrears of rent and denying the right of Nalin Chandra Shaw to receive the said advance rent or any portion of the same.

Although oral evidence was taken in

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this case, the matter has been argued before me by the Plaintiff's Counsel on the footing that it may be taken as admitted that on the 7th December 1921, the Defendant firm had paid to the mortgagor, Nalin Chandra Shaw, 17 months' rent in advance and that it was not till the 17th May 1922, that notice of the appointment of the Plaintiff as Receiver of the mortgaged properties was served on the Defendant firm. Now the lease in the present case relied upon by the Defendant firm is affected by the doctrine of *lis pendens* embodied in sec. 52 of the Transfer of Property Act. In the second place, the powers of a mortgagor to grant leases after the execution of a mortgage are very limited. He may no doubt make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses; but it is well settled that a mortgagor cannot after the date of the mortgage, and in the absence of an express power in that behalf, or the concurrence of the mortgagee, create except as stated above a lease or tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant [see in this connection *Doe v. Maisey* (1) and *Gibbs v. Cruikshank* (2)]. If that is so, the payment of rent in advance after the institution of the suit on the mortgage and indeed by virtue of a lease granted by the mortgagor after the execution of the mortgage is not binding upon the mortgagee or on the Plaintiff as Receiver of the mortgaged properties. The matter is concluded by authority [see in this

connection *De Nicholls v. Saunders* (3)]. Payments made by tenants to a mortgagor after a mortgage, but before notice of it, must, in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due before notice of the mortgage [*Cook v. Guerra* (4)]; but where a lessee has prepaid to his lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee who neglects to make proper enquiry of the lessee, who is in possession, the mortgagee cannot recover any part of the rent reserved by the lease [see *Green v. Rheinberg* (5)]. This is so because under the doctrine of *Daniels v. Davison* (6), the subsequent mortgagee is affected with notice of the interest which the tenant had in the land [see in this connection *Lord Ashburton v. Nocton* (7)]. In view of these principles, I must come to the conclusion that the lease referred to above is not binding upon the Plaintiff and that the payment of rent in advance is likewise not binding on the Plaintiff.

The result, therefore, is that the Plaintiff is entitled to judgment for Rs. 3,150 less the sum which the Defendant firm have paid on account of owner's share of the municipal rates and taxes. The Defendant firm is legally entitled to credit only for the payments made by them on account of the owner's share of the municipal rates and taxes and for nothing else, but as the Plaintiff has chosen to state before me that he is willing to allow to the Defendant firm credit for payments made for the owner's

(3) L. R. 5 C. P. 589 (1870).

(4) L. R. 7 C. P. 132 (1872).

(5) 104 L. T. 149 (1911).

(6) 16 Ves. 249 (1809).

(7) [1915] 1 Ch. 274 at pp. 290, 291 (1914).

(1) 8 B. & Cr. 767 (1828).

(2) L. R. 8 C. P. 454 (1873).

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as well as the occupiers' shares of the rates and taxes, the decree will be for a sum of Rs. 3,150 less the sum of Rs. 816-14 mentioned in para. 3 of the written statement, i.e., Rs. 2,333-2 with costs on Scale No. 2 and interest on judgment-debt at 6 per cent. until realization.

Mr. N. C. Bose, Solicitor for the Plaintiff.

Mr. Nittyendra Krishna Dutt, Solicitor for the Defendant firm.

D. N. S.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. (MIS.) NO. 87 OF 1924.

WALMSLEY, J.

MUKERJI, J.

1924,

Heard,

15, August.

Judgment,

19, August.

SUBODH CHANDRA RAY
CHOUDHURI

v.

THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898 as amended by Act XII of 1923), sec. 491—Directions in the nature of habeas corpus—Jurisdiction of Criminal Appellate Bench of High Court to entertain application—Sec. 54, cl. 7—Arrest without warrant on suspicion for offence committed outside British India—Conditions necessary to justify arrest under section—"Reasonable suspicion," "credible information," meaning of—Liability for arrest and detention in British India, if to be present existing liability or future possible liability—Duty of Police to produce person arrested under cl. 7, sec. 54, immediately before a Magistrate—Deputy Commissioner of Police, Calcutta, as Justice of the Peace, if has power to direct detention of person arrested for unlimited time

The Petitioner, a servant of the Jodhpur State, was arrested without warrant by the Calcutta Police under cl. 7 of sec. 54 of the Code of Criminal Procedure on receipt of certain information from the Jodhpur State. The Petitioner applied to the High Court under sec. 491 of the Code of Criminal Procedure:

Held—That the information received

did not contain sufficient material to justify the arrest of the Petitioner whose detention was therefore improper.

That in consequence of the amendment introduced in sec. 491 by Act XII of 1923, the Criminal Appellate Bench of the High Court had jurisdiction to entertain an application under sec. 491 of the Code of Criminal Procedure.

Per WALMSLEY, J.—The words "credible" and "reasonable" in cl. 7 of sec. 54 must have reference to the mind of the person receiving the information and bare assertions cannot form the material for the exercise of an independent judgment.

Per MUKERJI, J.—To satisfy the requirements of cl. 7 of sec. 54, two conditions must be present. The first of these requisites contemplates either the proof of a fact, namely, the fact of the person having been concerned in the act or a reasonable complaint or credible information or a reasonable suspicion of his having been concerned therein.

The wording of cl. 7 clearly indicates that the arresting police officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information.

The second requisite is that there must be a present liability for apprehension or detention and not a future possible liability. The issue of some sort of process under the law would create such a liability though the process may not have arrived and is not available for execution.

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Where all the conditions necessary to satisfy the requirements of cl. 7 of sec. 54 are made out and an arrest is validly and lawfully made the Police must forthwith produce the person arrested before a Magistrate.

The provisions contained in the Indian Extradition Act and the Fugitive Offenders Act referred to.

Quære.—Whether a Deputy Commissioner of Police as a Justice of the Peace in Calcutta has power under the Calcutta Police Act to direct detention for an unlimited period.

This was a Rule granted against the arrest, detention of the Petitioner and the order of the Deputy Commissioner of Police refusing to give him a reasonable bail.

The facts of the case will appear from the judgment.

Mr. Pugh, Mr. A. K. Bose and Babu Satyendra Kissors Ghose for the Petitioner.

Mr. B. L. Mittler, Standing Counsel, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This Rule was obtained under sec. 491 of the Code of Criminal Procedure.

The circumstances are as follows :—

Subodh Chandra Ray Choudhuri, a servant of the Jodhpur State, was arrested by the Calcutta Police without a warrant on August 11th. He was produced before the Deputy Commissioner on August 13th when an application for bail was practically refused, for the sum demanded was prohibitive.

It appears that the Calcutta Police received two telegrams on or about August 11th, the first, in addition to personal

description said “wanted for embezzlement.” The second, in addition to suggestions about possible movements, said “embezzlement of money to the value of a couple of lakhs of rupees.” This was all the information which the Calcutta Police had when they arrested the man, and the search of his house yielded nothing. Both these telegrams were sent by “Police” without further specification.

Since the arrest, and in answer to a telegram from Calcutta, telegrams have been received from the Judicial and Political Member of the State Council, and from the Inspector-General of Police, and from the Resident. The two former give a considerable amount of information as to the nature of the charges preferred against the arrested man.

There is no doubt about the proper procedure in cases of this nature. Under sec. 7 of the Extradition Act there should be a warrant issued by the Political Agent to the address of the Chief Presidency Magistrate. I can quite understand that that procedure may entail an amount of delay which would enable the fugitive to escape. That, however, is a danger against which there is a double safeguard. First, there is the one specially appropriate to cases, such as the present; namely, application to a local Magistrate as provided by sec. 10 of the Extradition Act. Admittedly, recourse was not had to this procedure. Secondly, there is the wide power of arrest without warrant conferred upon the Police by sec. 54 of the Criminal Procedure Code. Of the clauses in that section the seventh is the one on which reliance is placed for justification of the arrest. It is urged that the conditions mentioned in that clause are fulfilled and that the arrest was therefore lawful.

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The first question is whether the statements in the telegram of the 11th August constituted credible information or created reasonable suspicion. Now there was in the telegram nothing but a bare assertion: no details as to how the embezzlement was effected or how it was detected were given. It appears to me that an assertion like that may suffice for a requisition, but is not enough when the conditions suggested by the words credible and reasonable have to be satisfied. Those words must have reference to the mind of the person receiving the information, and such bare assertions cannot form the material for the exercise of an independent judgment. They are enough only if the receiver subordinates his judgment to that of another; consequently I think that the first half of the conditions mentioned in the seventh clause is wanting, and that the arrest without a warrant was unlawful.

It is urged that since then much more information has been received. That is true: but the nature of the offence alleged to have been committed is still obscure. Charges of forgery and cheating have been added, and very likely they are applicable, but the statement of facts suggests that the forging and the cheating may have taken place in British India. Even now therefore I am not prepared to say that all the elements required by the seventh clause to sec. 54, Cr. P. C., are established. As I take this view, I need not go into the question whether later details may be used to supplement the information on which the arrest was made.

In my opinion the telegrams received on August 11th did not contain materials which would justify the arrest of the man Subodh Chandra Ray Choudhuri without a warrant. His detention is therefore

improper: and the order that we must pass is that he be set at liberty.

An objection has been raised to-day as to the jurisdiction of this Bench to entertain this application. It appears to me that the Amending Act of last year, Act XII of 1923, made a great change, that the Rules framed under the Code as it stood before the amendment and the practice that formerly obtained have now become out of date, and in my opinion the terms of sec. 491, Cr. P. C., as it now stands, give this Bench jurisdiction to entertain and dispose of the application.

MUKERJI, J.—I agree. The learned Standing Counsel has raised a preliminary objection that the Criminal Appellate Bench of this Court has no jurisdiction to deal with an application made under the provisions of sec. 491, Cr. P. C., or that at any rate, having regard to the uniform practice which prevails as to the making of an application under that section before a Judge sitting on the Original Side of this Court, this Bench should not pass any order upon the present application. With regard to this matter, I should like to say only this: That by the amendment introduced by the Amending Act (XII of 1923) to sec. 491, Cr. P. C., the Rules framed by this Court for dealing with an application under sec. 491 have now become altogether inapposite and judging from the context of sec. 491, Cr. P. C., the Criminal Appellate Bench of the High Court being the highest Court of Criminal Appeal or revision has got ample power to deal with the application. I propose, therefore, to deal with the merits. The facts of the case may shortly be stated as follows:—

Subodh Chandra Ray Choudhuri was arrested by the Police of Calcutta on the 11th August 1924 at about 5-30 P.M. He was placed before the Deputy Commis-

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sioner of Police on the 13th August 1924, 12th having been a Sunday, when an application for bail was made on his behalf, and it was urged that the arrest and detention were wholly illegal. The Deputy Commissioner of Police made an order that Subodh Chandra Ray Choudhuri might be released on bail of rupees two lakhs to be furnished in ten sureties or less. Subodh Chandra Ray Choudhuri was unable to avail of the said order, and his brother Sushil Chandra Ray Choudhuri applied to this Court under sec. 491 of the Code of Criminal Procedure and sec. 107 of the Government of India Act, 1915, for an order for setting him at liberty, and in the alternative, for reduction of the bail. In pursuance of our order Subodh Chandra Ray Choudhuri was produced before us. We ordered his release on his own bond of Rs. 5,000 and on his furnishing four sureties of Rs. 5,000 each or one surety for Rs. 20,000, whichever might be convenient to him, pending our orders on the application in so far as it purports to be one under sec. 491, Cr. P. C.

It appears that the arrest was made on the strength of two telegrams received by the Calcutta Police on or about the 11th August 1924 which ran as follows :—

“ O. T. Jodhpur—9 Raj.

Police Commissioner, Calcutta.

Subodh Chandra Choudhuri, Bengalee of 46A, Bosepara, Baghbazar, Calcutta, wearing eye-glasses, age about 35, bald head, stoutish, wheat complexion, of the State Audit Office wanted for embezzlement, please arrest if found, goes in European habits at times—Police.”

“ I. B. Jodhpur, 11 Raj 66.

Police Commissioner, Calcutta.

My wire of 9th instant regarding Subodh Chandra Ray Choudhuri to your address enquiries show that he may go to

Chandernagar, his wife and children at Calcutta at address given by me in my telegram embezzlement of money to the value of a couple of lakhs of rupees please search his and his father's house and attach all valuables including money. . . . Police.”

After the arrest the Calcutta Police sent the following telegram to the Inspector-General of Police, Jodhpur :—

“ Jodhpur Raj Police—Jodhpur.

Your telegrams 9th, 11th. Subodh Chandra Ray Choudhuri arrested, nothing found on house search, application going to be made in Calcutta High Court for release on bail, wire full details of charges preferred and when extradition proceedings expected. Police Commissioner, Calcutta.”

To this two telegrams were received by the Calcutta Police by way of reply, one from the Political and Judicial Member, State Council, Jodhpur, and the other from the Inspector-General of Police, Jodhpur. They ran as follows :—

“ Jodhpur 14—99.

Police Commissioner, Calcutta.

Thanks for your telegram of the 13th to our Inspector-General of Police. Subodh Chandra Ray Choudhuri was Assistant Treasury Officer at Jodhpur when he fraudulently obtained from Railway Auditor two cheques Nos. B 291780 and 48762 for one lakh each and cashed them fraudulently at Ajmeer and Bombay respectively and misappropriated the amount. Wanted here under secs. 420, 409 and 467, I. P. C. He should not therefore be released on bail. His co-accused under arrest here. Extradition proceedings will be sent shortly. Political and Judicial Member, State Council, Jodhpur.”

“ Jodhpur 14 Raj—72.

Police Commissioner, Calcutta.

Please refer wire of last night from

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Political and Judicial Member, State Council, Jodhpur, to your address. Offence under sec. 409, I. P. C. non-bailable and in view of the grave importance of the offences the bail application of Subodh may kindly be opposed. Moreover it is possible he may commit suicide or escape beyond reach if left to himself. Inspector-General of Police."

It appears also that a further telegram was thereafter received by the Calcutta Police from the Resident of Jodhpur which ran thus:—

"Jodhpur Residency.

Police Commissioner, Calcutta.

2021 Reference. Arrest Subodh Chandra Ray Choudhuri by Jodhpur Durbār for offences under secs. 420, 409 and 467, I. P. C. Warrant will be sent as soon as possible, meanwhile kindly do not grant bail. Resident."

The arrest as I have said was made on the first two telegrams set forth above and it is sought to be justified by reference to clause seventhly of sec. 54 of the Code of Criminal Procedure. That clause runs thus:—

"Any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which if committed in British India, would have been punishable as an offence, and for which he is under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India."

In dealing with the question as to the legality or otherwise of the arrest under this clause it would be convenient first of all to dispose of an argument based on the decision in the case of *In re Mukund*

Babu Vethe (1) which has been put forward before us. That decision can no longer be treated as good law since the addition of clause seventhly to sec. 54, Cr. P. C., by sec. 3 of Act III of 1891 [see *Emperor v. Huseinally Niazally* (2)].

To satisfy the requirements of this clause two conditions must be present: *First*, that the person to be arrested has been concerned in any act committed at any place out of British India, which if committed in British India would have been punishable as an offence, or against the person a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in such an act: and *second*, that the person is liable for such act to be apprehended or detained in custody in British India under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise.

The first of these requisites contemplates either the proof of a fact, namely, the fact of the person having been concerned in the act or a reasonable complaint, or credible information or a reasonable suspicion of his having been concerned therein. The wording of this part of the clause is very similar to that of clause firstly of the section. Under that clause it has been held by this Court in the *matter of Cheru Chandra Majumdar* (3) that the section gives a Police Officer personal authority and involves personal responsibility and the reasonable suspicion and credible information must be based upon definite facts which the Police Officer must consider for himself before he acts under this section, and that he

(1) I. L. R. 19 Bom. 72 (1894).

(2) 7 Bom. L. R. 463 (1905).

(3) I. L. R. 44 Cal. 76: s. c. 20 C. W. N. 1238 (1916).

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cannot delegate his discretion or take shelter under the belief or judgment of another Police Officer. To provide for cases where one Police Officer has to act on a requisition issued by another Police Officer clause ninthly has been added by sec. 10 of Act XVIII of 1923 which restricts the responsibility of the arresting Police Officer to the conditions mentioned in that clause. In cases, however, where clause firstly applies the responsibility is that of the arresting officer himself and the principle laid down in the case of *Charu Chandra Majumdar* (3) still holds good. This new clause does not affect the provisions of clause seventhly and in fact it has not been suggested before us that it does. The wording of clause seventhly clearly indicates that the arresting Police Officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of an information cannot be given; both must depend upon the existence of some tangible proof within the cognisance of the arresting Police Officer and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge, information or suspicion. The first two telegrams give no facts whatsoever and merely state that Subodh Chandra Ray Choudhuri was wanted for having embezzled a couple of

lakhs of rupees. They do not set out even so much in the shape of facts as were set out in the communication upon which the Police acted in the case of *Charu Chandra Majumdar* (3) referred to above. The first of the two conditions therefore in my opinion was not satisfied in the present case. In my opinion the arrest was not one authorised by law and Subodh Chandra Ray Choudhuri is entitled to his immediate release.

In view of the materials which the Calcutta Police obtained subsequent to the arrest it is necessary to consider the matter further as to whether those materials would not justify his re-arrest, for there would be no object in releasing him if on these materials he may be re-arrested and again put in custody, the consequence of which will probably be a further application to this Court when the matter will have to be considered again.

The later telegrams judging from the sources from which they came must be taken as absolute guarantee of the truth of the information conveyed thereby, but they hardly supply the facts which the arresting Police Officer must have before him in order to form his own opinion as to the complicity of the person to be arrested in the act which he has got to consider under the first part of clause seventhly of the section. Of these three telegrams the first one discloses that the charge against Subodh Chandra Ray Choudhuri was that he had fraudulently obtained the cheques and fraudulently cashed them and misappropriated the amounts of the cheques. It mentions secs. 420, 409 and 467, I. P. C., but sets out no allegations as to sec. 467, I. P. C., and gives no particulars upon which one

(3) I. L. R. 44 Cal. 76 : s. c. 20 C. W. N. 1233 (1916).

(3) I. L. R. 44 Cal. 76 : s. c. 20 C. W. N. 1233 (1916).

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can make out whether the acts alleged to have been committed amount to offences under secs. 420 and 409, I. P. C. The next telegram speaks only of the offence under sec. 409, I. P. C. The last one merely says that Subodh Chandra Ray Choudhuri is wanted for offences under secs. 420, 409 and 467, I. P. C. If one has to form an opinion as to whether these offences have been committed or not, the telegrams, I venture to think, will not enable him to do so and yet the arresting Police Officer is called upon to do so by the first part of the clause in order to make the arrest. The position would have been wholly different if there was any credible information that a warrant had been issued, for that would have been very substantial material justifying the arrest.

Then as to the second condition. The question is what is the meaning of the expression "for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise liable to be apprehended or detained in custody in British India." Does this expression only qualify the offence and denote its character for which there may be such a liability, or does it indicate a present liability for apprehension or detention? In my opinion it means the latter and that the act must be one for which there is a present liability to apprehension or detention in custody in British India under the laws of extradition or the Fugitive Offenders Act or any other law. The word suggests this interpretation. To adopt the other view will lead to absurdities. I propose to give only two illustrations. Suppose a Police Officer in British India receives credible information, that is to say, from one who gives him positive proof as to the commission of an offence by a person

outside British India and the offence is an extradition offence. If the Police Officer believes in the information he would be competent to arrest the offender and keep him in custody and in fact it would be his duty to do so. The arrested person will thus be arrested and detained though it may never be in the contemplation of the informant to take further proceedings against him and though the authorities within whose jurisdiction this offence was committed may never think of sending out an extradition warrant or a requisition. In my opinion it could never have been the intention of the legislature to arm the Police with such powers and I am confirmed in my opinion by the provisions in the Extradition Act which the legislature has made for the arrest and detention of offenders in anticipation of the issue of warrant or requisition in such cases—provisions which lay down ample safeguards in the shape of magisterial intervention. Nextly, it will be seen that clause firstly speaks of cognizable offences only, while clause seventhly includes all acts which amount to offences, provided only that they are offences for which there is a liability for apprehension, a detention under the law. A Police Officer in British India cannot arrest without warrant a person who has committed a non-cognisable offence, say forgery in British India. Forgery, however, is an extradition offence. If the other view be adopted he would be competent to arrest the offender without warrant when the offence has been committed outside British India. This would be an anomaly and the anomaly would be greater if the Code of Criminal Procedure applies to the State wherein the offence has been committed. The local Police will not be competent to arrest the offender without a warrant and yet the British Indian

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Police will have power to do so at the request of the local Police. The legislature could never have been so unreasonable as to have intended this. In my opinion the expression contemplates cases in which there is a present liability and not cases in which there may be liability in future for apprehension or detention. The issue of some sort of process under the law would create such a liability though the process may not have arrived and is not available for execution.

The legislature has made ample provisions for the arrest and detention of persons under similar circumstances. Under the Indian Extradition Act (XIV of 1913) ample provision has been made by Chap. III for the surrender of fugitive criminals in cases of States other than Foreign States. Under sec. 7 of the Act warrants for extradition offences may be issued by Political Agents and under sec. 9 requisition may be made to the Government of India or to any local Government by or on behalf of any State, not being a Foreign State, for the surrender of a fugitive criminal in respect of any offence. Under sec. 10 of the Act certain Magistrates in British India are empowered to issue warrants for the arrest of fugitive offenders who may have committed offences in any State not being a Foreign State and for whose arrest no warrant or requisition has yet been issued, and sufficient safe-guards have been laid down for the exercise of the powers so conferred on the Magistrates by providing for the exercise of a sound judicial discretion as to the sufficiency of the materials and for the submission of a report forthwith and prescribing the period of detention and making provision for bail. Similar provisions are to be found in the Fugitive Offenders Act of 1881 (44 and 45 Vict., Chap. 69) for the issuing of endorsed warrants and provin-

cial warrants—the provisions for issuing provincial warrants corresponding in some respect to those contained in sec. 10 of the Indian Extradition Act.

To allow a person to be arrested by the Police when no extradition warrant has been issued nor any requisition made and no assistance is sought for from the Magistrate within the local limits of whose jurisdiction the offender is at the time, would be to subvert the whole law as to arrest of fugitive offenders, as contained in the Indian Extradition Act which undoubtedly is the law regulating the procedure to be adopted in the case.

There is a further matter to which I think it necessary to refer. Even if all the conditions necessary to satisfy the requirements of clause seventhly of sec. 54 of the Code of Criminal Procedure are made out and an arrest is validly and lawfully made the Police must forthwith produce the person arrested before a Magistrate. There can be no doubt in this respect, whatever may be the view as to the powers of the Police in Calcutta as to detention of persons arrested by them in the discharge of their normal duties under the Calcutta Police Act. Under that Act power of detention for an unlimited period is claimed in the Deputy Commissioners by virtue of their being Justices of the Peace. That has been doubted by this Court on more occasions than one. Whether there is such power or not, it is clear to my mind that when an arrest is made under sec. 54, clause seventhly, on the supposition that the person arrested is liable to apprehension under the provisions of the Indian Extradition Act, he must forthwith be produced before a Magistrate in order that the detention may conform to the provisions of sec. 23 of the Act. This does not appear to have been done in this case.

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In my judgment, therefore, the arrest was improper and the detention unwarranted by law and Subodh Chandra Ray Choudhuri must at once be released and discharged from his bail

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB]

LORD SHAW.

LORD PHILLIMORE.

LORD BLANESBURGH.

SIR JOHN EDGE.

LORD SALVESEN.

1924,

Heard, 29, January,
4 and 5, February.

Judgment,

26, February.

MUSST. DURGA

DEVI and anr.,

Appellants,

v.

SHAMBHU NATH and
ors., Respondents.

Hindu law - Family custom, proof and validity of—Kashmiri Brahmins, settled at Amritsar, adoption amongst, governed by custom—Adoption of boy of 17 years already invested with sacred thread, valid according to custom

Held—That the parties who were Kashmiri Brahmins settled at Amritsar in the Punjab were governed in matters of adoption by custom and not by the principles of the Mitakshara form of Hindu law; and that the Plaintiff was validly adopted according to custom, though at the time he was 17 years of age and had already been invested with the sacred thread.

Custom binding inheritance in a particular family has long been recognised in India though such a custom is unknown to the law of England and foreign to its spirit.

ABDUL HUSSEIN KHAN v. BIBI SONA DERO (1) followed.

(1) L. R. 45 I. A. 10; s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917).

This was an appeal from a decree, dated the 10th March 1916, of the Chief Court of the Punjab, which reversed a decree, dated the 31st July 1914, of the District Judge of Amritsar.

The suit was instituted by the Respondent Shambhu Nath to recover possession of certain property left by his paternal uncle Ram Chand. During his life-time Ram Chand adopted Amar Nath who married Mt. Indrani and predeceased Ram Chand. The Respondent alleged that he was then adopted by Ram Chand.

Amar Nath's widow Indrani took possession of Ram Chand's property on the death of the latter's widow and purported to transfer it to her daughter Durga Devi, the Appellant, by deed of gift. Durga Devi and her son Kali Sahai opposed the claim of Shambhu Nath. They denied the validity of his adoption and contended that his claim was barred by limitation.

The suit was dismissed by the District Judge but the High Court on appeal reversed his findings and decreed the suit.

Messrs. DeGruyther, K. C. and Parikh for the Appellants.—There is no proof that the parties are governed by local custom and in the absence of such proof the parties are governed by the strict Benares School of the Mitakshara, which provides that there can be no adoption after the Upanayana ceremony has been performed.

Mayne's Hindu Law, secs. 140, 141, 142.

Strange's Hindu Law, Vol. 2, p. 104.

Bal Gangadhar Tilak v. Shrinivas Pandit (5).

The judgment of the Board in this latter case was merely on the question of "datta homam."

(5) L. R. 42 I. A. 135, 151; s. c. I. L. R. 39 Bom. 441; 19 C. W. N. 729 (1915).

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"Upanayana" was only mentioned incidentally and the High Court are in error in considering it a conclusive decision on the question of "Upanayana".

The cases decided in Bombay and Madras are valueless for the correct decision of this case, as they are based either on the Mayuka or on customary law.

The question is discussed at considerable length by Mahmood, J., in *Ganga Sahai v. Lekhraj Singh* (6) and there is a definite ruling on the point that there can be no adoption after the Upanayana ceremony. In that case Mahmood, J., expressly distinguishes the Bombay rule as laid down in *Dharma Dagu v. Ramkrishna Chinnaji* (7) and his findings have been accepted by Mookerjee, J., in *Lachmi Dai v. Kissen Lal* (8). Any alleged custom which differs from the rule must be clearly proved and such proof has not been given.

[On this point reference was also made to Dubois' "Hindu Manners, Customs, and Ceremonies," pp. 371-374; *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (9).]

On the question of limitation, the suit is barred, as the widows were in adverse possession of the property for more than 12 years.

Their possession must be presumed to have been adverse unless there is proof that it was permissive and no such proof has been adduced.

Mt. Lachan Kunwar v. Anant Singh (10) and *Sham Koer v. Dah Koer* (11).

(6) I. L. R. 9 All. 253 (1886).

(7) I. L. R. 10 Bom. 80 (1885).

(8) 4 C. L. J. 537 (1906).

(9) L. R. 26 I. A. 113; s. c. I. L. R. 22 Mad. 398; 3 C. W. N. 427 (1899).

(10) L. R. 22 I. A. 25; s. c. I. L. R. 22 Cal. 445 (1894).

(11) L. R. 29 I. A. 132; s. c. I. L. R. 29 Cal. 664; 6 C. W. N. 657 (1902).

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Respondents.—There are concurrent findings of the lower Courts that possession of the widows was permissive and not adverse.

The argument based on the invalidity of an adoption after "Upanayana" was never raised in the lower Courts where the contest centred mainly round the age of the adopted boy, and that point was later given up.

The strict law of adoption is seldom followed in the Punjab and among Kashmiri Brahmins, such as the parties in the present appeal. *Apārarka* is followed and not the strict *Mitakshara*.

Mayne's Hindu Law, para. 26.

Even if *Mitakshara* is applicable the adoption of a brother's son after the investiture with the sacred thread is not invalid.

In *Ganga Sahai v. Lekhraj Singh* (6), the decision as to "Upanayana" was *obiter*. Mahmood, J., treated what are moral directions as being legal obligations basing his findings on the view taken by Mitter, J., in *Upendra Lal Roy v. Sm. Rani Prasannamayi* (12) which view was later disapproved in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (9).

The prohibition in the *Dattaka Chandrika* and *Dattaka Mimamsa* refers to the tonsure ceremony and not to "Upanayana." The prohibition does not appear in the *Smritis* and is not of primary importance.

The present question is fully discussed in *Sircar Shastri's Hindu Law of Adoption*, p. 359, where the performance of

(6) I. L. R. 9 All. 253 (1886).

(9) L. R. 26 I. A. 113 at pp. 134, 135, 136; s. c. I. L. R. 22 Mad. 398; 3 C. W. N. 427 (1899).

(12) 1 Beng. L. R. A. C. 224 (1862).

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Upnayana is said not to be a bar to adoption.

The Indian Judges in *S. B. Gurulingaswami v. S. B. Ramalakshamma* (9) treated the question as being one for discussion in a moral rather than a legal sense and that has been the attitude throughout the reported cases. See *Lakshmappa v. Ramava* (3), *Viraragava v. Ramalinga* (13) and *Papamma v. V. Appa Rau* (14)*.

However the adoption has been proved to be valid according to the family custom and its validity has never been questioned until this suit was filed.

Mr. DeGruyther, K. C., in reply.—The requirements for establishing a family custom are set out in Mayne's Hindu Law, para. 50.

Abdul Hussein Khan v. Bibi Sona Dero (1).

No single instance of a similar adoption has been satisfactorily proved.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by Mussammat Durga Devi and her minor son Kali Sahai, two of the Defendants to the suit, from a decree, dated the 10th March 1916, of the Chief Court of the Punjab, which reversed a decree, dated the 31st July 1914, of the District Judge of Amritsar, which had dismissed the suit. The Respondents are Shambhu Nath, who is the Plaintiff in the suit, and Arjan Singh and Nathu Mal, who are two of the Defendants to the suit and have taken no part in this appeal or in the litigation.

(1) L. R. 45 I. A. 10, 14; s. c. I. L. R. 45 Cal. 450; 22 C. W. N. 353 (1917).

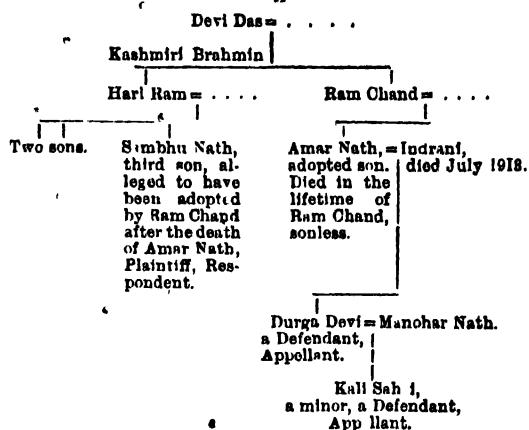
(3) 12 Bom. H. C. R. 364 (1875).

(9) I. R. 26 I. A. 113; s. c. I. L. R. 22 Mad. 398; 3 C. W. N. 427 (1899).

(13) I. L. R. 9 Mad. 148, 164 (1885).

(14) I. L. R. 16 Mad. 384, 396 (1893).

The pedigree of the family to which Shambhu Nath belonged is as follows:—



The suit was brought in the Court of the District Judge of Amritsar on the 21st October 1913, for a decree for the possession of two houses, a well, a *kothri* and a shop in Amritsar, of which the Plaintiff alleged that he, as the adopted son of Ram Chand, was the owner. His case is that he was adopted by Pandit Ram Chand in September 1896, who was the owner of the property in question, and died on the 13th July 1897. The case of the Defendants Durga Devi and Kali Sahai, her minor son, is that Plaintiff was not adopted by Ram Chand and that the suit is barred by the law of limitation. The other two Defendants, who have no title if the Plaintiff is the adopted son of Ram Chand and is not debarred from maintaining the suit by the law of limitation, did not defend the suit and were by an amendment of the decree of the Chief Court, made not liable for costs.

It will be convenient to consider whether Shambhu Nath was validly adopted by Ram Chand before considering whether Shambhu Nath's suit is barred by the law of limitation.

Shambhu Nath was the third son of Hari Ram, a brother of Ram Chand. They belonged to a family of Brahmins which

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came from Kashmir and settled in Amritsar in the Punjab, and sec. 5 of Act IV of 1872, the Punjab Laws Act, 1872, as amended, applied to that family of Kashmiri Brahmins. By that section it is, so far as is material to this suit and appeal, enacted as follows :—

"5. In questions regarding succession, . . . adoption, . . . or any religious usage, . . . the rule of decision shall be—

(a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority ; •

(b) the Muhammadan law, in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by such custom as is above referred to."

The adoption alleged in this suit to have been made was an adoption applicable by custom to the family of Kashmiri Brahmins to which Ram Chand and Shambhu Nath belonged, and had not been altered or abolished or declared to be void.

At the date of the alleged adoption Shambhu Nath was 17 years old and he had been invested with the sacred thread, that is, the ceremony of Upanayana had already been performed upon him. There was no evidence as to what school of Hindu law Kashmiri Brahmins living in Kashmir are subject to, and it has not been suggested that this family of Kashmiri Brahmins was living in the Punjab subject to any school of Hindu law peculiar to Kashmir. They were, however, Brahmins by caste, and consequently were Hindus of a twice-born class.

In considering whether a family custom as to adoption was proved in this suit

it is advisable to bear in mind what Lord Buckmaster said in delivering the judgment of the Board in *Abdul Hussein Khan v. Bibi Sona Dero* (1) as to the proof of family customs in India. After pointing out that it is incumbent upon a Plaintiff to allege and prove the custom upon which he relies, Lord Buckmaster said :—

"Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognized in India [see *Soovendranath Roy v. Heeramonee Burmoncah* (2)] although such a custom is unknown to the law of this country, and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or not by another family, would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that within certain and definite limits, it undoubtedly existed."

There are concurrent findings of the trial Judge and the Chief Court that Shambhu Nath was in fact adopted by Ram Chand, and there was evidence upon which those Courts could so find, and those findings as to the factum of the

(1) L. R. 45 I. A. 10 at p. 14; A. C. I. L. B. 45 Cal. 450; 22 O. W. N. 353 (1917).

(2) 12 M. I. A. 91 (1888).

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adoption must be accepted as conclusive. Each Court also found that the adoption was valid, but apparently for different reasons. The trial Judge apparently relied for his finding that the adoption was valid, not upon the evidence as to custom, but upon a judgment of the Bombay High Court in *Lakshmappa v. Ramava* (3) to which this family of Kashmiri Brahmins were not parties. He also referred to Trevelyan's *Hindu Family Law*, edition of 1908, p. 148. He did not, however, express any opinion that on the evidence before him in this suit the adoption was invalid. He, however, dismissed the suit on the ground set up by Mussammat Durga Devi and her son in their written statement that the suit was barred by the law of limitation. He dismissed the suit without costs. From that decree Shambhu Nath and Mussammat Durga Devi and her son appealed. The Chief Court found on the evidence that by the custom of this family the adoption was valid, and that the suit was not barred by limitation, and decreed the suit with costs. The Chief Court dismissed the appeal of Mussammat Durga Devi and her son with costs.

Shambhu Nath, the Plaintiff, did not in his plaint state in what particular form he had been adopted by Ram Chand, but he alleged in his plaint that he was the adopted son of Ram Chand, and that Ram Chand, son of Pandit Devi Das, by caste a Kashmiri Pandit, resident of Amritsar, had been the owner of the property, specified in his plaint, in respect of which he, Shambhu Nath, claimed a decree for possession. As Shambhu Nath had been adopted in September 1896, openly and in the presence of many members of the brotherhood, the form of his adoption must have been perfectly well known in the

family and by Mussammat Durga Devi. In the written statement which she filed in the suit on behalf of herself and her son she confined herself so far as the question of Shambhu Nath's adoption was concerned, to a simple denial that Shambhu Nath was the adopted son of Ram Chand. On those pleadings Shambhu Nath was, in order to succeed in his suit, bound to prove that he had been validly adopted.

On behalf of Shambhu Nath several witnesses were called, most of whom were members of the Biradri, and all of whom, so far as appears, were persons of respectability. Some of them who were members of the Biradri lived in Amritsar, others lived in Lahore. Ram Chand was a Guru, that is, a religious teacher and spiritual guide amongst these Kashmiri Brahmins of Amritsar, and was obviously much respected, and he must have known what were the essentials to a valid adoption in the family to which he belonged. As has already been mentioned Shambhu Nath was 17 years old when the adoption took place, and he had been then already invested with the sacred thread; those are facts which must have been known by the members of the Biradri and by other friends of the family who attended the adoption, several of whom gave evidence in support of his case. It is not suggested that any one who attended the adoption had questioned in any way the right to validly adopt in this family a boy or young man who had previously been invested with the sacred thread. Not one question was put in cross-examination of any witness for the Plaintiff to suggest that Shambhu Nath could not have been validly adopted because he had been previously invested with the sacred thread, and the cross-examination of the Plaintiff's witnesses was directed to make out a case

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that the adoption was invalid by reason of Shambhu Nath having been 17 years old when the adoption took place. There was abundant evidence that there was no limit of age for a valid adoption in this family, and the contention that there was a limit of age within which a valid adoption could be made in this family was subsequently abandoned. After the Plaintiff's evidence had been closed, some witnesses were called on behalf of Mussammat Durga Devi and her son, who, if their evidence was believed, proved that a boy of 17 years of age could not be adopted.

One of the witnesses for the Defendants-Appellants was Kishori Lal, a Kashmiri Pandit of Delhi. He stated that "a boy who has gone through his *janoo* ceremonies (ceremonies of investiture with the sacred thread) can never be adopted," and "we follow Mitakshara." It may be mentioned with regard to his evidence that the Chief Court of the Punjab had held in *Maharaj Narain v. Banoji* (4) that Kashmiri Brahmins of the Delhi District were proved to be governed in matters of adoption by custom and not by the principles of the Mitakshara form of Hindu Law.

Another witness for the Defendants-Appellants was Mohan Lal, a Kashmiri Brahmin of Lahore. He stated that "a boy who has gone through the *janoo* ceremony cannot be adopted," and "we follow Dharam Shastar in matter of *janoo* and adoption"; he further stated, "According to Hindu law *janoo* ceremonies cannot be performed after the age of 11 or 12 years. I do not know whether there is any age restriction as regards adoption. I have not read the Hindu Law." It is not necessary for their Lordships to consider what is the law of the Mitakshara or of the Dharma-Sutras, as the question on which this suit depended is one as to a

custom of adoption in this family of Kashmiri Brahmins. The Plaintiff was not entitled to call rebutting evidence on the question of adoption as his case as to the alleged adoption had been closed.

After a careful consideration of the evidence their Lordships have come to the conclusion that Shambhu Nath was validly adopted by Ram Chand. His adoption was recognised, as valid by the Biradri and by the friends of the family, and so far as appears its validity was not questioned by any one from 1896 until the present dispute arose in 1913. When Ram Chand died his brother Hari Nath and two elder sons of Hari Nath were living, but it was Shambhu Nath who performed the funeral obsequies of Ram Chand and of Ram Chand's widow, and on Ram Chand's death Shambhu Nath succeeded him as the Guru. It was Shambhu Nath who gave Mussammat Durga Devi away in marriage, and it was Shambhu Nath who paid the not inconsiderable expenses of the marriage.

The contention of the Appellants that this suit is barred by the law of limitation on the ground that Mussammat Umraoti, the widow of Ram Chand, and Mussammat Indrani, and after her Mussammat Durga Devi held adverse possession of the property in suit for more than 12 years was, in the circumstances of the case, in their Lordships' opinion an impudent and unfounded contention of the Appellants. The family house at Amritsar was naturally the proper place in which Umraoti, Indrani and Durga Devi until her marriage should live. Shambhu Nath permitted them as female members of the family to live in that house. He had obtained employment at Lahore in the service of the Railway Company. The rents of the property at Amritsar were trifling and he allowed Umraoti, Indrani and Durga Devi

(4) *Punj. Record* for 1907, Vol. 42, p. 147.

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to enjoy these rents for their maintenance as female members of his family. There was no 12 years' adverse possession of any of the property in suit.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: Messrs. Downer & Johnson for the Appellants.

Solicitors: Messrs. Ranken Ford & Chester for the 1st Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1923,

Heard, 26 and

29, October.

Judgment,

22, November.

PUJARI LAKSH-
MANA GOUNDAN

and anr.,

Appellants,

v.

SUBRAMANIA

AYYAR and ors.,

Respondents.

Dedication, proof of—Temple founded by Hindu, whether dedicated to public—Temple not taken under control of Board of Revenue, effect of—Founder holding temple out as public temple, proof of dedication—Sudra, if may be pujari in Hindu temple.

The question was whether a Hindu temple founded between 1841 and 1856 in the village of Kalipatta in the District of Salem in the Madras Presidency was dedicated by the founder to the public or not. There was no deed or document of dedication and it was not taken under the control of the Board of Revenue:

Held—That it might be assumed that it would have been taken under the control of the Board if it had been dedicated to the public by a deed which was made public. The question whether the temple was ever dedicated to the public must

therefore depend upon inferences which could legitimately be drawn from facts not in dispute and from unambiguous evidence on the record of the suit, regard being had to the principles of Hinduism which prevailed in the Presidency of Madras. It would be a legitimate inference to draw that the founder had dedicated the temple to the public, if it was found that he had held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship.

“Apparently in the Presidency of Madras there are some public Hindu temples, the pujaris of which are Sudras.”

This was an appeal from a judgment and decree, dated the 25th September 1919, of the High Court of Judicature at Madras, in Letters Patent Appeal, which reversed a judgment and decree of Mr. Justice Oldfield, dated the 10th December 1918 and a judgment and decree, dated the 20th December 1916, of the Temporary Subordinate Judge of Salem.

The main question for determination on the present appeal was whether the temple or chapel which formed the subject-matter of the suit was a public religious trust within the meaning of sec. 92 of the Code of Civil Procedure, 1908.

The Subordinate Judge, as well as Mr. Justice Oldfield (Abdur Rahim, J., dissenting) answered the question in the negative, but on appeal under cl. 15 of the Letters Patent a Bench of three Judges of the Madras High Court held that the temple or chapel was a public religious trust to which sec. 92 applied.

The Plaintiffs filed their suit with the leave of the Collector.

On the 4th December 1914, they stated that the Plaintiffs were Brahmins and “worshippers in the well-known Shrine of Sri Kandaswami, otherwise known as Sri Subramanyaswami, in the

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village of Kalipatti" in the District of Salem, and that as such worshippers they were interested in the worship and management of the said temple. They alleged "that this temple, originally a small one, became famous," and a large number of worshippers made offerings of gold and silver, jewels, money, grain, etc., which were utilised by Lakshmana Goundan (grand-father of the 1st Defendant), who was appointed *pujari* for the support of the temple and its improvements. The Plaintiffs further alleged that after Lakshmana Goundan, his son, Pudu Palani Goundan, was similarly appointed and carried on the worship of the temple. The Plaintiffs complained that the 1st Defendant, *pujari* Lakshmana Goundan, the son of Pudu Palani Goundan, and the 2nd Defendant, Kandasami Goundan, the son of Defendant No. 1, who are the *pujaris* and managers of the said temple, were mismanaging the temple. The Plaintiffs claimed that the temple was a public religious institution or trust within the meaning of sec. 92 of the Code of Civil Procedure, 1908, and they prayed for a decree for removing the Defendants from the office of *dharma-karta* of the temple, for appointing new trustees, and settling a scheme generally for the management and up-keep of the temple.

The Defendants denied that the temple was a public religious trust and they pleaded, among other things, that it was founded by their ancestor, Lakshmana Goundan, in or about 1821, and that ever since its foundation the Defendants and their ancestors had performed the worship of the idol, and managed the temple as the private temple of their family.

The suit was tried by the Temporary Subordinate Judge of Salem.

He held that the temple in suit was

not a public religious trust to which sec. 92 of the Code of Civil Procedure, 1908, applied. He was of opinion that the oral evidence produced by the Defendants was credible in preference to that produced by the Plaintiffs, and all the learned Judges of the High Court have affirmed that view.

The learned Subordinate Judge examined the evidence in great detail and inquired into the origin and foundation of the temple in suit, the gradual development of the temple, and the buildings and religious festivities connected with it and the administration and management of the temple and the offerings made therein. The following extracts from his judgment summarize his findings:—

"Plaintiffs' case that before the construction of the Plaint Temple there was a small old Temple in the site should be taken to be not proved. . . .

"There appears to be no doubt of the fact that there was no Temple, big or small, in the site where the Plaint Temple now stands before the life-time of 1st Defendant's grand-father. . . .

"The Temple has been in existence for more than 90 years. During the whole of this period it has been under the sole control and management of the Defendants' family. No one, before the Plaintiffs applied for sanction, seems to have claimed a right to interfere in its management or to question Defendants' family about the way in which the *pujas* and *utsavams* are done in the Temple.

"It is clear beyond doubt that ever since the time the Temple came into existence Defendants' family has been treating the Temple as their private property.

"It does not appear that the founder during his life-time parted with his pre-

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proprietary right to the Temple in favour of the public.

"I am inclined to hold that the founder retained his right of property over the Temple and that there has been no dedication of the Temple in favour of the public divesting the founder and his family of their proprietary right over the Temple. I therefore find issues 3, 6 and 7 against the Plaintiffs.

"Defendants' family since the time the Temple came into existence has been in sole management of the Temple and its affairs. No misconduct except the setting up a right of private property under *bond fide* belief that it is so, is proved in this case."

In the result the learned Subordinate Judge made a decree dismissing the suit of the Plaintiffs, and from that decree the Plaintiffs appealed to the High Court of Judicature at Madras. The appeal was heard by Mr. Justice Oldfield and Mr. Justice Abdur Rahim, who delivered separate judgments, differing from one another, on the 10th December 1918. Mr. Justice Oldfield came to the conclusion that the said Subordinate Judge was right in holding that the temple in suit was not a public religious trust within the meaning of sec. 92 of the Code of Civil Procedure, 1908, but Mr. Justice Abdur Rahim took the opposite view.

Both the learned Judges of the High Court concurred in affirming the finding of the Subordinate Judge that the Plaintiffs' case, as made in the original plaint, to the effect that in remote antiquity a small temple existed on the site of the present temple, and that the old temple was enlarged with public contributions into its present condition, and that the grand-father of Defendant No. 1 was appointed the *pujari* or priest of the temple, was unfounded. They held that the 1st

Defendant's grand-father founded the temple in or about 1821.

But Mr. Justice Abdur Rahim was of opinion that "the way in which from the very beginning the Temple has been thrown open to members of the public, and the services and festivals, including the periodic carrying of Idols in public processions conducted for their benefit, and out of the income of their offerings," raised the inference that the founder could not have founded the temple or maintained it as a source of private gain, but that he must have intended to dedicate it to the public.

Mr. Justice Oldfield concluded his judgment in the following words:—

"In the beginning offerings were given mainly or entirely to him (*i.e.*, Lakshmana Goundan) personally, the predominating sentiment being respect for his alleged powers; and the Temple existed for his profit in connection with their exercise. It is not necessary to suppose that he or his descendants have taken an unduly commercial view of their position. Motives are seldom susceptible of exact analysis or unmixed; and I find no difficulty in believing that he and his descendants in all good faith regarded the worship of Sri Kandaswami as conducted for their benefit and themselves as entitled to profit by its popularity. His descendants maintained the private and family character of the Temple by the exceptional burial of his body and worship of his and his wife's effigies within it and by the exceptional retention of themselves as worshippers; and no objection was taken to their doing so. If the public subsequently paid more attention to the better known Sri Kandaswami than to Lakshmana, that is only natural. But it would involve nothing amounting to a dedication by the only persons competent to

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make one, Defendants' family; and nothing resembling a dedication, express or implied, by them is proved. In these circumstances, I find that none was made at any time and would confirm the Lower Court's decision, dismissing the appeal with costs."

In view of the difference of opinion between the two learned Judges of the High Court the appeal of the Plaintiffs was dismissed in accordance with the judgment of Mr. Justice Oldfield, and a decree to that effect was made, and from that decree the Plaintiffs appealed under cl. 15 of the Letters Patent. The appeal was heard by three learned Judges of the said High Court, who delivered separate judgments on the 25th September 1919.

They held that sec. 92 applied to the temple in suit, and that the Defendants were trustees of the temple in the English sense. They accordingly allowed the appeal of the Plaintiffs, set aside the decrees made by Mr. Justice Oldfield and the Subordinate Judge and made the following decree in favour of the Plaintiffs:—

"This Court, disallowing the prayer in the plaint for the removal of the 1st Defendant from the trusteeship and *pujar* office, doth order that the suit be remanded and that the Temporary Subordinate Judge of Salem do restore the suit and proceed to frame a proper scheme in the light of the observations contained in the judgment herein with due regard to the position of the Defendants' family in connection with the plaint institution."

The Appellants appealed from the decree of the High Court to His Majesty in Council.

The argument was directed to the evidence.

Messrs. DeGruyther, K. C. and Dubé for the Appellants.

Mr. Narasimham for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Defendants from an order of the High Court at Madras dated the 25th September 1919, by which it was declared that the temple of Sri Kandaswami, otherwise known as Sri Subramanyaswami in the village of Kalipatta, situate in District of Salem, was a public religious institution, and remanding the suit to the Court of the Subordinate Judge of Salem with a direction that a scheme for the management of the temple should be framed by that Court in the light of the observations contained in the judgment delivered by the High Court. In the plaint it had been alleged that the Defendants were unfit to be the *pujaris* or *dharmakartas* of the temple and it was prayed that they should be removed from office. By the order of remand that prayer was disallowed.

The Plaintiffs are Hindus who worship at the temple. They are not related to the family of the Defendants. The first Plaintiff is a Brahmin, the other two Plaintiffs and the Defendants are Sudras by caste. The first Defendant has been for some years the *pujari* of the temple; he succeeded his father as *pujari* of the temple, and his father succeeded as *pujari* of the temple his father Lakshmana Goundan, who died in 1856 or 1857, and was the founder of the temple. The other Defendant is the undivided son of the first Defendant. In this judgment when a temple is mentioned without any other description it will be understood that the temple of Kandaswami in the village of Kalipatta is the temple referred to.

If the temple is not a public temple the Plaintiffs have no right to maintain the

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suit in which this appeal has arisen; unless it is a public temple the Plaintiffs are not concerned with it or with its management; their only remedy in such a case is to cease worshipping at the temple if they do not approve of the management of it. The Defendants deny that the temple is a public temple. Their case is that the temple is and has always been the private property of the family to which they belong.

The temple is not an ancient temple. It was founded between 1841 and 1856 by Lakshmana Goundan, the grand-father of the first Defendant, under circumstances which will later be mentioned. Unless the temple was dedicated to the public it was not a public temple, and in their Lordships' opinion a dedication of it to the public, if it was dedicated, must have been by Lakshmana Goundan, the grand-father of the first Defendant. No deed or other document of dedication of the temple has been produced, and it may be taken as a fact that there never was any deed or document of dedication of the temple to the public. In 1817 the British Government assumed the control of all public endowments, Hindu and Mahomedan, in the Presidency of Madras and placed them under the charge of the Board of Revenue; that policy was continued and acted upon until Act XX of 1863 was passed, when the Government divested itself of the charge and control of such institutions and placed them under the management of their respective creeds. [See *Vidya Varuthi Thirtha v. Balusami Ayyar* (1)]. The temple at Kalipatta was not taken under the control of the Board of Revenue. It may be assumed that it would have been taken under the control of the Board if it had been dedicated to the public by a deed

which was made public. The question whether the temple ever was dedicated to the public must consequently depend upon inferences which can legitimately be drawn from facts not in dispute and from unambiguous evidence on the record of this suit, regard being had to the principles of Hinduism which prevail in the Presidency of Madras. It would be a legitimate inference to draw that the founder of the temple, the grand-father of the first Defendant, had dedicated the temple to the public if it was found that he had held out the temple to the public as a public temple.

The suit was tried before Narayan Ayyar, then the Temporary Subordinate Judge of Salem, who finding that the temple had not been dedicated to the public and was the private property of the family of the Defendants, made a decree dismissing the suit. From that decree the Plaintiffs appealed to the High Court at Madras. The appeal was heard by Mr. Justice Abdur Rahim and Mr. Justice Oldfield; they differed, Mr. Justice Abdur Rahim finding that the temple is a public temple; Mr. Justice Oldfield finding that it is not a public temple and is the private property of the family of the first Defendant. As these learned Judges differed a decree was duly made dismissing the appeal. From that decree the Plaintiffs appealed under the Letters Patent of the Madras High Court, and their appeal was heard by Mr. Justice Sadasiva Ayyar, Mr. Justice Seshagiri Ayyar and Mr. Justice Burn. Those learned Judges delivered separate judgments finding that the temple is a public temple and made the order which is the subject of this appeal. All the judgments which were delivered in this suit were in their Lordships' opinion able and carefully considered judgments, and have been of much

(1) L. R. 48 I. A. 314; S. C. 26 C. W. N. 537 (1921)

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assistance in enabling their Lordships to arrive at their conclusion.

The facts which their Lordships find and upon which they found their conclusion are as follows:—Lakshmana Goundan, the grand-father of the first Defendant, lived in a small house which belonged to him in the village of Kalipatta. He was a devout Hindu and originally a poor man. He maintained in his house an idol of the goddess Amman which was the private idol of his family. He was also a devout worshipper at the public temple at Palni, at which there was an idol of the god Subramanyaswami, and he made yearly pilgrimages to Palni with offerings to that god. It is said, and probably with truth, that he dreamed that he should instal at his house at Kalipatta an idol of the god Subramanyaswami and that the god would come to his house and enable him to foretell events. He did instal that idol at his house, adopted the ritual which was followed at Palni and allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the *pujari* of the idol, and received as the *pujari* offerings made to the idol by worshippers and fees which he charged in respect of processions and other religious services. He obtained a great reputation as a holy man and as being enabled by the god to foretell events. The number of Hindu worshippers increased and with the offerings and fees he purchased some jewels for the idol, built for himself another house in the village to which he and his family removed, and he extended the house in which the idol was and added to it covered rooms for the accommodation of the worshippers during the ceremonies of worship. He also constructed a circular road round the place where the idol was for religious processions and he provided the

car used in such processions. He also built in the village a rest-house for the use of worshippers of the idol. On certain days in each week the Hindu public was admitted by him free of charge to worship in the greater part of the temple, to one part only on payment of fees, and to the inner shrine apparently not at all. With the income which he derived from offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. That may be assumed from the reputation which the temple acquired amongst Hindus. No accounts have been produced, probably he kept none, but it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immoveable property which he possessed before he died. On those facts which their Lordships have found they can come to no other conclusion than that Lakshmana Goundan, the grand-father of the first Defendant, held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship, and that the inference is that he had dedicated the temple to the public. They have come to that conclusion notwithstanding the facts that respectable local witnesses have stated that the temple was a private temple and that on three occasions since this dispute arose the tahsildars reported to the Collector of the District that the temple was not a public temple.

It may perhaps appear to be strange that the *pujari* of a public Hindu temple should be of a caste other than that of Brahmin, but apparently in the Presidency of Madras there are some public Hindu

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temples the *pujaris* of which are Sudras. Mr. Justice Seshagiri Ayyar in his judgment in this case stated that "there is no rule that unless a person belongs to a particular class (caste) he should not perform worship in a temple," and he referred, as an example, to a well-known public temple at Chidambaram in which he said that the priests (*pujaris*) are not Brahmins. The accuracy of that statement has not been questioned in this appeal.

Having come to the conclusion that the temple is a public temple their Lordships will humbly advise His Majesty that this appeal should be dismissed. Under the peculiar circumstances of the case the costs of each side in this appeal will come out of the funds of the temple.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitor: *Mr. Douglas Grant* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 31 of 1924.

<p>N. R. CHATTERJEA, J. GRAHAM, J. 1924, 16, July.</p>	}	<p>JOGENDRA NATH ROY and anr., Plaintiffs, Appellants, v. NAWAB MURTAZA BEGUM, Defendant, Respondent.</p>
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Interest at contract rate pendente lite, mortgagee's right to get—Usurious Loans Act (X of 1918), sec. 2, Court's power to interfere with the contract rate of interest without finding the rate of interest to be excessive or the transaction unfair.

Where the Court does not find the rate of interest excessive or the transaction substantially unfair, a mortgagee is entitled to have interest at the contract rate during the period the suit has been pending and up to the date fixed for payment.

This was an appeal from the decision of Babu Nalini Mohan Banerjee, Subordinate Judge, 3rd Court, 24-Parganas, dated the 5th of December 1923.

The facts material to this report are as follows:—The Plaintiffs-Appellants instituted the present suit on a mortgage bond, in which the Defendants agreed to pay interest at the rate of 9 per cent. per annum with quarterly rests. This rate of interest was subsequently raised from 9 per cent. to 11 per cent. by virtue of a subsequent agreement. The Subordinate Judge did not find the interest excessive or the transaction unfair, and allowed interest on the principal amount at the contract rate, but allowed interest at 6 per cent. per annum only from the date of the institution of the suit till the expiration of the period of grace. From this decree the Plaintiffs mortgagees preferred the present appeal to the High Court.

Dr. S. C. Basak (with *Babu Bankim Chandra Banerjee*) for the Appellants.

Babu Sitaram Banerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The only question raised in this appeal is whether the Appellants, the mortgagees, are not entitled to interest at the contract rate during the time the suit has been pending. There is no doubt that the mortgagees are entitled to interest at the contract rate until the date fixed for payment and thereafter at such rate which the Court may allow. The learned Subordinate Judge has allowed interest at the contract rate upon the principal amount, but has allowed interest at the rate of six per cent. per annum from the date of suit till the expiration of the period of grace.

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The learned Vakil for the Respondent has contended that the Subordinate Judge had the power to allow interest at a lesser rate than that agreed upon, under the provisions of sec. 3 of the Usurious Loans Act. Sec. 3 of that Act lays down the circumstances under which the Court has power to interfere with the contract rate of interest. The Court below has not stated any reasons in its judgment as to why it did not allow *pendente lite* interest at the contract rate.

It appears that the Plaintiffs instituted the suit so far back as the 8th August 1922. The Defendant-Respondent, virtually had no defence to make and she took time twice in the Court below on the ground that she was trying to raise money from some other creditors, and she is therefore responsible for the delay in the disposal of the suit which terminated on the 5th December 1923, that is, about a year and a half since its institution. There is no question of any unfair dealing towards the lady. When the Plaintiffs were about to sue, they were approached by the husband of the lady, and the Plaintiffs agreed not to sue upon the Defendant executing an agreement by which the rate of interest was to be raised from 9 to 11 per cent. We do not see any reason why the mortgagees should not get interest at the contract rate during the time the suit was pending. The creditors, however, are willing to accept Rs. 2,500 less provided that the Defendant pays off the mortgage debt within one month from this date, that is, on or before the 16th August 1924.

The date fixed for payment is three months from this date.

The appeal is allowed with costs, the hearing fee being assessed at three gold mohurs.

J. N. R. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 181 OF 1922.

NEWBOLD, J.
B. B. GHOSE, J.
1924,
19, August.

THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Defendant,
Appellant,

v.
KALI NARAYAN ROY
CHOUDHURY, Plaintiff,
Respondent.

Land revenue, assessment of—Asli lands assessed at the Permanent Settlement—Subsequent submergence and re-emergence—Government, if can resume and assess as diar—Possession by trespasser, if justifies re-assessment.

Revenue cannot be assessed by Government on lands which were asli at the Permanent Settlement and assessed as such, on their re-emergence after submergence subsequent to the Permanent Settlement. If the person in possession is not the rightful owner, that does not authorise the Government to resume and assess the land with revenue upon such re-emergence.

This was an appeal against the decree of P. C. De, Esq., Additional District Judge of Zilla Dacca, dated the 31st of January 1922, affirming the decree of Babu Bhupal Chandra Sen, Subordinate Judge, 5th Court of that District, dated the 20th of June 1919.

The facts of the case will appear from the judgment.

Babu Surendra Nath Guha and M. Nuruddin Ahamed for the Appellant.

Babus Sarat Chandra Roy Chowdhury and Sarat Chandra Lahiri for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Secretary of State for India in Council against the

THE SECY. OF STATE FOR INDIA IN COUNCIL *v.* KALI NARAYAN ROY CHOUDHURY.

decision of the Additional District Judge of Dacca affirming the decision of the Subordinate Judge, 5thth Court, Dacca. The suit arises out of certain resumption proceedings by which certain lands in the possession of the Plaintiff was assessed to revenue. Both the Courts have held that these lands are not liable to such assessment and the Plaintiff has been given a decree declaring his title to the land in suit. His title is declared in respect of some of these lands to be in *taluki* right in respect of other lands to be by right of accretion. In the view we take it is not necessary to discuss at length the facts of the case.

The main facts as found are these:—The Plaintiff is the proprietor of Mouzahs Mastul and Bailjuri. At the time of the Permanent Settlement the lands in suit were *asli* lands and were assessed to revenue. Sometime after the Permanent Settlement but before the Thak Survey the river Dhaleswari, a navigable river, flowed over the land in suit. Subsequently the river receded and as it receded the Government claimed the right to assess the newly formed land to revenue. Sometime after 1860 there was what is called a *daimibundabust* by which certain estates were created which were settled with the Plaintiff's predecessor. The Plaintiff claimed the land in suit partly as appertaining to certain estates dating from the Permanent Settlement and partly as appertaining to these so called *daimibundabust* estates. Having regard to the finding that all this land was *asli* land and was settled as *asli* land at the time of the Permanent Settlement and were then assessed with revenue it seems obvious that the Government has no right to make additional assessment of revenue on these lands. The Plaintiff is undoubtedly in possession and it is immaterial whether

these lands appertain to his estate or not. If these lands formed part of other estates, it is for the proprietors of these estates to assert their rights and they will not be bound by the decision in this suit. The Government clearly can have no right to make assessment of this land and recover it from the Plaintiff. The Government has in fact settled these lands in dispute with the Plaintiff and the Plaintiff has paid revenue on this assessment under protest. The Government therefore cannot deny the Plaintiff's title to these lands. Under the Regulations the Government is bound to settle the lands with the proprietors even if they are accreted lands.

The lower Courts in our opinion have fallen into some error in the remarks they had made with reference to accretion. On the finding that the lands in suit were assessed to revenue at the time of the Permanent Settlement they cannot now be treated as accretions in the strict sense of the word. The Plaintiff is entitled to these lands either as reformation *in situ* or possibly by adverse possession, but he does not base his title on accretion, since accretion of land to a permanently settled estate is liable to settlement of revenue. However, no cross-appeal has been filed and the Plaintiff is satisfied with the decree which has been given to him which in fact gives him all he wants, namely, a declaration that he is not liable to pay additional revenue for this land and is entitled to a refund of such revenue as has been wrongly paid.

For these reasons we must dismiss this appeal with costs.

N. G.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE

No. 2464 of 1921.

WALMSLEY, J. DHUNPUT SINGH
 MUKERJI, J. KUTHARI and ors.,
 1924, Plaintiffs, Appellants,
 Heard, 4 and v.
 7, April. HARI CHARAN AGAR-
 Judgment, WALLA and ors., Defend-
 11, April. ants, Respondents.

Principal and agent—Property, if passes to agent as against principal—Destruction by fire of goods purchased by agent Loss to be borne by principal or agent.

The Plaintiffs were employed by the Defendants as agents for buying various goods. A fire broke out after some goods had been bought for the Defendants by the Plaintiffs. The lower Appellate Court in affirming the decision of the trial Court held that the Plaintiffs must bear the loss, the property not having passed to the Defendants :

Held in reversing the judgment of the lower Appellate Court—That it is contrary to the whole idea of the relation between agent and principal to hold that property so purchased passes to the agent as against the principal, and in the absence of proof of negligence the loss falls on the principal.

This was an appeal against a decree of the District Judge of Zillah Murshidabad (Mr. J. A. Ross), dated the 14th September 1921, affirming a decree of the Munsif at Jangipur (Babu Manindra Prasad Sinha), dated the 27th March 1920.

The facts of the case will appear from the judgment.

Babus Broja Lal Chuckerbutty and Sushil Kumar Bose for the Appellants.

Babus Ram Chandra Majumdar and Bankim Chandra Mukerji for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Plaintiffs who are the Appellants sued the Defendants for a sum of Rs. 663 as due on *arar* accounts for business done by them as agents for the Defendants.

It is common ground that the Plaintiffs were employed by the Defendants as agents for buying various goods.

The dispute has arisen between them because a fire broke out after some goods had been bought for the Defendants by the Plaintiffs, and practically the question is whether the Plaintiffs or the Defendants are to bear the loss. The decision of the lower Courts is that it is the Plaintiffs who must bear the loss, and it is against that decision that the Plaintiffs appeal.

It appears to me that both the Courts below have fallen into error in their conception of the agent's position. Both take the view that there is a time at which the property in the goods bought by the agent for the principal vests in the agent. The learned Judge speaks of the Plaintiffs as commission agents who resell the goods to the Defendants. This view, the learned pleader for the Respondents admits, goes too far.

The error is probably due to the fact that the Plaintiffs made allegations about a representative of the Defendants being present at the time of purchase and about the method of delivery to the Defendants. Connected with the latter allegation was an answer elicited from Plaintiffs' witness about property passing to the Defendants when the goods were put in sacks provided by the Defendants. The question must have been put in the belief that the matters referred to in sec. 18 of the Sale of Goods Act had something to do with the relation between the parties.

It appears to me that those allegations

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in the plaint have nothing to do with the question, and that the failure of the Plaintiffs to prove their allegations does their case no harm. They were admittedly employed as agents and it is contrary to the whole idea of the 'relation between agent and principal to hold that property passes to the agent as against the principal. An attempt has been made to support such a view by reference to the case of *Ireland v. Livingstone* (1), but that was a case of a merchant in one country and a commission agent in another, and the passage to which reference is made must be read with due regard to the words of limitation which it contains.

Apart, however, from the law as contained in the Contract Act, I think that the Defendants are bound by the statements contained in the fourth paragraph of their written statement. They deliberately charged the Plaintiffs with telling a false story about the fire, with a view to taking advantage of a rising market and selling goods which belonged to the Defendants. It is said that this statement was made to meet the hypothetical case that the property in the goods had passed to the Defendants, but in my opinion it is impossible to put that construction on the paragraph.

Lastly, an attempt was made to justify the decision of the lower Courts on the ground that the Plaintiffs were guilty of negligence. It appears, however, that the Plaintiffs were not guilty of any act or omission which could be regarded as negligent.

In my judgment the Courts below were wrong and the appeal must be allowed and the suit decreed in full with costs in all Courts.

MUKERJI, J.—I agree and wish to add only a few words. The contract in the pre-

(1) L. R. 5 H. L. 395 (1872).

sent case was essentially one of agency and the findings of the Courts below as to purchase of the goods by the Plaintiffs to the order of the Defendants clearly show that in the present case they acted as commission agents on behalf of the latter. The views of the respective liabilities of the parties taken by the Courts below are to my mind wrong, the Court of first instance having laid too much stress upon the stray statement of a witness for the Plaintiffs about the property in the goods passing to the Defendants when the goods are put into sacks supplied by the latter, and the lower Appellate Court having introduced into its consideration a theory of resale by the Plaintiffs to the Defendants after making the purchase to the order of the latter. The former is an opinion on a question of legal liability which should not form the basis of the Court's decision and the latter is based upon a misconception of the relations between the parties. In support of the latter view reliance has been placed upon a dictum of Lord Blackburn in *Ireland v. Livingstone* (1) which is in these words: "It is quite true that the agent who in thus executing an order ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sells them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them . . . and just so does the property in the goods pass from the country-producer to the commission merchant, and then when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee who has given him the order is

■ SEE (1) L. R. 5 H. L. 395 at p. 408 (1872).

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a contract of sale passing the property from the one to the other and consequently the commission agent is a vendor and has the right of one as to stoppage *in transitu*." These observations define the relations between the commission agent and his foreign correspondent and proceed upon an appreciation of the difficulty which would exist in establishing any privity of contract between the foreign correspondent and the original vendors. In his work on Contract on Sale, Lord Blackburn reviews the cases of *Feise v. Wray* (2), *Siffken v. Wray* (3) and *Tucker v. Humphrey* (4) and says that the same conclusion follows from them in respect of a factor acting for a foreign correspondent and purchasing goods in his own name. In *Turner v. Liverpool Docks Trustees* (5), it was assumed that the relation of vendor and purchaser existed between the foreign commission merchant and his principal in England. Story in his work on Agency in like manner treats a factor in a foreign country who purchases goods on his own credit for his principal and ships them to the latter as one having the rights and remedies and being in the same predicament as a vendor of the goods. This dictum of Lord Blackburn was explained in the case of *Cassaboglou v. Gibb* (6). In that case Brett, M. R., observed as follows:—" Lord Blackburn has not said that as long as the contract of principal and agent is executory the principal can sue the agent and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters; one with regard to the

theory of passing the property in the goods, and the other as to the power of stopping the goods *in transitu* and as to these matters he has said with reference to the first of them that if a foreign commission agent has purchased the goods which he was ordered to purchase, and has put them on board consigned to his principal, by that appropriation the property in the goods passed from the commission agent to the principal, as if such agent were a vendor. Then as regards the power to stop *in transitu* Lord Blackburn has said that if the commission agent abroad is bound to pay for the goods to the foreign seller of whom he bought them, and after he has shipped them to his principal, such agent has not been paid, and his principal is insolvent, so that the foreign seller could only have him to look to for payment and the Courts have held that such agent may stop the goods *in transitu* as if he were a vendor or in the position of a vendor." These observations make it clear that even in the case of a foreign correspondent, the contract remains a contract of agency, and only for certain purposes he was to be treated as a vendor or as one in the position of a vendor. In this connection the remarks of Fry, L. J., in that case are worth quoting, as they clearly summarise the position. He observed as follows:—" Now as to the first of these grounds, was there such a contract (meaning such a contract as created the relation between a vendor and a purchaser)? Was the contract of principal and agent merged into that of vendor and purchaser? This must be a question of fact and as a matter of fact there was no such contract. It is said for two reasons, first, because otherwise the property in the goods would not pass to the English merchant for whom the agent abroad

(2) 3 East 93 (1802).

(3) 6 East 371 (1805).

(4) 4 Bing. 516 (1820).

(5) 6 Exch. 543 (1851).

(6) 11 Q. B. D. 797 (1883).

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bought them. In my judgment the property would pass. If the article was specific it would pass by the purchase and if not specific, but was appropriated by the agent for his principal, it would pass by virtue of the appropriation. The other reason for inferring the relation of vendor and purchaser was said to be because the foreign agent who has bought for his principal has the right of stoppage *in transitu*, but that, in my opinion, is no reason for such inference." After dealing the case of *Lickbarrow v. Mason* (7) and other cases where the right to stop *in transitu* has been allowed without the relationship of vendor and purchaser existing, and where it was held that even an agent, who puts the goods on board is able to exercise that right, being in the same condition as if he had been an ordinary unpaid vendor, Fry, L. J., referred to the case of *Ireland v. Livingstone* (1) and observed as follows:-- "Then in the case of *Ireland v. Livingstone* (1), Cleasby B. says that there was there not a mere contract between vendor and purchaser, although after the goods were shipped a relation like that of vendor and vendee might arise." No doubt in that case Lord Blackburn uses stronger language and says that the legal effect of the transaction is a contract of sale passing the property from the one to the other and consequently the commission merchant is a vendor and has the right of one as to stoppage *in transitu*; but by the legal effect of the transaction, he means the legal effect of an analogous contract to that of a contract of purchase and sale. It is important also to observe that Lord Chelmsford in that case puts the matter so as to exclude the existence of any contract of purchase and sale.

(1) L. R. 5 H. L. 395 (1872).

(7) 1 Sm. L. C., 8th Ed., p. 353.

He says: "I would preface what I have to say by stating my opinion that the question is to be regarded as between principal and agent though the Plaintiffs might in some respects be looked upon as vendors to the Defendants, so as to give them a right of stoppage *in transitu*." Therefore in such a case as the present there is in fact no contract as between a vendor and a purchaser.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 710 OF 1922.

PEARSON, J.	}	GOSTA BEHARI PRAMANIK and ors.,
GRANHAM, J.		Plaintiffs, Appellants,
1924,		
Heard, 21 and		
22, May.		
Judgment,	}	HEM CHANDRA DAS DE and ors., Defendants,
28, May.		Respondents.

Kabuliyat, interpretation of—Stipulation as to non-maintainability of claim for abatement on grounds specified and on any account whatsoever—Principle of *ejusdem generis*—Abatement, claim of, on ground of acquisition by Government—Bengal Tenancy Act (VIII of 1885), secs. 52, 38, effect of—Tenant, if can set up claim for abatement in rent suit—Separate suit for the purpose, if necessary—Set-off in rent suit of payments previously made and wrongly debited against tenant.

In a *kabuliyat* relating to an occupancy holding it was stipulated that the tenant was to suffer any loss arising from the lands being left fallow or from floods or drought and he would not be entitled to claim abatement of the stipulated rent on any account whatsoever. A portion of the land comprised in the holding was acquired under the Land Acquisition Act and in a suit for rent the tenant claimed abatement and also pleaded certain payments:

Held—That the *kabuliyat* meant that abatement would not be claimable in the

GOSTA BEHARI PRAMANIK v. HEM CHANDRA DAS DE.

case of loss by reason of causes *eiusdem generis* with those specified. It could not be taken to include a case where deficiency was due to compulsory acquisition under the law of a portion of the land.

That in answer to a rent suit the tenant could set up a claim for abatement. By sec. 52 of the Bengal Tenancy Act a right is conferred upon the tenant to claim abatement for deficiency in area and sec. 38 does not limit the assertion of that right to the case of a tenant coming forward as Plaintiff in a suit instituted specifically for the purpose.

That the lower Court acted properly in going into the character of the payments alleged by the tenant and in directing that credit should be given to the tenant for the amount wrongly debited against him under the guise of interest.

This was an appeal, preferred on the 8th of March 1922, against the decree of J. W. Nelson, Esq., District Judge of Zillah Murshidabad, affirming the decree of Babu Sat'chidananda Mukherjee, Munsif, first Court, Kandi, dated the 23rd of March 1920.

The facts of the case will appear from the judgment.

Babu Debendra Narayan Bhattacharjee for the Appellants.

Babus Hemendra Nath Sen, Sarat Kumar Mitra and Narendra Krishna Basu for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is from the judgment of the District Judge of Murshidabad. The Appellant is the Plaintiff in a rent suit, the Respondent No. 1 being the tenant and No. 2 a co-sharer landlord. The suit related to an occupancy holding go-

verned by the terms of a *kabuliyat* executed in 1875. In 1911 four bighas odd was acquired for Railway purposes under the Land Acquisition Act, and the compensation money, some Rs. 470, was paid over to the tenant. In 1919 this suit was brought for the rent for the years 1922 to 1925. The Defendant claimed abatement and also pleaded certain payments. The first Court gave effect to both pleas and made a decree in part. The learned District Judge dismissed the appeal. Before us various points have been taken in argument which were not touched in the Courts below. It is argued first of all that having regard to the terms of the *kabuliyat* no question of abatement can arise at all, because it is expressly provided against. The terms are as follows, according to the translation before us :—

"Any loss arising from leaving the lands fallow or from floods or drought will be mine; you will not have anything to do with it, nor shall I be entitled to claim abatement of the stipulated rent on any account whatsoever; any such claim will not be entertained."

We think that what is contemplated by those clauses of the *kabuliyat* is loss arising from the natural causes referred to, or due to the tenants' own default, and that when the clause goes on to provide that abatement cannot be claimed "on any account whatsoever," it must be read as a whole along with what precedes it, and should be taken as meaning that abatement would not be claimable in the case of loss by reason of causes *eiusdem generis* with those specified. It cannot be taken to include a case where the deficiency is due to compulsory acquisition under the law of a portion of the land. The question has to be decided as a matter of construction of this particular

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document, but mention may perhaps be made of the case of *Watson & Co. v. Nistarini Gupta* (1) where a very similar question arose for decision.

It is next contended that under the provisions of the Bengal Tenancy Act it is not permissible for a tenant to set up a claim for abatement in answer to a rent suit, and that having regard to the provisions of sec. 38 and sec. 52 of that Act, the only procedure open to him is himself to institute a suit for the purpose of establishing his claim to abatement and a refund of anything already overpaid. The cases under Act X of 1859 show that under the law as then existing such matters could be raised and adjudicated upon in a rent suit. See *Deen Dayal Lal v. Thukroo Koonwar* (2), *Mahtab Chand Bahadur v. Chittro Coomaree Beebee* (3) and *Gour Kishore Chunder v. Bonomalee Chowdhry* (4). In the case of *Siba Kumari Debi v. Biprodas Pal Choudhury* (5) it was held that a tenant could set up such a plea in a rent suit in a case where he had never actually obtained possession of a portion of the land, though it was held that secs. 38 and 52 of the Act were not applicable. The same principle is illustrated in *Beni Madhab Ray v. Kriشنا Kamini Gupta* (6).

The case of *Sukhraj Rai v. Ganga Dayal Singh* (7) is directly in point, and upholds the principle that abatement may be claimed in a rent suit. By sec. 52 of the Act a right is conferred upon the tenant to claim abatement for deficiency in area, and I do not think it is possible

to say that anything in the language of sec. 38 necessarily limits the assertion of that right to the case of a tenant coming forward as Plaintiff in a suit instituted specifically for the purpose. It is further argued that the matter ought not to be entertained as there has been no compliance with the provisions of the Civil Procedure Code in regard to the pleading of set-off, but there appears to be no substance in this. The Defendant in his written statement definitely claimed a specified amount under the heading of abatement, and though it may be that the term set-off was not used, that is immaterial so long as the matter has been substantially and unmistakably raised as in the present case.

Then it is contended that there has been no measurement as contemplated by sec. 52, and without that no claim to abatement can be allowed. The *kabuliyat* gives the area as 23B. 14K. 19Gds. of land "described in the schedule below" and the schedule contains the particular area and rent of a large number of smaller plots making up the whole. The acquisition by the Railway related to a portion of two of those plots only, amounting to 4B. 1K. 5Ch. That was the measurement arrived at in the Land Acquisition proceedings. The learned Munsif found that that amount had been so acquired, and apparently no question of fresh measurement was ever raised by the Plaintiff at any stage of the suit in the original Court. The proof so far as it went was unchallenged, and afforded some evidence of measurement of the land.

It is further urged that if the abatement is allowed at all it should be confined to that claimable for the years covered by the suit, and no questions of payment should have been gone into. But as to

(1) I. L. R. 10 Cal. 544 (1884).

(2) 6 W. R. 24.

(3) 16 W. R. 201 (1871).

(4) 22 W. R. 117 (1874).

(5) 12 C. W. N. 767 (1908).

(6) 36 C. L. J. 121 (1921).

(7) 6 P. L. J. 665 (1921).

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a matter of set-off there has been no reason suggested why the claim should be so limited; and as to the question of payment, there is no reason why the Munsif should not have gone into the character of the payments as he has done and after finding that a specified amount had been wrongly debited against the Defendant under the guise of interest, direct that credit should be allowed him in this suit for the amount.

Upon the whole, therefore, the appeal fails and must be dismissed with costs.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 527 of 1924.

SANDERSON, C. J. CHOTZNER, J. 1924, 14, August.	}	SUKESH CHANDRA GUPTA, Complainant, Petitioner, . v. ABDUL JABBAR, Accused, Opposite Party.
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Criminal Procedure Code (Act V of 1898), secs. 250, 537 One of two accused discharged and the other subsequently acquitted—On the latter occasion complainant directed to show cause and ordered to pay compensation to both accused—Propriety of procedure—Effect of the amendment of the section—Defect, if curable.

One of two accused was discharged and the case against the other accused was adjourned to a subsequent date when he was acquitted and the Magistrate called upon the complainant to show cause against an order for compensation being passed and directed the complainant to pay compensation to each of the accused:

Held—That under sec. 250, Cr. P. C., as now amended, the procedure adopted was illegal. The case against the accused who was discharged was at an end when the order of discharge was made and the order to show cause under sec. 250 so far

as payment of compensation to him was concerned should have been made along with the order of discharge.

That sec. 537 of the Code of Criminal Procedure did not cure the defect.

This was a Rule granted on the 2nd July 1924 against an order of the 3rd Presidency Magistrate of Calcutta (A. Z. Khan, Esq.); dated the 2nd June 1924, directing compensation to be paid to the accused under secs. 250 and 253, I. P. C., for bringing a frivolous charge against him.

Complainant was the Sirkar of Kali Das Dutt, owner of premises No. 20, Camac Street, the accused was a tenant and No. 2 was his room-mate and friend. The complainant on 30th April 1924 went to accused and demanded rent when the latter abused him, slapped him and caught him by his wrist and accused No. 2 forcibly took out Rs. 31-12 from his pocket which consisted of collections from other tenants. On the complaint, the accused were put upon their trial before the 3rd Presidency Magistrate, Calcutta, for having committed offences under secs. 323 and 379, I. P. C.

The Magistrate disbelieved the evidence, acquitted accused No. 1 and discharged accused No. 2.

Babu Satindra Nath Mukerjee for the Petitioner.

Babu Harendra Nath Sarbadhikari for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a Rule granted by my learned brothers Mr. Justice Newbould and Mr. Justice Mukerji calling upon the Chief Presidency Magistrate and upon the Opposite Party Abdul Jabbar to show cause why the order directing the payment of Rs. 25 as compensa-

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tion to Abdul Jabbar should not be set aside on the ground that the Magistrate did not proceed in compliance with sec. 250 of the Code of Criminal Procedure.

The Rule was obtained by the complainant. He made a complaint against Sheik Yusuf and Abdul Jabbar, alleging that an offence of simple hurt had been committed by these two accused.

The case was heard by the learned 3rd Presidency Magistrate and after hearing some witnesses called on behalf of the complainant, the learned Magistrate discharged the second accused, *viz.*, Abdul Jabbar on the 23rd of May 1924.

The case, as far as the first accused Sheik Yusuf was concerned, was adjourned and was finally disposed of by the learned Magistrate on the 2nd of June 1924, when he acquitted the first accused.

The learned Magistrate on the 2nd of June called upon the complainant to show cause why he should not pay compensation to the two accused under the provisions of sec. 250 of the Criminal Procedure Code. The complainant apparently was in Court that day: and, after hearing the complainant, the learned Magistrate directed him to pay Rs. 25 to each of the accused under sec. 250 of the Criminal Procedure Code.

Then an application for a Rule was made, and this Rule was granted. It is to be noted that the Rule was limited to the case of the second accused Abdul Jabbar.

The argument of the learned vakil who appeared for the complainant was to the effect that the order directing the complainant to show cause why he should not pay compensation to Abdul Jabbar was not made in accordance with the provisions of sec. 250, inasmuch as the accused Abdul Jabbar was discharged on the 23rd of May, and the order with regard

to compensation was made on the 2nd of June. Sec. 250 has been amended by the recent amending Act and now runs as follows:—

"(1) If, in any case instituted upon complaint to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid." It appears to me that in this case the Magistrate did not follow the provisions of that section. It is clear that on the 23rd of May Abdul Jabbar was discharged: and, as far as he was concerned the proceedings were at an end. If the Magistrate had desired to call upon the complainant to show cause why he should not pay compensation to Abdul Jabbar he should have made the order at the same time as he made the order of discharge, that is to say, if the complainant was present in Court at the time. There is no doubt in this case that the complainant was present in Court on the 23rd of May 1924; and, consequently, the order calling upon the complainant to show cause why he should not pay compensation to Abdul Jabbar should have been made on the 23rd of May.

It was argued by the learned vakil, who appeared on behalf of Abdul Jabbar

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to show cause, that the order was in accordance with the provisions of the section, because the proceedings in the case were not finally determined until the 2nd of June 1924, when Sheik Yusuf was acquitted. In my opinion that argument cannot be accepted. It disregards altogether the words of the section to which I have already referred: and, it also disregards the fact that on the 23rd of May 1924 the proceedings were entirely at an end so far as Abdul Jabbar was concerned.

The further argument by the learned vakil who appeared to show cause, was that although the provisions of sec. 250 were not complied with, this Court should apply the provisions of sec. 537 of the Code of Criminal Procedure. He argued that no prejudice had been caused to the complainant, and there would be no failure of justice if this order were allowed to stand. I do not understand why sec. 250 was amended and enacted in the precise words which are now to be found in it, unless it was intended that its provisions should be observed and carried out by the subordinate Court. I think, it is desirable that we should make it clear that the provisions of the Criminal Procedure Code should be observed by the Magistrates in subordinate Courts.

For these reasons, in my judgment, this Rule should be made absolute and the order, directing compensation to be paid to Abdul Jabbar, should be set aside. The compensation, if paid, will be refunded.

CHOTZEN, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SHAW.

LORD BLANESBURGH.

SIR JOHN EDGE.

1924,

Heard, 1, February.

Judgment, 1, February.

RAMABAI,

Appellant,

v.

HARNABAI and
anr., Respondents.

Hindu law—Coparcener, disqualification of, to share inheritance and adopt—Leprosy, when disqualifies.

A Hindu who was suffering from a type of leprosy which did not unfit him for performing both social and religious duties in company with others, was not disqualified from holding and enjoying property and making an adoption.

“Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both texts and decisions as the most satisfactory test.”

KAYAROHANA PATHAN v. SUBBARAYA THEVAN (3) approved.

MOHUNT BHAGABAN RAMANUJ DAS v. MOHUNT ROGHUNUNDUN RAMANUJ DAS (2) and JANARDHAN PANDURANG v. GOPAL (3) referred to.

This was an appeal from a judgment and a decree, dated the 5th December 1918, of the High Court of Judicature at Bombay, affirming a judgment and decree, dated the 1st November 1916, of the Additional 1st class Subordinate Judge of Poona.

The Appellant was the widow of one Vishnu Mawal and the daughter-in-law of Narayan. The 1st Respondent was the daughter of Narayan, whereas the 2nd Respondent was his alleged adopted son.

(1) I. L. R. 38 Mad. 250 (1913).

(2) L. R. 22 I. A. 94: s. c. I. L. R. 22 Cal. 843 (1895).

(3) 5 Bom. H. C. R. (A. C. J.) 145 (1868).

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Vishnu and his father Narayan were members of a joint Hindu family possessed of large moveable and immoveable properties. Narayan suffered from leprosy and died in 1914. Vishnu predeceased his father in 1913.

The sole question for consideration in this appeal was whether Narayan as a leper was disqualified from inheritance under the Hindu law.

On the 12th August 1915, the 1st Respondent instituted the present suit claiming the suit properties for herself as the sole heir of her deceased father Narayan. In her plaint she denied the validity of the adoption of the 2nd Respondent and alleged, *inter alia*, that her father was not a leper, so as to be deprived of his inheritance under the Hindu law.

On the 16th December 1915, the Appellant filed her written statement in which she alleged, *inter alia*, that her husband Vishnu and his father Narayan were members of a joint Hindu family, that Narayan suffered from a serious type of leprosy, and thus lost his rights in the suit properties, that Vishnu was the sole owner of all the suit properties at his death, that she succeeded him as his widow and that the alleged adoption of the 2nd Respondent is neither true nor valid as Narayan had no capacity to adopt.

The 2nd Respondent claimed the suit properties as the validly adopted son of Narayan.

The Subordinate Judge held that the adoption of Defendant No. 2 was proved, that Narayan Mawal was not disqualified from adopting because of his leprosy, that the Plaintiff was not the legal heir of the deceased Narayan, he having adopted Defendant No. 2, that the Plaintiff was not entitled to any relief and that the Will of Narayan was proved and legal. In his reasons for his findings, he stated that it

was beyond doubt that the deceased did suffer from a sort of leprosy since before the husband of the Defendant No. 1 died, but that the case of the deceased Narayan was to all intents and purposes the case of the man dealt with by the late Mr. Justice Russell in *Ranchod Naran v. Ajoobai* (4), and that he had no difficulty in saying that the deceased Narayan was not disqualified but was possessed of proprietary rights.

He held that the Plaintiff's suit failed against the Defendant No. 2, that the Defendant No. 1 had wholly failed while the Plaintiff failed on her admission of the adoption of the Defendant No. 2, and directed that Defendant No. 1 should bear her costs and pay one set of costs of the Plaintiff and Defendant No. 2.

In accordance with the above judgment a formal decree was drawn up.

Against the said decree, dated the 1st November 1916, of the Additional First Class Subordinate Judge at Poona, the Appellant preferred an appeal to the High Court at Bombay.

On the 5th December 1918, the High Court delivered its judgment in the appeal, in the course of which different forms of leprosy were discussed. The Court came to the conclusion that the deceased could not have been suffering from a loathsome disease, and accepting the conclusion arrived at by the trial Judge, affirmed his decree and dismissed the appeal.

Mr. Narasimham for the Appellant.

Messrs. DeGruyther, K. C. and Parikh for the Respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—The case for the Appellant has been stated with admirable clearness and brevity by his Counsel, but their

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Lordships do not think it necessary to call for any argument for the Respondents.

This is an appeal from a decree of the 5th December 1918, of the High Court of Judicature at Bombay, which affirmed a decree, dated the 1st November 1916, of the Court of the Additional First Class Subordinate Judge at Poona.

The only question submitted to the Board, and now subsisting, is as to the condition of body, and possibly of mind, of one Narayan Mawal. The Appellant maintains that Narayan Mawal was so afflicted with leprosy as to deprive him of the position of being joint owner of certain family property, and secondly to deprive him of the ability to make a valid adoption of a son. His natural son had died and the adoption was made a few weeks before his death. Had Narayan not been a leper, this natural and proper act could not have been challenged.

In the opinion of the Board no question of fact arises on this appeal. It appears to be definitely concluded by both of the Courts below, which both concur in their findings. The High Court in terms expresses approval of the decision of the Court of first instance: and the decision of the Court of first instance is to the effect that Narayan Mawal was not so crippled or disabled by bodily infirmity or deformity as to cease to be a useful member of society capable of holding and enjoying property. Their findings show that although he was afflicted with a certain type of leprosy it was a type not very apparent except to minute inspection, and certainly a type which did not unfit him for performing both social and religious duties in company with others.

In these circumstances the law of the case is attacked by the Appellant's Counsel, but the law of the case may be stated to have been well settled in India for very

many years. In the case of *Kayarohana Pathan v. Subbaraya Thevan* (1), a joint judgment of Benson and Sundara Ayyar, JJ., concludes with the following proposition:—

“Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test.”

In the case of *Mohunt Bhagaban Ramanuj Das v. Mohunt, Roghunundun Ramanuj Das* (2), Sir Richard Couch delivered a judgment of this Board which substantially agreed with that test. Sir Richard Couch was already deeply committed on the subject, for, so far back as the year 1868, in the case of *Janardhan Pandurang v. Gopal* (3), he had expressed himself in nearly similar terms.

The result is that their Lordships will humbly advise His Majesty that this appeal be disallowed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitor: *Mr. E. Delgado* for the 2nd Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SUMNER.	}	THE MIDNAPUR
LORD PHILLIMORE.		ZAMINDARY CO., LD.,
SIR JOHN EDGE.		Appellants,
MR. AMEER ALI.		v.
1923,		UMA CHARAN
Heard, 8, June		MANDAL and ORS.,
Judgment, . . .		Respondents.
8, June.		

Civil Procedure Code (Act V of 1908), sec. 100—Second appeal—Issue of law, construction of documents, when—Misdirection in point of law.

(1) I. L. R. 38 Mad. 250 (1913).

(2) L. R. 22 I. A. 94; s. c. I. L. R. 22 Cal. 843 (1895).

(3) 5 Bom. H. C. R. (A. C. J.) 145 (1868).

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Where the question to be decided is one of fact, it does not involve an issue of law merely because documents, which were not instruments of title or contracts or statutes or otherwise the direct foundations of rights but were really historical material, have to be construed for the purpose.

There is no ground for a second appeal upon a question of fact unless it can be shown that the lower Appellate Court misdirected itself in point of law in dealing with this question upon the evidence.

These were consolidated appeals from a judgment and 19 decrees of the High Court of Calcutta, dated the 30th August 1920, and made on remand in pursuance of a judgment of the Privy Council delivered on 3rd June 1919.

The facts which have given rise to the litigation may be shortly stated as follows:—The Plaintiffs were the successors-in-interest of Robert Watson and Company, who obtained on the 8th March 1885 a *putni* Taluk of Barahabhum, District Manbhum, from Raja Brajakishore Singh, the then Zamindar. Under the *putni* there was an old established tenure held by one Sharup Ganjan Singh for which he paid a rent of Rs. 210, annas 6 per year. The tenure was called Taraf Dhadka, and comprised lands in a number of villages. In execution of a mortgage decree, “a moiety share of the Sikmi Zamindari Taraf Dhadka, exclusive of *ghatwali* lands, owned and held by the judgment-debtor (Sharup Ganjan Singh)” was sold in 1899, and was purchased by Rajah Jagabandhu Singh. In the certificate of sale the amount of rent payable to the landlord in respect of the Zamindari was stated to be Rs. 210, annas 6.

The predecessor-in-title of the Plaintiffs, Mr. H. Mathewson, who was the

then landlord, brought a suit against the said Rajah Jagabandhu Singh, to recover arrears of rent for three years—1305, 1306 and 1307 F.S. (1898, 1899 and 1900), at the rate of Rs. 210, annas 6 per year. It was finally dismissed by a judgment of the High Court of Judicature at Fort William in Bengal, dated the 24th May 1905. The High Court ruled as follows:—

“It follows therefore that the Plaintiff is not entitled to realise rent from the Defendant at the rate of Rs. 210-6-0 for two reasons. In the first place as the learned Judicial Commissioner has found that the rent was fixed at Rs. 210-6-0 for the *mal* and *ghatwali* lands taken together, the Plaintiff was obviously not entitled to make the Defendant liable for the whole amount when he holds nothing but *mal* lands. In the second place, there has been no sub-division of the tenure, and as, according to the finding of the learned Judicial Commissioner, no rent has been separately assessed in respect of the *mal* and *ghatwali* lands, the suit as framed must fail.”

Mr. Mathewson thereupon sent the following notice, dated the 4th May 1906, to the said Rajah Jagabandhu Singh and the heir of the said Sharup Ganjan Singh:—

“The Opposite Party No. 1 is holding possession of the said *ghatwali* land and the Opposite Party No. 2 is holding possession of the *mal* lands by virtue of purchase. As there was one tenure in respect of both the aforesaid kinds of land, and as they were before in the possession of only one person, there was not much inconvenience in realising the rents payable on account of the same. Eventually the different portions of the said tenure having come under the possession of you, different persons, the rent payable in respect thereof of being a consolidated one, it has become

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inconvenient for the same being realised. It is necessary that the said jumma (rental) should be apportioned in your presence. In such circumstances, the aforesaid jumma in respect of the *ghatwali* and *mal* lands held by you respectively, should be apportioned in your presence. You are, therefore, hereby informed that you shall send competent officers respectively on your behalf to my house at Purulia on the 20th May next, so that the said jumma may be apportioned in their presence."

By a conveyance, dated the 25th June 1906, Mr. Mathewson sold all his rights in respect of the said *putni* Taluk to the Plaintiffs-Appellants. When the tenure of the *mal* lands was separate from that of the *ghatwali* lands, the said Raja Jagabandhu Singh made default in the payment of the rent of the tenure of the *mal* lands for 1312-13 and 1314 F. S. (1907-8-9).

The Plaintiffs brought separate suits to recover the rent of the said tenure at Rs. 90-6-0 per year. The suit (No. 1214 of 1908-9) was decreed on the 19th August 1908 for Rs. 104-10-0, and in execution of that decree the said tenure was sold on the 7th December 1908, and was purchased by the Plaintiffs-Appellants, who obtained a formal delivery of possession thereof on the 29th January 1909.

The Plaintiffs thereupon instituted twenty suits in the Court of the Subordinate Judge of Purulia, and the present consolidated appeal arises out of nineteen of them. The material allegations in the plaints in all the suits are substantially the same. The plaint in Suit No. 219 of 1909 against Uma Charan Mandal and others may be taken as a sample of the nature of the present suits.

The Plaintiffs stated that they had purchased the said tenure at a public sale held

for arrears of revenue under the provisions of Act VIII (B. C.), 1865, on the 7th December, 1908, free from all encumbrances. The Plaintiffs further stated that they had come to know that the Defendants were in possession of certain lands appertaining to the said tenure in which the Defendants claimed a *mokurari* interest.

The Plaintiffs claimed that the under-tenures held by the Defendants were encumbrances, and that the Plaintiffs were entitled to annul the same. They therefore claimed the following relief:—

(*ka*)—that the Plaintiffs' right by auction-purchase in the manner alluded to above, be decreed in Manza Raja Uli described in Schedule (*ga*) below, and a decree for *khas* possession thereof may be given to the Plaintiffs by evicting the Defendants from possession;

(*kha*)—that a decree may be given for costs in Court with interest;

(*ga*)—that a decree may be given granting any other relief that may be justly determined by the Court and which the Plaintiffs may recover from the Defendants.

The Defendants denied the claim of the Plaintiffs and they raised various pleas, of which the following are now material:—

(1) That the sale, held on the 7th December 1908, was not a public sale, but a fraudulent one, and that the Plaintiffs' suit was therefore not maintainable.

"That the alleged encumbrances were in existence long prior to the creation of the said tenure which the Plaintiffs had purchased, and that they could not therefore be annulled by the Plaintiffs."

(2) That the Plaintiffs are not entitled to *khas* possession of the lands held by the Defendants.

The first plea was upheld by a judgment of the said High Court, dated the 1st June

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1914, and the suits of the Plaintiffs were dismissed by the High Court without determining the remaining questions arising before it. But the judgment of the High Court was reversed on appeal by an Order of His Majesty in Council in accordance with the judgment of the Lords of the Judicial Committee of the Privy Council, delivered on the 3rd June 1919, and the suits of the Plaintiffs were remitted to the said High Court to be disposed of according to law. The present consolidated appeal was brought from the judgment of the said High Court on remand.

The suits were tried by the Subordinate Judge of Purulia, who framed several issues of which the following are now material :—

(5th) Did the Mauza mentioned in Schedule (ka) of the plaint constitute a separate tenure bearing a jumma of Rs. 90-6-0 per year?

(6th) When did this separate tenure come into existence?

(9th) Are the Plaintiffs entitled to obtain *khas* possession of the Mauzas by ejecting the Defendants? Are they entitled to have the encumbrances created by Sharup Ganjan Singh and Rajah Jagabandhu Singh set aside?

The parties produced oral and documentary evidence, and after examining it the said Subordinate Judge delivered one judgment in all the suits on the 21st March 1910.

He found the above issues against the Plaintiffs, and his findings may be summarized in the following words :—

“(a) There is absolutely no evidence on behalf of the Plaintiffs that originally there existed two tenures, one *ghatwali* bearing a certain *jama* and another *mal* bearing a different and separate *jama*.”

(b) On the whole, I have not the least doubt that the incidents of the old tenure

were completely altered and a tenancy was created on terms which did not govern the old one. On the whole, my finding is that the tenure which was sold in execution of the decree for arrears of rent was created on the 5th March 1884 by the *ghatwali* Ruffanama and it was an entire and undivided tenure.”

In the result the learned Subordinate Judge held that originally the *mal* tenure purchased by the Plaintiffs was not separate from the *ghatwali* tenure, and that the compromise of 1884 created two separate tenures. He accordingly made decrees setting aside the under-tenures which had been made after 1884, and dismissing the Plaintiffs' claim to annul the under-tenures which had been created before 1884, and from those decrees, the Plaintiffs as well as the Defendants appealed to the District Judge of Manbhum, who delivered two judgments on the 30th September and the 30th November 1910.

The former was the principal judgment governing all the appeals.

The learned District Judge affirmed the finding of fact at which the Subordinate Judge had arrived, and he concluded his judgment in the following words :—

“I agree, therefore, with the learned Subordinate Judge in finding that prior to the Ruffanama of 1884 there was only one tenure, of which this *mal* tenure which was subsequently sold, was a part.

It seems to me that this is purely a question of fact. What was the intention of the parties to this document? There was in existence a single large tenure comprising villages claimed by the Zamindar as *mal* and by the *ghatwal* as *ghatwali*. What apparently happened was that the parties, in order to avoid litigation, decided that this tenure was to be split up

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into three. The villages, which the Zamindar admitted to be *ghatwali*, were to be held by the *ghatwal* as *ghatwali*, the other villages being held as *mal*. The rent was increased, that is to say, certain *mal* lands were assessed to separate rent over and above the rent at which the original tenure had been held, and a separate rent was assessed for the *mal* lands and for the *ghatwali* lands. On the whole, I agree with the learned Subordinate Judge that the intention of the parties to this document was to put an end to the existing confusion and disputes, by concluding the former tenancy and creating new tenancies in its place.

I find, therefore, that the tenure which was sold for arrears of rent was a separate tenure and that it was created by the Ruffanama in 1884. This finding agrees with that of the Subordinate Judge."

The learned District Judge therefore made decrees affirming the judgment and decrees of the said Subordinate Judge and dismissing the appeals and cross-appeals, and from those decrees the Defendants appealed to the said High Court, and the Plaintiffs filed cross-objections.

As already stated the High Court dismissed the suits of the Plaintiffs by its judgment, dated the 1st June 1914, which has been reversed by an Order of His Majesty in Council, and which remanded the cases, directing to the High Court to re-hear the appeals and cross-objections.

On remand two contentions were urged before the High Court on behalf of the Defendant, namely :—

(1) That the Courts below ought to have held that all the under-tenures created before the 24th May 1905, or at any rate before the 4th May 1906, were protected and could not be annulled by reason of the sale held on the 7th December 1908; and

(2) That the Courts below were in error in making a declaration that the Plaintiffs were not bound by the terms of the leases granted by Sharup Ganjan Singh, so far as the fixity of rent of the under-tenures was concerned.

The High Court delivered judgment on the 30th August 1920. On the first point the learned Judges of the High Court affirmed the finding of the said District Judge in terms following :—

"On the first point taken before us, the determination of the question of the date of the creation of the tenure which was brought to sale on the 7th December 1908, is all important, and we have the concurrent findings of the two Courts below to the effect that the tenure in question was created by the Ruffanama of 1884. If so, it would follow that the Plaintiff Company who were the successors-in-interest of one of the parties to the said Ruffanama, are only entitled to avoid as encumbrances such under-tenures as were created after the 6th of March 1884."

With regard to the second point the learned Judges of the High Court were of opinion that neither in the plaint nor in the pleadings any question about the incidents of the under-tenure was raised, and that the only question before the Courts below was whether in the events which had happened certain under-tenures were or were not liable to be annulled. They concluded their judgment in the following words :—

"In the absence of a contest between the parties on the question of the incidents of the under-tenures in question, we are unable to hold that it was open to the Courts below, in the circumstances of these cases, to make the declaration they have made. In our opinion the question of the incidents of the under-tenures created before 1884 must be left open.

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The result is that the decrees made by the Lower Appellate Court in the suits relating to under-tenures created after 6th March 1884, must be confirmed and the appeals must be dismissed with costs. As regards suits relating to under-tenures created before 6th March 1884, the Plaintiff Company fails, and the suits are dismissed, the Defendants in those suits being entitled to their costs throughout, so far as those costs have not already been awarded to them."

The said High Court made decrees accordingly, and from those decrees the Plaintiffs have now appealed to His Majesty in Council.

Hence the appeal to His Majesty in Council.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellants.—The Appellants purchased the lands at a Court sale held under the provisions of Bengal Act VIII of 1865, and all under-tenures were annulled (secs. 4 and 16).

The Respondents had two kinds of tenures, (1) *mal* and (2) *ghatwali*.

The tenures were separate and distinct and had very different incidents; moreover the *ruffinama* of 1884 did not in law create the two tenures. The *ghatwali* tenure was in existence from 1799.

Leelanand Singh v. Benqal Government (1) and *Shamchand Kundu v. Brojonath Pal Chowdhury* (2).

The District Judge has misread the documents and has held that you can treat a *ghatwali* and a *mokurari* tenure as the same thing.

His findings are incorrect in law and the High Court were entitled to reverse them even on second appeal.

(1) 6 M. I. A. 101 (1855).

(2) 21 W. R. 94; 12 Beng. L. R. 484 (F. B.) (1873).

Mr. B. Dubé for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—Their Lordships do not desire to hear the Respondents. The point arising for decision on this appeal is a short one. In the group of suits, which the Appellants brought in India, the question which, for the purposes of to-day, was the material one to be considered was this:—At what date is the under-tenure, of which they had become purchasers at a sale under a decree for rent, to be taken to have originated?

It was in connection with a prayer to have encumbrances cleared off that this question arose, and according to the date fixed, earlier or later, they would be able to clear off more encumbrances or fewer. Now to ascertain the date, at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights.

The Subordinate Judge, who tried a number of these suits, came to the conclusion that the date at which the under-tenure purchased by the Plaintiffs had first arisen was the 6th March 1884. Some others were heard by the Munsif, who came to a contrary conclusion. They were all consolidated and came before the

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District Judge, and the finding of the District Judge affirmed that of the Subordinate Judge, not in every respect upon the same grounds in detail, but substantially upon the same lines.

The case was then appealed to the High Court. When first it came before the High Court, that tribunal contented itself with observing that the issues which are now before their Lordships raised questions of some nicety, and proceeded to dispose of the appeal upon a different ground, which need not be further enlarged upon. That judgment of the High Court was brought before their Lordships and was reversed, and so the case came to be remitted to India to be finally disposed of, and on the second occasion the High Court dealt with the issues now in question, which they had previously said little about, and briefly concurred in the view taken by the District Judge.

Now if the question before the District Judge was one of fact, admittedly there is an end of the matter. The District Judge, having to fix a date, fixed this particular date as being the date at which a certain *ruffinama* or compromise was arrived at, under circumstances which are not very clear, for no oral evidence was called, but which he thought he could sufficiently infer from the contents of the *ruffinama* and from some previous documents of earlier date. He came to the conclusion that there was at that time a dispute, the gist of which was, whether the tenant was right in claiming that all the land of which he was in possession was held on *ghatwali* tenure, or whether the Zamindar was right in contending that but a small portion of that land was held on *ghatwali* tenure and the rest was really *mal* land. This is the dispute which was compromised in the *ruffinama*; and the conclusion which the District Judge,

agreeing therein with the Subordinate Judge, arrived at was that upon that occasion the parties solved this dispute by deciding that the amount of *ghatwali* land was less than it was claimed to be; and that, in addition to what was admittedly *mal* land, some further land should be regarded as and held as *mal* land, and so the matter ended. Thereupon, he held that it was from that date, and in consequence of that compromise, that the present under-tenure relating to some of these *mal* lands, of which the Plaintiffs were the purchasers, came into existence as a separate tenure. There had been produced a series of documents of earlier date, which it is not necessary to go through—they are of varying characters, and it must be admitted that they are scarcely luminous as to their purport. It cannot really be suggested from these previous documents when the alleged separate *ghatwali* tenure or the alleged separate *mal* tenure came into existence. As to the latter, it is hypothetically said to begin about 1834, and as to the former, it is said to have been in existence at least as early as 1799; but these documents are only fragments, and by no means copious fragments, of a long chain of documents of various kinds, which must have existed at one time or another, and, they like the *ruffinama*, are documentary evidence of the point in dispute from which the District Judge had to draw his own conclusions.

It is clear, therefore, that, unless it can be shown that he has misdirected himself in point of law in dealing with this question of fact upon this evidence, there is no ground for appealing from his decision upon the question of fact, and from the judgment of the High Court upon it. The suggestion is that it can be made to appear clearly from the construction of the

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documents prior to the *ruffinama*, that the present tenure can be dated earlier than the 6th March 1884. That appears to their Lordships to be nothing but a contention that a different conclusion of fact might have been drawn from those documents.

The other way of putting the matter is to say that on the construction of the *ruffinama* itself, it negatives the view taken that this under-tenure was first created at that date. Their Lordships do not wish to be understood as agreeing with that view of the contents of the *ruffinama*, but again the construction of it is merely the weighing of a particular piece of evidence expressed in that particular form. Their Lordships are unable to see that there has been any error in law on the part of the District Judge and of the High Court, and that being so they neither desire nor are entitled to criticise the merits or otherwise of the conclusion of fact.

The result being that this is a pure question of fact which has been determined in India by tribunals whose judgment must be final, nothing remains but to dismiss these appeals with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Burton Yeates & Hart* for the Appellants.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DEOREE

No. 622 of 1922.

GREAVES, J.
CHAKRAVARTI, J.

1924,

Heard, 1, May.

Judgment, 9, June.

ABDUL HAKIM KHAN
CHAUDHURI and ors.,
Plaintiffs, Appellants,
v.
ELAHI BAKSHA SHA
and ors., Defendants,
Respondents.

Presumption of permanent tenancy, elements necessary to raise—Principles upon which such presumption is raised—Question of law—Second appeal—Non-agricultural tenancy before Transfer of Property Act—Dwelling house with mud walls and tiled roof, covered with thatched chalas, pucca stairs, gateway and privy situated within Municipality—Origin of tenancy not unknown—Absence of written lease—Long possession—Succession—Uniform payment of rent—Permanent pucca building, if necessary to raise presumption of permanent tenancy—Tenancy in absence of proof of definite terms of permanency, if from year to year.

In a suit for ejectment of the Defendants from their homestead situated within a Municipality, the facts found by the Courts below were:

(1) The tenancy was 44 or 45 years old, the lands being let out by the Plaintiffs' mother to the Defendants' father for dwelling purposes, and its origin was not unknown.

(2) Uniform payment of rent at the rate of Rs. 5-10 as. per year.

(3) There was one case of succession to the Defendants from their father.

(4) Defendants' father built a house with mud walls and tiled roof, over which there were thatched chalas, and also constructed a pucca staircase and a pucca gateway. The Defendants constructed a pucca privy.

Upon these facts the Munsif held that the structures were not of a substantial character and the Defendants failed to establish that the tenancy was a perma-

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ment one, and gave the Plaintiffs a decree for ejectment. Upon appeal the Subordinate Judge held that the structures were of a substantial character and the facts justified the presumption of permanency of the tenancy, and he therefore dismissed the Plaintiffs' suit. Plaintiffs thereupon preferred this second appeal:

Held—That upon the facts found there were no substantial pucca buildings on the land, and the presumption of permanency was not justifiable.

In order that the presumption of permanency may be drawn it must be established that the origin of the tenancy must be unknown and that substantial pucca structures must be built without objection by the landlord.

MOHARAM CHAPRASI v. TELAMUDDIN KHAN (13)* not followed.

Pucca stairs and pucca privy within a Municipality are not structures which a reasonable landlord can object to so long as the tenancy subsists.

The fact that the tenant is allowed to continue in possession of lands for generations, without alteration of rent, is of common occurrence in this country and is usually attributable to the reluctance of the landlord to eject a tenant from his home so long as he does not make himself objectionable and regularly pays his rent. Mere forbearance to enhance the rent or eject the tenant, where the right exists, means nothing.

Held also—That the tenancy in the absence of proof of any definite terms of permanency would be at best one from year to year.

(13) 16 O. W. N. 567; s. c. 15 O. L. J. 220 (1911).

* REPORTER'S NOTE.—See the case of *Shorashi Channingji v. Shajee Sah*, 22 O. L. J. 35.

Absence of a written lease could not improve the position of the tenant because he must know under what terms he held the land of his lessor.

Held further—That the circumstances of each case must determine whether the presumption of permanency should be made or not.

The question, as to whether upon the facts found the presumption of permanency can be raised is a question of law and is open to correction in second appeal.

Before the Transfer of Property Act there was no statute dealing with homestead land as distinguished from agricultural land. No person after the Transfer of Property Act came into operation can claim to hold a permanent tenancy in what is called bastu land unless it was created by a written and registered lease.

In respect of a non-agricultural holding created before the Transfer of Property Act, the tenant must prove the nature and extent of the interest which the landlord granted to him and thereby put a limitation to his own rights.

In such cases where the terms of the original tenancy cannot be directly proved, the inference of permanency of the tenancy is made upon two broad principles: (1) The first principle is, that in cases where the origin of the tenancy is unknown and its inception is lost in antiquity the principle of a lost grant is invoked by the tenant and from the conduct of the parties and the surrounding circumstances the Court is asked to presume that the tenancy was a permanent one. The conduct of the landlord in recognising succession, transfer and in standing by when pucca buildings have been raised upon the land are mainly relied on in finding out the terms of the

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lease at its inception. (2) The second principle is that of equitable estoppel against the landlord, shewing that the lease was a terminable one.

Decided cases shew the existence of the following elements in order that the presumption of permanency of a tenancy may be thus raised:—(1) The origin of a tenancy for residential purpose must be unknown; (2) existence of permanent pucca buildings on the lands built long before any controversy arises and that to the knowledge of the landlord; (3) uniform payment of rent; (4) recognition of succession and transfer by the landlord.

Absence of either of the first two elements will be ordinarily fatal to any claim of permanency on the theory of a lost grant. Absence of the 3rd and the 4th elements usually will raise difficulties in the way of raising the presumption, but may not be decisive if there are other circumstances in aid of the presumption.

The case-law on the point reviewed.

This was an appeal preferred on the 28th of February 1922 against the decree of Babu Shish Chandra Banerjee, Subordinate Judge of Zillah Rajshahye, dated the 28th of November 1921, reversing the decree of Babu Nagendra Chandra Ganguly, Additional Munsif of Rampur Boalia, dated the 18th of September 1919.

The facts of the case appear from the judgment.

Babu Bireswar Bagchi for the Appellants.

Babu Radhika Ranjan Saha for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

CHAKRAVARTI, J.—This is an appeal by the Plaintiffs and the question raised in this appeal is whether upon the facts

found by the lower Appellate Court, the presumption that the tenancy is a permanent one is correct in law. The Munsif held that the presumption did not arise but the Subordinate Judge has held that it did. The facts shortly stated are these:—

Plaintiffs are the owners of a *kaimi mokurari jote* and the land in suit is a piece of *bastu* land situated within the Municipality of the town of Rajshahye and was let out to Golab Saha, the father of the Defendant, about 44 or 45 years ago, by the mother of the Plaintiffs apparently for dwelling purposes. Plaintiffs served a notice to quit on the Defendants and after the expiry of the term bring this suit for *khas* possession of the lands, giving the Defendants the option to remove the houses standing thereon, which the Plaintiffs allege, are of an unsubstantial character.

The defence of the Defendants *inter alia* was, to quote the words of the learned Munsif, "that the Defendants and their predecessors-in-interest having resided on the disputed land for a long time by erecting *pucca* and *kucha* structures on payment of a uniform rate of rent and the tenancy having been treated as heritable, the *jote* in suit is a *kaimi mourashi mokurari* one."

The facts found by the Munsif were:—

"(1) That the tenancy was 44 and 45 years old and its origin was not unknown. (2) That the rent paid was uniformly Rs. 5-10 as. per year. (3) That there was one case of succession from Golab to the Defendants. (4) That Golab Saha, father of the Defendant, built a house with mud walls and tiled roof, over which there were thatched *chalas*. Golab also constructed *pucca* staircase for the house and a *pucca* gateway. This house, which has been described as a *morataghar* by

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Defendants' witnesses, fell down in the great earthquake in 1304 B. S. The *pucca* gate was also destroyed by the earthquake. At present only the *pucca* steps of the *morataghar* exist. It is also established by the evidence of P. W. No. 4 that the Defendants constructed a *pucca* privy on the land 7 or 8 years ago and that the privy is still in existence. The question is whether the structures raised by the Defendants and their father can be called substantial structures. I am of opinion that the house built by Golab Saha cannot be called a substantial structure as the roof was not a *pucca* one but was covered with mud and required the protection of thatched *chalas*."

On these facts the Munsif held that the Defendants have failed to establish that the lease was a permanent one. The Munsif further pointed out that there was no allegation by the Defendants that the lease was a permanent one at its inception.

On appeal by the Defendants, the Subordinate Judge has reversed the Munsif's judgment and held that the facts justified the presumption of permanency of the tenure. As to the facts, the learned Subordinate Judge has agreed with the Munsif as to his findings under heads 1 to 3 and although there is no difference of opinion as to the nature of the structures on the land the learned Subordinate Judge says that—"As the land was let out for building, the presumption is that in its inception the holding was not a temporary holding. In the next place, it appears that Defendants had a *morataghar*, i.e., house with mud walls and tiled roof, over which there were thatched *chalas* with *pucca* staircase and *pucca* gateway. There is also a *pucca* privy. The learned Munsif says that the privy was constructed without the knowledge of

the Plaintiff. I do not agree to that view.

"I am satisfied upon the evidence that Plaintiffs had knowledge of the existence of the *pucca* privy. In my opinion all these structures are of a substantial character."

The Munsif held that the Defendants gave no evidence as regards the actual cost incurred in constructing the house and other structures. The learned Subordinate Judge has not said anything as regards this matter. The Munsif held that the structures were not of a substantial character, but the Subordinate Judge on the same facts says: "In my opinion all these structures are of a substantial character." There were no *pucca* buildings on the land; *pucca* steps and a brick-built privy within a Municipality are not, in my opinion, structures to which any reasonable landlord could object, so long as the tenancy subsisted.

As I have already observed the question raised in this appeal is, is a presumption of permanency of the tenancy justified upon the facts found by the learned Subordinate Judge. The question thus raised is a question of law and is open to correction in a second appeal.

The learned Subordinate Judge has mainly based his judgment upon the cases of *Beni Madhub v. Jai Krishna* (1) and *Durga Prosad v. Brindabun* (2) and the case of *Nabu Mondal v. Cholim Mullik* (3) and he concludes by a bare reference to the cases of *Upendra Krishna v. Ismail Khan* (4) and *Niratan v. Ismail Khan* (5).

Upon the question now at issue there

(1) 7 B. L. R. 152; 12 W. R. 495 (1869).

(2) 7 B. L. R. 159; 15 W. R. 274 (1871).

(3) I. L. R. 25 Cal. 896 (1898).

(4) L. R. 31 I. A. 144; s. c. I. L. R. 32 Cal. 41; 8 O. W. N. 888 (1904).

(5) L. R. 31 I. A. 149; s. c. I. L. R. 32 Cal. 51; 8 O. W. N. 895 (1904).

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are numerous cases of this Court and a number of decisions of the Judicial Committee of the Privy Council. It is somewhat strange that the learned Subordinate Judge has not noticed them. It is indeed true that the cases are so many that it is neither possible nor profitable to refer to so many cases, but it seems to me that the case of *Beni Madhub v. Jai Krishna* (1) is hardly of any assistance in this matter. Sir Barnes Peacock when dealing with the question as to the permanency of the tenancy observed that "the evidence showed that *pucca* buildings had been erected, and that the land had been held for upwards of 35 years and had descended from father to son, and the *kabuliyat* showed that the tenures were not merely of a temporary nature" and further on he said "that in equity the Plaintiff was not entitled to turn the Defendant out of the land, because he stood by, and saw the tenants erecting *pucca* buildings on the land without any objection whatever. If he allowed the Defendants to erect *pucca* buildings upon the land without objecting, it appears to me that he was bound in the same way in equity as if he granted them a *pattah* with the privilege of building *pucca* house on the land." The decision in this case was based upon the terms of the lease and upon the principle of equitable estoppel. The question is different here.

As to the case of *Durga Prosad v. Brindaban* (2) the passage quoted by the Subordinate Judge shows that the main fact which was relied upon was that the land "was not given for any temporary purpose." What these words were actually intended to mean it is impossible to find out. At any rate there is no

finding as to the purpose precisely for which the lease was created at its inception and the main question raised and decided was that of the transferability of the tenancy.

The case of *Nabu Mondal v. Cholim Mullik* (3) is helpful in so far as it gives us a list of most of the cases then available. The view of the learned Judge referring the case to the Full Bench was against the raising of a presumption of permanency merely upon long occupation and ultimately the reference fell through without any decision by the Full Bench on the points referred to it. The cases of *Upendra Krishna v. Ismail Khan* (4) and *Nilratan v. Ismail Khan* (5), which, as I said before, were only mentioned by the Subordinate Judge, have no application here as I shall show later on.

The learned vakil who appeared for the Appellants submitted that the facts found do not justify the presumption and referred us to the cases of *Lala Beni Ram v. Kundun Lal* (6), *Narasayya v. Raja of Venkatagiri* (7), *Secretary of State v. Luchmeshar Singh* (8), *J. Winter-scale v. Sarat Chandra* (9), *Seturatnam v. Venkatachela* (10) and *Nainapillai v. Ramanathan* (11). The learned vakil for the Appellants argued that in the present case the origin of the tenancy was

(3) I. L. R. 25 Cal. 896 (1898).

(4) L. R. 31 I. A. 144; s. c. I. L. R. 32 Cal. 41; 8 O. W. N. 889 (1904).

(5) L. R. 31 I. A. 149; s. c. I. L. R. 32 Cal. 51; 8 O. W. N. 895 (1904).

(6) L. R. 26 I. A. 58; s. c. I. L. R. 31 All. 406; 3 O. W. N. 502 (1899).

(7) I. L. R. 37 Mad. I (1910).

(8) L. R. 16 I. A. 6; s. c. I. L. R. 15 Cal. 223 (1889).

(9) 8 O. W. N. 155 (1903).

(10) L. R. 47 I. A. 76; s. c. I. L. R. 46 Mad. 587; 26 O. W. N. 485 (1919).

(11) L. R. 51 I. A. 88; s. c. 28 O. W. N. 809 (1923).

(1) 7 B. L. R. 152; 12 W. R. 495 (1869).

(2) 7 B. L. R. 159 at p. 164; 15 W. R. 274 (1871).

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not unknown; there were no substantial buildings on the land, therefore there was no justification for raising the presumption of permanency of the tenure. The learned vakil for the Respondents, in addition to the cases quoted by the Subordinate Judge, cited the following cases:—*William Grant v. Mrs. Robinson* (12) and *Moharam Chaprasi v. Telamuddin Khan* (13) and contended that the facts found in the present case brought it within the principle laid down in these cases.

As I have already observed the cases on the point, as one could expect, are not only many but are not easily reconcilable. In these circumstances it may be said, if that can be said of a question of law, that the circumstances of each case must determine whether the presumption should be made or not as it is impossible to give any exhaustive enumeration of the facts which shall or shall not justify the presumption to be drawn.

I shall endeavour to find out from some of the leading cases and the general law what are the principles upon which the Court has proceeded in deciding the question now raised. I must not, however, be understood to attempt an exhaustive analysis of all the cases.

I shall now briefly refer to some of the principles which underlie a question of this nature as between landlord and tenant and I am here speaking only of the non-agricultural holdings created before the Transfer of Property Act of 1882.

When a tenant claims to hold land as a tenant under the landlord, the tenant must prove the nature and the extent of the interest which the landlord, the owner of the full rights, granted to him and thereby put a limitation to his own

rights. In this connection I shall quote a few passages from the decision of Lord Hobhouse in the case of *Secretary of State v. Luchmeshdar Singh* (8). His Lordship says:—"The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things there would be strength in that argument, but as the origin of them is known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the Plaintiff to explain the possession, it is the business of the Defendant to show that it leads to the inference of a perpetual tenancy." The Judicial Committee referred to this case and re-stated the law in these words:—"That permanent right of occupancy can only be obtained by a tenant by custom or by a grant from an owner of the land who happens to have power to grant such a right or under an Act of the Legislature." *Nainapillai v. Ramanathan* (11). No person can, after the Transfer of Property Act came into operation, claim to hold a permanent tenancy in what is called *basti* land unless it was created by a written and registered lease. It is common knowledge that numerous leases of the class, we are dealing with now, were

(12) 11 C. W. N. 242 (1906).

(13) 16 C. W. N. 567: s. c. 15 I. O. L. J. 220 (1911)

(8) L. R. 16 I. A. 6 at p. 11: s. c. I. L. R. 16 Cal. 223 (1899).

(11) L. R. 51 I. A. 20 at p. 20: s. c. 28 G. W. N. 808 (1923).

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and are daily created in Bengal more especially in the towns, and one may safely say that 50 years back and thereafter written leases had come into general use and except under special circumstances, no tenant would consider it safe to take a permanent lease without a registered deed evidencing the demise, particularly when the tenant paid a substantial premium, or intended to spend large sums on the land for building and other purposes. The granting of a permanent right in land is a matter of considerable importance and usually is evidenced by appropriate deeds. The Transfer of Property Act must have had regard to the habits and practice of the people of Bengal when it was made applicable to them. Before the Transfer of Property Act there was no statute dealing with homestead land as distinguished from agricultural land, as to which numerous statutes, beginning with the regulations passed at the time of the Permanent Settlement, down to the passing of the Tenancy Act in Bengal in 1885, regulate the relationship between the landlords and the tenants. There are numerous judicial decisions with reference to agricultural land and they have no direct bearing on the question now at issue.

The cases, some of which I shall presently discuss, proceed upon two broad principles and some of them rely upon a combination of both, whenever the inference of permanency of the tenancy has been made in favour of the tenant when the terms of the original tenancy could not be directly proved. The first principle is, that in cases where the origin of the tenancy is unknown, and its inception is lost in antiquity the principle of a lost grant has been invoked by the tenant and from the conduct of the parties and the surrounding circumstances, the Court has

been asked to presume that the tenancy was a permanent one. The conduct of the landlord in recognising succession, transfer and in standing by when *pucca* buildings have been raised upon the land, have been mainly relied on in finding out the terms of the lease at its inception.

The second principle relied upon is that of equitable estoppel against the landlord, from showing that the lease was a terminable one.

The first of those principles was relied upon by the tenant in the case already cited and reported in *Secretary of State v. Luchmeswar Singh* (8). Their Lordships refused to draw the inference although in that case the lease was created in 1764 and one uniform rent was paid for 80 years before the dispute arose. This principle was also relied upon by the tenant but this Court refused to draw the inference in the following cases:—

In the well-known case of *Prosunno Coomaree v. Rutton* (14), Sir Richard Garth on a careful consideration of the earlier cases, laid down the law in the following words:—"The truth is that the terms of a holding as between landlord and tenant must always be matter of contract either expressed or implied," then again, "there is no law, of which we are aware in this country which converts a holding-at-will or from year to year or for a term of years into a permanent tenure merely because the tenant without any arrangement with his landlord chooses to build a dwelling house upon land demised."

In this case the Defendants, their father and grand-father had occupied the land for fifty or sixty years and used it as

(8) L. R. 16 L. A. 61; s. c. I. L. R. 16 Cal. 228 (1890).

(14) I. L. R. 8 Cal. 686 (1877).

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a homestead consisting of a house and fruit trees. Sir Richard Garth refused to draw the inference of permanency in this case although the origin of the tenancy was unknown.

This case was followed in a number of subsequent cases and I shall refer to some of them only : *Tarakpada Ghosal v. Shyama Charan Napit* (15), *Prosanna v. Jagannath* (16) and *Rakhai Das v. Dinomoyi* (17). In these cases the Court refused to presume the permanency of the holding.

In the cases, which I shall next discuss, the principle was relied upon and the Court drew the inference in favour of the permanency of the tenancy. I have already discussed the case of *Beni Madhub v. Jai Krishna* (1). In the case of *Prosanna Kumar Chatterjee v. Jagannath Bysack* (16), Sir Richard Garth discussed some of the cases and distinguishing the case of *Prosunno Coomaree v. Rutton* (14) held at p. 30: "No doubt if land is let for building pucca houses upon it, or if the tenant with knowledge of the landlord does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with a long continued enjoyment of the property by the tenant or his predecessors-in-title might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained. But the mere circumstance of a tenant occupying buildings upon property would not justify such presumption, unless it could be shown that they were erected by him or his predecessors, because a landlord might let pro-

perty of that kind in the same way as agricultural land, at will, or from year to year." In the case of *Gangadhar Sikdar v. Ayimuddin* (18), Sir Richard Garth again distinguished the case of *Prosunno Coomaree v. Rutton* (14), and held that (at p. 962)—"It was apparently let upwards of sixty years ago for building purposes; because it is found that, after the grant (whatever it was), these buildings, which are of a substantial character, were erected some sixty years ago by the Defendants' ancestors, and that they and their ancestors have lived there ever since. Under these circumstances we think that the Court below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character." These two cases might be considered as laying down the principle clearly and definitely. These cases were followed by Sir F. Maclean, C. J., in the case of *Grant v. Robinson* (12) and the circumstances from which the inference was drawn were that "the original nature of the grant was unknown, the Defendants were tenants on the land and were in occupation for nearly sixty years and that they raised substantial structures on the land and the grant was for the purpose of residence." These cases really settled the grounds upon which such a presumption in favour of the tenant may be drawn and the subsequent cases which followed these cases stressed the facts that the origin of the tenancy must be unknown and that substantial pucca structures must be built without objection long before the controversy arose. The present case does not come within the principle so laid down.

(1) 7 B. L. R. 152; 12 W. R. 495 (1869).

(14) 1 L. R. 3 Cal. 696 (1877).

(15) 8 C. L. R. 30 (1881).

(16) 10 C. L. R. 35 (1881).

(17) 1 L. R. 3 Cal. 662 (1877).

(12) 11 C. W. N. 242 (1903).

(14) 1 L. R. 3 Cal. 696 (1877).

(18) 1 L. R. 3 Cal. 900 (1882).

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In the case of *Moharam Chaprasi v. Telemuddin Khan* (13), their Lordships found that the origin of the tenancy was unknown, the rent never varied, the landlord treated the tenancy as heritable and that the land was let out for residential purposes and relied upon the authority of a number of cases both of this Court and of the Judicial Committee. Their Lordships summed up as follows:—"There can be no doubt that in view of the decision of this Court in the cases of *Dinendra v. Tituram* (19) and *Winterscale v. Sarat Chandra* (9) and of the Judicial Committee in the cases of *Gopal Lal v. Teluk Chandra* (20), *Dhunput v. Gooman* (21), *Ram Chandra v. Jugesh Chandra* (22), *Suttosurrin v. Mohesh Chandra* (23), *Upendra Krishna v. Ismail Khan* (4), *Nilratan v. Ismail Khan* (5) and *Naba Kumari v. Behari Lal* (24), the inference is irresistible that the tenancy in its inception was of a permanent character. The Subordinate Judge himself indeed would have arrived at the same conclusion but for the error into which he fell when he assumed that to bring a case within this rule, it was essential to establish that there were permanent structures on the land. But the decision of the Judicial Committee in *Naba Kumari v. Behari Lal* (24) shows conclusively that although the presence of permanent structures on

the land may be a very important factor, it is by no means essential to establish that the tenancy in its inception was of a permanent character."

This case for the first time definitely held that a tenancy in homestead land, without any substantial structures built on it by the tenant, may be presumed to be a permanent tenancy even in the absence of any admission by the landlord, or any circumstance importing permanency of tenure.

The cases cited in support of that view, it is respectfully submitted, lend no support to that proposition. The first case cited is the case of *Dinendra v. Tituram* (19) and relates to a question of apportionment of compensation money and has little to do with question now in issue.

The next case of *Winterscale v. Sarat Chandra* (9) was decided on the ground that the landlord was aware of a *kobala* and of a *pattah*, from the terms of which the Court presumed that the landlord was bound to recognise the permanency of the tenure. The next four cases are decisions of the Judicial Committee in which the question of the permanency of agricultural tenures was discussed and decided, and, as I have shown before, this class of tenancy stands upon a different footing altogether. The case of *Nilratan v. Ismail Khan* (5), which is next referred to, deals no doubt with tenancy in homestead land, but in that case the head-note itself shews this "that the execution and exchange of the *pattah* and *kabuliyat* shew knowledge and recognition on the landlord's part of the transmission of permanent rights." Obviously this case has nothing to do with the proposition under consi-

(4) L. R. 31 I. A. 144: s. c. I. L. R. 32 Cal. 41; 8 C. W. N. 889 (1904).

(5) L. R. 31 I. A. 149: s. c. I. L. R. 32 Cal. 51; 8 C. W. N. 895 (1904).

(9) 8 C. W. N. 155 (1903).

(13) 16 C. W. N. 567: s. c. 15 C. L. J. 220 (1911).

(19) I. L. R. 30 Cal. 801 (1903).

(20) 10 M. I. A. 183, 191 (1865).

(21) 41 M. I. A. 433 (1867).

(22) 12 B. L. R. 229 (1873).

(23) 12 M. I. A. 263 (1868).

(24) I. L. R. 34 Cal. 902: s. c. 11 C. W. N. 885; 6 C. L. J. 122 (P. C.) (1907).

(5) L. R. 31 I. A. 149: s. c. I. L. R. 32 Cal. 51; 8 C. W. N. 895 (1904).

(9) 8 C. W. N. 155 (1903).

(19) I. L. R. 30 Cal. 801 (1903).

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deration in this case. The last case of *Naba Kumari v. Behari Lal* (24) deals also with an agricultural tenure and the decision is mainly based on an admission by the landlord. It seems to me therefore the case of *Moharam Chaprasi v. Telamuddin Khan* (13) went beyond the rule which had been adopted by the leading cases which I have already discussed, and they show that in these cases permanency was presumed on the theory of a lost grant.

The fact that the tenant is allowed to continue in possession of lands for generations, without alteration of the rent, is of common occurrence in this country and is usually attributable to the reluctance of a landlord to eject a tenant from his home so long as he does not make himself objectionable and regularly pays his rent. Mere forbearance to enhance the rent or eject the tenant, where the right exists, means nothing. If transfers are made, describing the tenancy as permanent, and the landlord recognises the transfer, then the landlord allows creation of evidence by conduct, otherwise transfer of tenancy of homestead land would also be ordinarily no evidence of permanency of the tenancy.

The building of *pucca* houses and that to the knowledge of the landlord is evidence of the assertion of the tenant of his belief that the tenancy at its inception, which is unknown, was permanent. In this connection, no question of estoppel or acquiescence arises, the case depends upon the principle of inference of the term of a lost grant.

The second principle, namely, of estoppel against landlord, the Privy

Council deals with in the case of *Beni v. Kundun* (6). The decision runs thus:—

“In order to raise the equitable estoppel which was enforced against the Appellants by both the Appellate Courts below, it was incumbent upon the Respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.

“Their Lordships have had no difficulty in coming to the conclusion that the Respondents have failed to discharge themselves of that onus. If there be one point settled in the equity law of England, it is that, in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below.” Lord Watson, in discussing the case of *Ramsden v. Dyson* (25), the leading authority in the law of England, quoted the following passage from the judgment of the Lord Chancellor (Lord Cranworth), *Beni v. Kundun* (6): “It follows as a corollary from these rules, or perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking pos-

(13) 16 C. W. N. 567: s. c. 15 L. L. J. 220 (1911).

(24) I. L. R. 34 Cal. 802; s. c. 11 C. W. N. 365; 6 C. L. J. 122 (P. C.) (1907).

(6) L. R. 26 I. A. 58 at p. 64: s. c. I. L. R. 21 All. 406; 3 C. W. N. 502 (1899).

(25) L. R. 1 H. L. 141 (1866).

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session of the land and buildings when the tenancy has terminated. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

In order to avail himself of the equitable estoppel against his landlord, the tenant is bound to prove special circumstances, the mere building of a costly structure is not enough. In the present case the principle of equitable estoppel was not relied upon and could not be.

An analysis of the cases cited before, in which presumption of permanency was made, shows that the following elements existed in these cases, *viz.*, *first*, the origin of a tenancy for residential purpose must be unknown; *secondly*, existence of permanent *pucca* buildings on the lands built long before any controversy arises and that to the knowledge of the landlord; *thirdly*, uniform payment of rent; *fourthly*, recognition of successions and transfer by the landlord. Many cases were decided upon the admission by landlords as to permanency of the tenure in various ways but these cases are based on a different consideration as also the cases in which an equitable estoppel is raised against the landlord. It seems to us that the absence of either of the elements Nos. 1 and 2 as stated above would be ordinarily fatal to any claim of permanency on the theory of lost grant.

Absence of the 3rd and the 4th elements usually would raise difficulties in the way of raising the presumption, but may not be decisive if there are other circumstances in aid of the presumption.

In the case now before us, both the Courts have agreed in holding that the origin of the tenancy was not unknown and no evidence was adduced to prove its terms. Absence of written lease

cannot improve the position of the tenant, because a tenant must know under what terms he holds the land of his lessor. At the time, when the building was first constructed, the tenancy was one in which no presumption in favour of the tenant existed and the tenancy in the absence of proof of any definite terms of permanency would be at best one from year to year. On this ground alone, we think that the presumption of permanency raised by the lower Appellate Court is erroneous and the case of *Moharam Chaprasi v. Telamuddin Khan* (13) is distinguishable. Upon the findings of the lower Appellate Court it appears to us that there were no substantial *pucca* buildings on the land as understood in the cases in which the presumption has been sustained and some of which I have already discussed. In the circumstance of this case, we do not think the inference of permanency is justifiable. The result is that the judgment and decree of the lower Appellate Court is set aside and those of the Munsif are restored with costs in all Courts.

GREAVES, J.—I agree.

H. C. S.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

REVIEW RULES NOS. 169S AND
170S OF 1924.

WALMSLEY, J.

SUBHAWARDY, J.

1924,

Heard,

8, August.

Judgment,

20, August.

BRINDABAN CHANDRA
GHOSH, Petitioner,

v.

DAMODOR PRASAD
PANDAY, Opposite
Party.

*Review—Civil Procedure Code (Act V of 1908),
Or. 47, r. 1—Error apparent on the face of the
record—Judgment reviewed on the ground that deci-*

(18) 16 C. W. N. 567; S. C. 15 C. A. J. 220
(1911).

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sion of Privy Council relied on by High Court was differently interpreted in a later judgment delivered by the Privy Council after the judgment of the High Court.

In a Second Appeal, judgment was given by the High Court for the Defendant-Appellant relying on a decision of the Judicial Committee. After an application for a review of this judgment was presented but before its hearing the Judicial Committee delivered another judgment in which the case relied on in the judgment of the High Court was construed in a manner which rendered the judgment of the High Court wrong. A rule was issued on the basis of the later decision of the Judicial Committee:

Held—That the expression "error apparent on the face of the record" was wide enough to embrace a case like the present and the Court was justified in granting the review.

These were Rules issued on the Defendants to show cause why the judgment of this Court in S. A. Nos. 390 and 393 of 1921, dated the 10th May 1923, should not be reversed for the reasons stated in the application for review made by the Plaintiffs.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and Babus Bireswar Bagchi and Nirode Bandhu Ray for the Petitioner.

Babus Amarendra Nath Bose and Dwijendra Krishna Dutt for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—These are applications for review of a judgment delivered by us on 10th May 1923. The facts of the suits are stated in our judgment. It is convenient, however, to mention here that

the Plaintiffs were mortgagees and the Defendants were the sons of the mortgagor and governed by Mitakshara law: the lower Courts had decreed the suits in part, that is, to the extent that the principal secured by the mortgage corresponded with the debt due on a prior mortgage. The Defendants as Appellants urged that the prior mortgage was not an "antecedent debt" and they were not liable under the mortgages executed by their father in favour of the Plaintiffs. We upheld that contention in the belief that the decision of their Lordships of the Privy Council in the case of *Sahu Ram Chandra v. Bhup Singh* (1) compelled us to do so.

This application for review was presented on 4th August, and as I was away at the time it could not be dealt with until after the vacation. On 20th November we adjourned the hearing. On 14th November their Lordships of the Privy Council delivered judgment in the case of *Brij Narain Rai v. Mongla Prasad* (2); this was published in India in January and appeared in the Calcutta Weekly Notes on 14th January. When we heard the application for review on 1st February, this later judgment was before us, and we called on the Defendants to show cause why in view of that judgment our decision should not be reversed.

Without going into an examination of the differences between the judgment in *Sahu Ram's* case (1) and the judgment in *Brij Narain's* case (2), I think it is enough to say that the circumstances in which we have to deal with this application are altogether unusual.

It is contended on behalf of the Defendants that this application is not main-

(1) L. R. 44 I. A. 127; s. c. I. L. R. 39 ALL. 437; 21 C. W. N. 698 (1927).

(2) 28 C. W. N. 253 (P. C.) (1923).

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tainable, that the ground on which it is pressed was not set out in the application and there has been no amendment, that the rule is in a wrong form, because this Court should at most set aside the judgment delivered instead of replacing it with another, and that on the merits our decision is correct in spite of the judgment in *Brij Narain's* case (2).

The second and third objections may be dismissed in a few words. From the dates I have mentioned, it is obvious that no reference to the recent judgment could have been made in the application; the principle it establishes was, however, mentioned and the judgment was read to us when we granted the Rule, and, as the Rule expressly refers to the judgment there can be no prejudice to the Defendants in the fact that the application was not amended.

With regard to the third ground it is no doubt open to us to proceed by stages, but that course is not compulsory: there is precedent for proceeding at once to a judgment on the appeal in favour of the Plaintiffs and in the rather special circumstances of this case that seems the only logical thing to do.

There is more substance about the first objection, but I can hardly deal with it until I have considered the merits.

As I have said, in our judgment we thought that we were following the law as laid down in *Sahu Ram's* case (1). We referred to the case of *Arumugham Chetty v. Muthu Koundun* (3) and to two Allahabad cases of *Ram Singh v. Chet Ram* (4) and *Chet Ram v. Ram Singh* (5).

(1) I. R. 44 I. A. 127; s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).

(2) 28 C. W. N. 53 (P. C.) (1923).

(3) I. L. R. 42 Mad. 711 (F. B.) (1919).

(4) I. L. R. 41 All. 529 (1919).

(5) I. L. R. 44 All. 368; s. c. 27 C. W. N. 150 (P. C.) (1922).

The order made by the Allahabad High Court on *Brij Narain's* application for leave to appeal refers to the Madras decision. Their Lordships of the Privy Council refer to this conflict of opinion between the Courts of Madras and Allahabad, and accepted the Madras view. That is the view which we did not follow. It is quite clear to me that in the light of the judgment in *Brij Narain's* case (2) our decision was wrong.

It is suggested that as we found on the facts that necessity had not been proved, the question of law does not arise. I cannot agree to this contention: it was only in the alternative that the Plaintiffs sought to rely on necessity.

Now, I can come to the first objection. It is urged that the application cannot be brought within any one of the three clauses of Or. 47, r. 1. No one suggests that it can come under the first. "Other sufficient cause" might seem wide enough to cover it, but the remarks in the case of *Chhajju Ram v. Neki* (6) make me hesitate to use those general words. The remaining clause is "error apparent on the face of the record," and the learned vakil for the Petitioner urges that this expression is wide enough to embrace such a case as this. I think that view is right. The law has not been altered: their Lordships are careful to say that the judgment in *Sahu Ram's* case (1) introduced no modification and that again the judgment in *Brij Narain's* case (2) made no change. The position therefore is that we have been told authoritatively that we put a wrong construction on the decision that we were bound to follow and imagined that we

(1) I. R. 44 I. A. 127; s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).

(2) 28 C. W. N. 243 (P. C.) (1923).

(3) 26 C. W. N. 597 (P. C.) (1922).

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were following. In such circumstances I think we ought to hold that there is an error apparent on the face of the record.

Accordingly I grant the application of review, set aside our judgment of 10th May 1923 and restore the judgments and decrees of the District Judge.

On the appeals we showed indulgence to the Plaintiffs in the matter of costs. For similar reasons I think we should now show the same indulgence to the Defendants and direct that each party pays his own costs in these applications. The Petitioners are entitled to a refund of the excess court-fees paid on the review applications under sec. 15 of the Court Fees Act.

SUHRAWARDY, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 797 OF 1924.

SUHRAWARDY, J.

MUKERJI, J.

1924,

Heard,

25, October.

Judgment,

3, November.

BAHADUR MOLLA and
Brs., Petitioners,

v.

ISMAIL and anr.,

Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 407, 408—Appeal, by a convicted person, from an order passed against him under sec. 562, releasing on probation of good conduct, if lies—Scheme of the old Code and the amending Act of 1923—Sec 415A, right of appeal of other convicted persons who go. non-appealable sentences.

A convicted person has a right of appeal from an order passed against him under sec. 562 (1), Criminal Procedure Code, releasing him on probation of good conduct, though no provision as to appeal has been expressly made in respect of an order under sec. 562.

MI SHWE NYUN v. KING-EMPEROR (1),

(1) 11 Cr. L. J. 548 (1904).

EMPEROR v. MANOHAR DAS (2), HAYATA v. EMPEROR (3) and EMPEROR v. GHASITE (4) referred to.

As an appeal lay on behalf of the convicted persons against whom the order under sec. 562 (1) was made, there was a right of appeal in the other convicted persons who were not so released but who got non-appealable sentences, by the operation of sec. 415A.

This was a Rule granted against an order of the Sessions Judge of Jessore (Mr. M. C. Ghose), dated the 16th August 1924, dismissing the appeal on the ground that no appeal lay to him from an order of the Deputy Magistrate of Jhenidah (T. J. M. N. Chaudhuri, Esq.), dated the 27th June 1924.

The facts material to this report are these:—The Petitioners were convicted under secs. 147 and 342, I. P. C., and some of them were sentenced to pay a fine of Rs. 25 each under each of the sections; and against others an order under sec. 562, Cr. P. C., was passed. The Petitioners preferred an appeal to the Sessions Judge of Jessore, who, however, dismissed the appeal on the ground that no appeal lay to him. Against that order the present Rule was obtained.

Babu Bhudar Haldar for the Petitioners.

Babus Probodh Chandra Chatterjee and Nanda Gopal Banerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—The question involved in this Rule is whether a convicted person has a right of appeal, generally speaking,

(2) 24 P. R. Cr. 1904; 1 Cr. L. J. 1098 (1904)

(3) 18 Cr. L. J. 400; 88 I. C. 991 (1916).

(4) I. L. B. 87 All. 31 at p. 133 (1914).

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from an order passed against him under sec. 562, Cr. P. C.

As far as we have been able to discover there is no reported decision of this Court on the point. The point was considered by the Court of the Judicial Commissioner of Upper Burma in the case of *Mi Shwe Nyun v. King-Emperor* (1) and the Chief Court of the Punjab in the case of *Emperor v. Manohar Das* (2), which latter decision has been afterwards followed by the same Court in the case of *Hayata v. Emperor* (3). The Allahabad High Court appears to have followed the ruling of the Punjab Chief Court, see the case of *Emperor v. Ghasite* (4).

All the above decisions are in favour of the view that an appeal does lie from an order passed under sec. 562, Cr. P. C.

From a consideration of the provisions of Chap. XXXI of the Code which were framed long before sec. 562 was enacted it is difficult to evolve a complete scheme; and in this respect the present case is perhaps more unsatisfactory than its predecessor.

Sec. 404, Cr. P. C., seeks to classify appeals into appeals from judgments and appeals from orders, though judgments and orders are not necessarily contrasted terms. Assuming, however, that judgments stand for final orders of conviction or acquittal, though to accept this meaning also there may be some difficulty, secs. 406 and 406A speak of appeals against orders, while secs. 407 and 408 speak of appeals against orders and sentences by convicted persons; secs. 410, 411, 412, 413 and 414 speak of appeals by convicted persons only, the explana-

tions to sec. 413 and sec. 415 speak of appeals from or against sentences. Sec. 415A speaks of an appealable judgment or order, though the word judgment does not occur in any of the other sections. Moreover sec. 417 speaks of an order of acquittal. Sec. 423 mentions an appeal from an order of acquittal, appeal from a conviction and an appeal from any other order. In sec. 425 the expression "finding, sentence or order appealed against" occurs. Under the Indian Limitation Act for the purpose of a criminal appeal time runs from date of the sentence or order appealed against, indicating that orders of acquittal are orders and not judgments: so also an order of conviction is an order unless followed by a sentence. Travelling outside Chap. XXXI, further difficulties are in the way, e.g., in sec. 307 occurs the expression judgment of acquittal or of conviction, and sec. 349 speaks of judgment, sentence or order. It is unnecessary to proceed further with an examination of the other sections of the Code, for, as I have said, no consistency has been attempted to be maintained in the meaning and import of the words and expressions referred to above.

Marginal notes are not parts of the sections, but there is no reason why they should not be consistent with the sections themselves. As an instance if we take sec. 407, Cr. P. C., the section speaks of an appeal by a person convicted on a trial held by a Magistrate of the second or third class, or any person sentenced under sec. 349 or in respect of whom an order has been made or a sentence has been passed under sec. 380, Cr. P. C., by a Sub-Divisional Magistrate of the second class. The marginal notes to the sections only speak of appeal from sentence of Magistrate of the second or

(1) 1 Cr. L. J. 543 (1904).

(2) 24 P. R. Cr. 1904, 1 Cr. L. J. 1038 (1904).

(3) 18 Cr. L. J. 490, 188 I. C. 931 (1916).

(4) 1 L. R. 27 All. 21 at p. 28 (1914).

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third class, ignoring the distinction between orders and sentences indicated in the body of the section, and is thus inapposite. It is not profitable to multiply instances.

Examining the relevant provisions of the chapter for a solution of the question that we have to decide it would appear that the question is not altogether free from difficulty and the learned Judges who had to deal with the question under the Code of 1898 felt it in no small measure. Under the present Code the difficulty remains the same, if it has not become greater.

On the one hand, no provision as to appeal has been expressly made in respect of an order under sec. 562, and sec. 404 says that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. Sec. 407, however, which deals with appeals by persons convicted on trials held by Magistrates of the second or the third class, gives a right of appeal from a sentence of a Sub-Divisional Magistrate of the second class and also against an order (which is not a sentence) passed by a Sub-Divisional Magistrate of the second class under sec. 380, Cr. P. C. An order under sec. 562 (1) may be passed by the Sub-Divisional Magistrate under the provisions of sec. 380 according to the proviso to sec. 562 (1). Such an order, if passed by him, would be clearly appealable under sec. 407, Cr. P. C. Then turning to sec. 408, it gives a right of appeal to a person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or a Magistrate of the first class, and from a sentence passed under sec. 349 by a Magistrate of the first class or an order (which is not a sentence) passed by a Magistrate of the

first class under sec. 380, Cr. P. C. Such an order, as I have already said, may include an order under sec. 562 (1). This section is controlled by two sub-sections, viz., (b) and (c), sub-sec. (a) having been deleted from the Code of 1898. These two sub-sections contained in the proviso do not, in my opinion, curtail the right of appeal given by the section itself, but make exceptions as to the venue of the appeal which ordinarily lies to the Court of Session, in cases specifically mentioned in the provisos (b) and (c). The rights conferred by secs. 407 and 408 are only restricted by the reservation contained in secs. 412, 413 and 414 and subject to the provisions of sec. 415 which is a proviso to secs. 413 and 414.

Upon a plain reading of the statute I am disposed to put upon it the interpretation which I have indicated above. I am aware that this interpretation lead to certain anomalies, but a contrary view, in my opinion, leads us into absurdities of not less serious nature.

If this interpretation is adopted a person against whom an order under sec. 562, cl. (1) has been passed will have one appeal in the first instance and possibly a second one when an order is passed sentencing him under sec. 563, cl. (2). What effect the dismissal of the first appeal or the non-preferring of it within time will have on the second one is not a matter which I need discuss here. According to this interpretation also there would be no appeals in certain petty cases such as those mentioned in sec. 413 or summary convictions such as are mentioned in sec. 414, while in cases where there is no sentence at all but only an order under sec. 562, cl. (1), appeals will lie. This result in view of the policy of secs. 413 and 414 seems somewhat

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strange. The statutory deprivation of a general right of appeal, however, must always be construed strictly.

I am further confirmed in my view by certain other considerations as well. In the first place the general tendency of the Amending Act of 1923 has been to enlarge rather than to curtail the right of appeal in favour of accused persons. By that Act several orders which were not formerly appealable have been made so; right to appeal to a higher Court has been conferred by sec. 406, an order refusing to accept or rejecting a surety has been made appealable by sec. 406A, the immunities enjoyed by certain sentences under secs. 413 and 414 have now been taken away, special right of appeal has been created in certain cases under secs. 415A and 418 (2); and it is also interesting to note that in the matter of refusal to accept or of rejecting sureties offered in compliance with an order under sec. 562 (1), the provisions as to right of appeal have been made applicable by sub-sec. (4) of sec. 562. Furthermore, the cases to which I have already referred are the decisions of High Courts within the meaning of the Code of Criminal Procedure. They are decisions of superior Courts in this country and the legislature must be presumed to have been aware of their existence when they proceeded to amend the Code. If with the knowledge of these decisions they only amended Chap. XXXI in this respect not by making any reference to sec. 562 at all, but on the other hand by introducing into secs. 407 and 408 the words, "or in respect of whom an order has been made or a sentence passed under sec. 380"—the words, the omission of which from the Code of 1898 was commented on in one of the cases referred to above—the conclusion irresistibly follows that they never in-

tended to make a change in the law by the curtailment of a right which the accused must be taken to have enjoyed all this time.

In the present case therefore an appeal lay to the Court below on behalf of the convicted persons against whom the order under sec. 562 (1) was made, and by the operation of sec. 415A there was a right of appeal in the other convicted persons as well. The order of the Court below complained of in this Rule should therefore be set aside and the said appeal should now be heard and disposed of in accordance with law.

The Rule, in my opinion, should be made absolute.

SUHWARDY, J.—I agree.

J. N. R. Rule made absolute.

PRIVY COUNCIL.**[APPEAL FROM MADRAS.]**

LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE. •
1924,
Heard, 19, May.
Judgment, 19, June.

VAIDYANATHA
AYYAR and anr.,
Appellants,
v.
K. SWAMINATHA
AYYAR and anr.,
Respondents

*Civil Procedure Code (Act V of 1908), sec 92—
"Interest," which relators must possess—Descendants through female of founder, if have "interest" to demand administration of chatram—User of chatram, if necessary qualification—Appointment of manager of property treated as private property, if appointment of trustee—Gift to dharma—Uncertainty.*

The consent of the Advocate-General to the institution of the suit by the Plaintiffs would not bring the suit within sec. 92 of the Civil Procedure Code, unless the Plaintiffs had an interest in the trust.

The bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him no such interest. To hold otherwise would defeat

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the object of the section, which is to prevent people interfering by virtue of it in the administration of charitable trusts merely in the interest of others and without any real interest of their own.

But the descendants although in the female lines of the founder of a chatram have an interest in the proper administration of the trust sufficient to enable them to maintain a suit under sec. 92, although they themselves may never find it necessary to use the chatram as a rest house or to obtain food there.

RAMACHANDRA AIYAR v. PARAMESWARAN UNNI (3) referred to.

Where V was appointed by S manager of properties which though in fact trust properties were alleged by S to belong to himself as proprietor:

Held—That this did not amount to appointing V as trustee of the trust properties.

BOIDYO GAURANGA SAHU v. SUDERI MATA (7) referred to.

JAN ALI v. RAM NATH MUNDUL (4) doubted.

A bequest, not to dharmam generally, but to a specifically indicated existing charity, is not void for uncertainty.

RUNCHORDAS VANDRAWANDAS v. PARVATIBHAI (5) distinguished.

These were consolidated appeals from a judgment and two decrees of the High Court, dated the 13th November 1919, affirming a judgment and two decrees of the Subordinate Judge of Kumbakonam.

The suit was instituted with the consent of the Advocate-General under sec. 92 of the Civil Procedure Code for the

framing of a scheme for the administration of an alleged public religious trust, and for the appointment of new trustees. The trust was said to have been endowed in or about 1856 by Kalyanarama, an ancestor of the Plaintiffs-Respondents.

The Defendants-Appellants came into possession of the trust properties in 1913, on the death and under the Will of Suri Ayyar, the last manager. They alleged that there was no dedication to the public of the chatram, the subject-matter of the trust.

The Subordinate Judge decided in favour of the Plaintiffs and directed the framing of a scheme for the due management of the trust.

The Defendants appealed to the High Court at Madras (Abdur Rahim and Burn, JJ.), which modified the decree of the lower Court by excluding certain properties but otherwise upheld its findings.

Messrs. Upjohn, K. C. and A. Majid for the Appellants.—The Respondents have not sufficient interest in the maintenance of the charity to justify their institution of the suit under sec. 92 of the Civil Procedure Code.

The fact that they have obtained the leave of the Advocate-General is not sufficient to justify the suit in the absence of such interest. An "interest" within the meaning of sec. 92, C. P. C., must be beneficial, not adverse to the trust.

Re : The Master Governors and Trustees of the Bedford Charity (1) and *Ramachandra Aiyar v. Parameswaran Unni* (3).

Although there are decisions that the founder's family have a material interest the present Appellants are too remote descendants to come within the principle. They also referred to *Boidyo, Gauranga*

(4) I. L. R. 8 Cal. 32 (1882).

(5) I. L. R. 42 Mad. 360 (1918).

(6) L. R. 26 I. A. 71; s. c. 3 C. W. N. 621 (1899).

(7) I. L. R. 40 Mad. 612 (F. B.) (1916).

(1) 2 Sw. Ch. Rep. 518 (1819).

(3) I. L. R. 42 Mad. 360 (1918).

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Sahu v. Suderi Mata (7) and *The Corporation of Ludlow, &c. v. Greenhouse* (2).

Messrs. DeGruyther, K. U., Dubé and Narasimham for the Respondents were not called upon.

The facts of the case and the arguments of Counsel are dealt with more fully in the judgment of their Lordships.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are consolidated appeals by Defendants in a suit, No. 1 of 1916, from two decrees, dated the 13th November 1910, of the High Court at Madras, which affirmed with a trifling variation as to some property claimed, a preliminary decree, dated the 15th April 1918, and a final decree, dated the 30th September 1918, of the Subordinate Judge of Kumbakonam.

The suit relates to a chatram, also called a choultry, at Kumbakonam, and property alleged to be endowed property of the chatram. The chatram is now known as Kalyanarama Ayyar's chatram. Formerly it was known as Rajappa Ayyar's chatram. Two Brahmins were the Plaintiffs. Since the suit was in appeal in the High Court one of the Plaintiffs died; his legal representative is now on the record and is one of the Respondents.

The Plaintiffs, on the 13th November 1916, brought this suit and claimed a declaration that the chatram was a public charitable institution having the properties mentioned in Sch. B of the plaint and seven-ninths of the properties mentioned in Schs. C to F as endowments; a declaration that the Defendants are not lawfully appointed trustees and are not entitled to any right to the management and

administration of the institution or in the properties belonging to it; that the Defendants be removed from the office; that fit and proper persons be appointed trustees for the administration of the trust and that the chatram and the properties belonging to it be vested in them; that a scheme for the administration of the trust be settled; and other reliefs. The case of the Plaintiffs was that the chatram was a public chatram, which had been founded and dedicated to the public more than 60 years before suit as a charitable institution for the convenience of travellers as a halting place and for the feeding of poor Brahmins resorting to it. The Plaintiffs had obtained under sec. 92 of the Code of Civil Procedure, 1908, the consent in writing of the Advocate-General to their institution of the suit.

The Defendants denied that the Plaintiffs were persons who had an interest in the trust within the meaning of sec. 92 of the Code of Civil Procedure, 1908. They alleged that the chatram was a private chatram, and they denied that it had ever been dedicated to the public, and that it had ever been endowed with any of the properties claimed as endowments; they pleaded that they had been duly appointed trustees, and other matters which are immaterial if they had not been duly appointed as trustees.

The learned Subordinate Judge who tried the suit recorded oral and documentary evidence, and he found that the Plaintiffs having obtained the consent in writing of the Advocate-General were persons who were entitled to institute the suit; that the chatram had been dedicated to the public and had been endowed as alleged in the plaint; that the Defendants were not duly appointed trustees, and decided that a scheme for the management of the trust should be framed: and he framed a

(7) I. L. R. 40 Mad. 612 (F. B.) (1916).

(2) 1 Bligh Rep. N. S. 17 (1829).

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scheme for the management of the trust. The learned Judges of the High Court on appeal concurred with the findings of the Subordinate Judge except that they found that a small portion of the property claimed as endowment was not endowed property and with that variation as to the endowed property affirmed by their decrees the decrees of the Subordinate Judge, and dismissed the appeals to their Court. From those decrees of the High Court these consolidated appeals have been brought.

Mr. Upjohn, who appeared for the Appellants, in his very able and exhaustive argument in support of these consolidated appeals, took and relied upon four points only. They were (1) that the Plaintiffs were not persons who had an interest in the charitable trust within the meaning of sec. 92 of the Code of Civil Procedure, 1908, and consequently had no *locus standi* to institute this suit; (2) that the chatram was not proved to be a public trust; (3) that the Courts below had misconstrued the Will of Swaminatha Ayyar of the 7th November 1881; and (4) that the first Defendant had been properly appointed a trustee and there was no ground for removing him from his office as trustee of the charity. Their Lordships will deal with these points in the order in which they were argued by Mr. Upjohn.

Mr. Upjohn's first point was that assuming for the purpose only of his argument that the chatram had been dedicated to the public with a trust created for public purposes of a charitable nature, the suit would not lie if the Plaintiffs had not within the meaning of sec. 92 of the Code of Civil Procedure, 1908, an interest in the trust. That is a perfectly sound argument. The consent in writing of the Advocate-General to the institution of the suit by the Plaintiffs would

not bring the suit within the meaning of sec. 92 of the Code of Civil Procedure, 1908, unless the Plaintiffs had an interest in the trust. Mr. Upjohn contended that the Plaintiffs had no interest in the trust within the meaning of sec. 92. The question is, had the Plaintiffs an interest in the trust within the meaning of the section? They were descendants in female lines of Rajappa Ayyar and his son Kalyanarama Ayyar, one of whom, probably the former, founded and dedicated to the public the chatram as a charitable institution, and are of the founder's kin. The chatram was at first known as Rajappa Ayyar's chatram and was subsequently known as Kalyanarama Ayyar's chatram.

On the 22nd August 1864 the five sons of Kalyanarama Ayyar executed a partition deed in which the chatram and the lands then belonging to it, from which the income of the chatram was derived, were mentioned. The lands belonging to the chatram were excepted from the partition, but it was agreed that the five brothers should manage the chatram lands according to the order of seniority. It is obvious that the chatram must have been endowed with these lands before the date of that deed of partition. Mr. Upjohn contended that "an interest in the trust" to be within sec. 92 of the Code of Civil Procedure, 1908, must be some special interest and not merely a sentimental interest, and he referred to the dictum of Lord Eldon, L. C., in *Re: The Master Governors and Trustees of the Bedford Charity* (1) in which in a reference to Sir Samuel Romilly's Act (52 Geo. 3, c. 101), which authorised persons other than the law officers to present petitions to the Court in certain matters of public charities, Lord Eldon said:

(1) 2 Sw. Ch. Rep. 518 (1819).

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"The Act, indeed, authorises 'any two or more persons' to present a petition; but I conceive that those words must be understood to mean persons having an interest," which earlier at p. 518 Lord Eldon interpreted as meaning "a direct interest in the charity."

Mr. Upjohn also referred to the observations of Lord Eldon, L. C., in *The Corporation of Ludlow, &c. v. Greenhouse* (2). It may be that the dictum of Lord Eldon in the *Bedford Charity* case (1) caused those who were responsible for the drafting of sec. 539 of the Code of Civil Procedure of 1877 (Act X of 1877) to draft that section as giving a right in cases of a breach of a trust created for public charitable purposes to "two or more persons having a direct interest in the trust," and who had obtained the consent of the Advocate-General to institute a suit under that section. It must, however, have subsequently appeared to the Governor-General of India in Council that the limitation of a "direct" interest was not expedient in India, and it was enacted by sec. 44 of the Civil Procedure Amendment Act, 1888, which amended the procedure then in force, "That in sec. 539, for the words having a direct interest the words having an interest shall be substituted."

It may be that Coutts Trotter, J., was correct in stating, in *Ramachandra Aiyar v. Parameswaran Unni* (3), that it was in consequence of the decision in *Jan Ali v. Ram Nath Mundul* (4) that the change in the law was made by omitting the word "direct." In that case the High Court at Calcutta had held that the Plaintiffs there, two Muhammadans who lived in a village and worshipped regularly at the village mosque, had no direct interest in

the mosque. Their Lordships would have considered that Muhammadans who worshipped regularly in the mosque of the village had a direct interest in the trust relating to the mosque. But so that they may not be misunderstood as to the meaning of "interest" in sec. 92 of the Code of Civil Procedure, 1908, they think it advisable to say that public "Hindu temples are *prima facie* to be taken," as Sir John Wallis, C. J., said in *Ramachandra Aiyar v. Parameswaran Unni* (3), "to be dedicated for the use of all Hindus resorting to them." They agree with Sir John Wallis that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the Legislature inserted these words in the section. "That object was to prevent people interfering by virtue of the section (sec. 92) in the administration of charitable trusts merely in the interests of others and without any real interest of their own." In the present case their Lordships are of opinion that the fact that the Plaintiffs are descendants although only in female lines of the founder of the chatram gave them an interest in the proper administration of the trust sufficient to enable them to maintain this suit, although they themselves may never find it necessary to use the chatram as a rest house or to obtain food there.

As to the second point argued by Mr. Upjohn it is sufficient to say that there are concurrent findings that the chatram was a public trust, and their Lordships may add they also find that the chatram is a public trust.

As to third point argued by Mr. Upjohn, that the Courts below misconstrued the Will of Swaminatha Ayyar of the 7th Nov-

(1) 2 Sw. Ch. Rep. 518 (1819).

(2) 1 Bligh Rep. N. S. 17 (1829).

(3) I. L. R. 42 Mad. 360 at p. 395 (1918).

(4) I. L. R. 8 Cal. 32 (1862).

(3) I. L. R. 42 Mad. 360 at p. 368 (1918).

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ember 1881, that contention if well founded would show that the gift of some of the property to the chatram which each Court has found to belong to the chatram was a void gift within the decision of the Board in *Runchordas Vandrawandas v. Parvatibhai* (5). The testator was one of the five sons of Kalyanarama Ayyar. It is not necessary to set out the translation of the whole of his Will; the contention turns on the meaning of part of the Will.

After referring to the partition of 22nd August 1894, between him and his brothers and some other matters, the testator's Will as translated continues, so far as is material, as follows:—

"The arrangement which I make regarding the aforesaid properties is this.—After my decease my properties and my estate shall be managed with all rights by my divided brothers—K. Venkataranga Ayyar and K. Suryanarayana Ayyar as executors. The incomes from the villages and gardens shall be divided into 3 portions and 2 portions thereof shall be given to my wife, and the said house and the *Ethiradi manai* (manai in front of it) be given to her for her occupation; and with the remaining one portion, the debts due by me and the debts contracted by me and K. Venkataranga Ayyar on the security of our family properties shall be discharged. After the said two kinds of debts are discharged, the said executors shall with the said one-third portion of the said income make annadhanam (feed poor people) in our family choultry in Perumbandi now under the management of K. Venkataranga Ayyar. My wife shall take all the aforesaid moveable properties and enjoy them according to her pleasure, and if she dies leaving any moveable properties, they shall be used by the said executors themselves for the said feeding charity. After my wife's decease, 2 out of 3 portions of the income enjoyed by her shall be utilised for the charity and the remaining 1 out of the 3 shares, and the

dwelling house and manai in front, shall be taken by K. Venkataranga Ayyar and K. Suryanarayana Ayyar and their posterity. The other *dayadis* have no right whatever."

Their Lordships assume the words "the charity" in the translation are the correct rendering of the vernacular which they are informed is in Tamil. If those words are the correct rendering of the vernacular they plainly refer to the chatram charity which had immediately before been indicated and the gift was not void for uncertainty. The original Will was before the learned Subordinate Judge who tried the suit and who understood Tamil. This is what he said as to that part of the Will:—

"14. It is next contended that this gift of a 2/3rd share in the 2/3rd share to a 'Dharmam' was invalid, and the decision in *Parthasarathi Pillai v. Thiruvengada Pillai* (6) was relied upon. A perusal of Swaminatha Ayyar's Will indicates to my mind that the 'Dharmam' he intended to create in respect of the 2/3rd share in the 2/3rd share was the Dharmam to which he gave a 1/3rd share in the income: and that the gift of 2/3rd share of a 2/3rd share is not void for uncertainty.

15. It was lastly contended that it was not open to this Court to construe the terms of Swaminatha Ayyar's Will, in so far as they relate to the charity: but it appears to me that it is open to this Court to see what interest the charity has in Swaminatha Ayyar's properties. I therefore find that the chatram has a 7/9th share in the income from the C to F schedule properties under Swaminatha Ayyar's Will."

This is what the learned Judges of the High Court said on that subject:—

"As regards 2/3rd of the income of the properties given to the wife which the Will directs to be utilised for dharmam on her death, it is argued that the reference there is not to this choultry but to charity generally. The learned Subordinate Judge has held that the word 'Dharmam' refers to this

(5) L. R. 26 I. A. 71: s. c. 3 C. W. N. 621 (1899).

(6) I. L. R. 30 Mad. 340 (1907).

VAIDYANATHA AYYAR v. K. SWAMINATHA AYYAR.

choultry and we think he is right in that construction. In that view of the Will the choultry becomes entitled, under Ex. C to 7/9th of the income of the properties."

Their Lordships hold that the Will was not misunderstood by either of the Courts.

As to the fourth and last point argued by Mr. Upjohn that the first Defendant, Vaidyanatha Ayyar, had been properly appointed a trustee of the chatram and ought not to have been removed, it is necessary to see what the appointment in fact was. His appointment was made by the 10th and 11th paras. of the Will of Suri Ayyar, probate of which was granted on the 17th July 1915. Suri Ayyar was the last survivor of the five brothers who were the sons of Kalyanarama Ayyar. The 10th and the 11th paras. of the Will, as translated, were as follows:—

"10. The choultry mentioned in para. 3 aforesaid and the entire properties attached thereto shall be in the management of the aforementioned R. Vaidyanatha Ayyar. The Brahmin feeding and the Dwadasi Kattalai of the said choultry shall be conducted on a scale not inferior to what is being conducted now.

11. After the abovementioned Vaidyanatha Ayyar, his younger brother, the said R. Narayanasami Ayyar and after him my friend Jayakrishna Chariar residing in Melakkaveri Achari Agraharam shall look after the management of the said choultry and of the entire properties attached thereto."

Turning to the 3rd para. of the Will it will be seen what were the properties for the management of which Vaidyanatha Ayyar was appointed. That 3rd para. is, as translated, as follows:—

"3. Besides the abovesaid properties there are in Kumbakonam town to the northern side of the Cauveri, my family choultry, the buildings attached thereto, lands, grounds, bandy pettai, etc., properties. These belong to me and are in my possession and enjoyment."

Suri Ayyar was appointing Vaidyanatha Ayyar manager of properties which he falsely alleged belonged to himself as proprietor, and was not appointing him as a trustee of properties which were already trust properties. Suri Ayyar as the last survivor of the descendants in the male line of the founder of the chatram possibly had a right to appoint a trustee of the charity. See *Boidyo Gauranga Sahu v. Suderi Mata* (7). But that was not what he was professing to do. He was professing to appoint a manager of property which he falsely alleged to be his own private property, and in the opinion of the Subordinate Judge his object was to afford a monthly income for the daughter of his late concubine and her children.

After Mr. Upjohn had concluded his arguments in support of the appeals his junior counsel addressed the Board on a subject which Mr. Upjohn had not referred to and contended that some small portions of the properties did not belong to the trust, but they had been concurrently dealt with in the decrees of the Trial Judge and the High Court as the properties of the charitable trust, and the attention of their Lordships was not directed to any evidence sufficient to justify the contention.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitor: *Mr. H. S. L. Polak* for the Respondent No. 2.

G. D. M.

(7) I. L. R. 40 Mad. 612 (F. B.) (1916).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD PARMOOR.

LORD CARSON.

SIR JOHN EDGE.

M^r. AMEER ALI.

1923,

Heard, 6, December.

Judgment,

6, December.

HAJI HEDAYETULLA,
Appellant,

v.

MAHOMED KAMIL and
ors., Respondents.

Partnership business continued after a partner's death—Effect—Right of representatives of deceased partner to accounts after death—Court, if may direct Commissioner to allow remuneration for management in the accounts—Objection to Commissioner's ruling in Court

If a partnership business is continued after the termination of the partnership by the death of a partner, it becomes a partnership at will and the representatives of the deceased partner are entitled to have accounts taken of the partnership subsequent to his death until its final dissolution on the footing that they have the same share as the deceased partner had in the business. The direction of the High Court to the Commissioner that all just allowance shall be made including fair remuneration for the management of the business was a proper order to make, it being open to any party to take exception to the Commissioner's ruling in Court.

This was an appeal from a decree, dated the 27th January 1921, of the High Court of Bengal, which varied a decree, dated the 5th April 1919, of the District Court of Birbhum.

The Respondents are the heirs of Mahomed Fazil who until his death on 2nd August 1915 carried on business in partnership with his brother Haji Hedayetullah, the present Appellant.

The partnership accounts were settled and adjusted as between the partners up to the 20th October 1913. After the death of Mahomed Fazil, the assets of the firm

were retained in the hands of the Appellant who applied them in continuing the business. The widow of Mahomed Fazil on behalf of herself and her minor children instituted a suit for dissolution of the partnership business, an account and incidental relief.

The Appellant in his defence alleged that he had set apart the share of the heirs of Mahomed Fazil in the partnership assets and that since Fazil's death he had carried on the business on his own behalf. The District Judge ordered the appointment of a Commissioner to take the following accounts:—

"(a) An account of the credits, property and effects which appertained to the partnership at the time of its final dissolution.

"(b) An account of the debts and liabilities of the partnership as it stood on 3rd August 1915.

"(c) An account of all dealings and transactions between Defendant and his brother relating to the partnership during the period from 11th October 1913 to 3rd August 1915.

"(d) An account of all moneys which might be paid to the Plaintiffs by Defendant after Fazil's death."

And further ordered that after the taking of those accounts "the Commissioner do settle the amount which was due to Mahomed Fazil at the time of his death and would be due to his heirs, the Plaintiffs"

On appeal the High Court (Mookerjee and Buckland, JJ.) allowed the appeal in part by inserting in the decree of the District Judge a direction that accounts be taken of the profits of the business since the death of Mahomed Fazil up to the date when the final decree is made.

Mr. Wallach for the Appellant.—Until the account has been taken by the Commissioner the High Court should not have

Haji Hedayetulla v. Mahomed Kamil.

ordered that Fazil's representatives are entitled to the same share that Fazil would have taken had he been alive. It is only after the Commissioner has reported the extent to which Fazil's assets have been employed in the business that his share of the profits can be arrived at.

Ahmed Musaji Saleji v. Hashim Ebrahim Saleji (1).

[LORD CARSON.—The fallacy in your argument seems to be that the business became the Appellant's on the death of Fazil.]

The name of the business was changed and it was no longer the same.

Mr. A. Majid for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARMOOR.—Their Lordships do not think it necessary to call on Counsel for the Respondents. It is possible to state quite shortly what is the advice which they will feel called upon to tender to His Majesty in this case.

There was a partnership carried on between the Defendants, who is the Appellant, and one Mahomed Fazil. This partnership terminated on 3rd August 1915, on the death of Mahomed Fazil. Accounts had already been taken in this partnership up to some date in 1913, so that it was not necessary to re-open them. The order of the first Court was that a further account should be taken up to the date in 1915 at which Mahomed Fazil died; but for some reason no order was made for taking any subsequent accounts. It is clear that after Fazil's death the old business was continued, although it became a partnership at will.

This action was brought by the repre-

(1) I. L. R. 42 Cal. 914; s. c. 19 C. W. N. 449 (P. C.) (1915).

sentatives of Fazil against the Appellant in order that proper accounts might be taken. The Court of Appeal made an order—

“that accounts be taken of the profits of the business since the death of Fazil on the 3rd August 1915, up to the date when the final decree is made, all just allowance, including fair remuneration, to be allowed in favour of the Defendant for managing the business. And it is further ordered that the Plaintiffs as representatives of Fazil will be entitled to the same share as Fazil would have taken if the partnership had not been dissolved, and the profits will be assessed on the basis of what may be found due to Fazil at the time of his death.”

In the opinion of their Lordships this order was a proper order to make. Although the partnership terminated on the death of Mahomed Fazil, the same business has been carried on. Certain suggestions have been made by the Counsel on behalf of the Appellant asking the Board to give some direction which might interfere with or fetter the discretion which the order gives to the Commissioner before whom the accounts will be brought. Their Lordships are of the opinion that no such direction should be given. It appears to them that the order as made is in the proper form in leaving all matters of account within the discretion of the Commissioner, subject to the direction that all just allowance shall be made including fair remuneration for management of the business and to the further order that the Respondents as representatives of Fazil will be entitled to the same share as Fazil would have taken if the partnership had not been dissolved. The business is to be regarded up to the date of the final decree as a continuing business although Mahomed Fazil died in 1915. They have only to add that if exception is sought to be

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taken to any ruling of the Commissioner the person who seeks to make the complaint can apply to the Court. No order or instructions are required from their Lordships. It is a matter of ordinary procedure, but it must not be taken that their Lordships suggest that any such application will be required or should be made.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Messrs. W. W. Box & Co.* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

SANDERSON, O. J.	}	GOBIND LAL DUTT
BUCKLAND, J.		v.
1924,		OFFICIAL ASSIGNEE
25, November.		OF CALCUTTA.

High Court Rules, Original Side, Chap. XVI, r. 27—Limitation Act (IX of 1908), sec 5—Extension of time for filing an appeal, condition of.

The principle enunciated in *PRAMATHA NATH ROY v. LEE* (1) applies equally well to the filing of a requisition to draw up a decree or order under r. 27, Chap. XVI of the High Court Rules.

An applicant, who or his attorney did not make any application to the Registrar's office to ascertain whether the Plaintiff had in fact sent in a requisition to have the decree drawn up, cannot, in the absence of any proof of sufficient cause under sec. 5 of the Limitation Act, get an extension of time to file his appeal.

The facts of the case will appear from the judgment.

Messrs. B. K. Ghose and A. N. Bose for the Appellant.

(1) I. L. R. 40 Cal. 999: s. c. 27 O. W. N. 188 (P. C.) (1922).

Mr. M. N. Kanjilal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an application on behalf of Gobind Lal Dutt, who was the Defendant in the suit, that the memorandum of appeal against the judgment and decree in the suit, dated the 6th of June 1924, which was presented on behalf of Gobind Lal Dutt on the 18th of November 1924 and which was not accepted by the Registrar, should be admitted.

The material dates are as follows: The decree was made on the 6th of June 1924, as I have already mentioned, in favour of the Official Assignee against the present applicant.

On the 11th of June a requisition for an office copy of the decree was made by the attorney of the applicant Gobind Lal Dutt.

Nothing further was done until the 7th of August 1924 when a requisition for drawing the decree was made on behalf of the Plaintiff.

This decree was drawn up, finally settled, and signed on the 16th of November 1924. The stamps necessary for the office copy were furnished on the 12th of November and the memorandum of appeal was presented on the 18th of November: on the 19th it was rejected by the Officiating Deputy Registrar on the following ground:—"As the requisition for drawing up the decree was not given within twenty days from the date of the decree, this memorandum cannot be accepted."

The learned Counsel who appeared for the applicant stated that he was bound to admit that the memorandum was not presented within the time specified by the Limitation Act and that it was necessary

GOBIND LAL DUTT v. OFFICIAL ASSIGNEE OF CALCUTTA.

for the applicant to obtain extension of time.

The ground upon which he based his application for extension of time was that "before the 11th of June 1924 one Surendra Narain Bhaduri, who is a clerk in the service of the applicant's attorney, was informed by one Benoy Krishna Mukerji—the Court clerk of Messrs. Fox and Mandal, who were the attorneys for the Plaintiff—that the requisition had been duly given for drawing up the said decree by the Plaintiff's attorneys and that relying on the said information and as the said requisition for the office copy was accepted by the office, he (Surendra Narain Bhaduri) assumed that the requisition for the drawing up of the said decree had been duly given by the said Plaintiff's attorneys and that he did not make any further enquiry as to whether such requisition had been actually given."

An affidavit has been filed on behalf of the Plaintiff, sworn by Benoy Krishna Mukerji, the clerk in the employ of Messrs. Fox and Mandal, who is referred to in the petition verified by Surendra Narain Bhaduri: and, in para. 5, it is stated as follows:—

"With reference to the allegations made in para. 5 of the affidavit I emphatically deny that before the 11th June 1924 or on any other day I informed the said Surendra Narain Bhaduri or any other person of the office of Mr. J. K. Dutt that requisition had been duly given for drawing up of the said decree by us. I say that the statement is an absolutely unfounded one and has been made to cover up laches. I further say that the said Surendra Narain Bhaduri did not even know my name and on or about the 18th of November 1924 he asked me what my name was. This I now think was

then done with a view to put in my name in the affidavit as his alleged informant."

There is therefore a direct conflict of testimony as to whether the information, upon which the applicant relies, was given by Benoy Krishna Mukerji to Surendra Narain Bhaduri.

In my judgment it is impossible for us upon the materials which are now before this Court to hold that that information was in fact given. The result is that this application must be decided upon the basis that the allegation as to the information referred to in Surendra Narain Bhaduri's petition is excluded from consideration.

The question then arises whether there are any other circumstances connected with this application which would justify this Court in holding that the applicant has satisfied the Court that he had sufficient cause for not preferring the appeal within the prescribed period as provided by sec. 5 of the Limitation Act.

Now, it is well-known that by reason of r. 27, Chap. XVI of the High Court Rules, if the party in whose favour a decree has been made does not apply to have the decree drawn up within four days from the date of the decree, any party to the suit may apply to have the decree drawn up within one month thereafter.

In my judgment, the applicant or his attorney ought to have taken proper steps to ascertain whether an application had been made by the Plaintiff to have the decree drawn up.

In this connection I desire to draw attention to the decision of this Court in *Kamruddin Hyder v. M. N. Mehta*, which was given on the 13th August 1924.

In that case reference was made to the judgment of the Judicial Committee of the Privy Council in *Pramatha Nath*

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Roy v. Lee (1) in which the following passage occurs:—"In their Lordships' opinion no period can be regarded as requisite under the Act which need not have elapsed if the Appellant had taken reasonable and proper steps to obtain a copy of the decree or order."

In this case, as I have already said, it is admitted that neither the applicant nor his attorneys made any application to the Registrar's office to ascertain whether the Plaintiff had in fact sent in a requisition to have the decree drawn up.

The applicant's attorney made a requisition to the Court's office on the 11th June (five days after the decree was made) for the purpose of obtaining an office copy of the decree. Neither the attorney nor his clerk made any enquiry at the Court's office as to whether a requisition for drawing the decree had been made by the Plaintiff. If such an enquiry had been made, it would have been ascertained that no requisition for drawing the decree had been made by the Plaintiff: such information having been obtained, if the applicant intended to appeal, it would have been his duty to make a requisition for the decree to be drawn up. In my judgment, time elapsed, which need not have elapsed if the applicant had taken reasonable and proper steps to get the order drawn up and to obtain an office copy.

If we were to hold that it was sufficient for the present applicant, desiring to appeal, to put in a requisition for an office copy without taking any steps whatever to have the decree drawn up in the event of the Plaintiff not so doing, it seems to me that the provisions of the Limitation Act might be avoided.

I am therefore not satisfied that the

applicant had sufficient cause for not preferring the appeal within the prescribed time.

For these reasons the application must be dismissed with costs.

BUCKLAND, J.—I agree, and as this matter is being decided with reference to a point upon which, so far as I am at present aware, there has hitherto been no decision I desire to add a few words as to the principle involved.

Before an appeal can be filed, the decree or order must be drawn up and the would-be applicant must obtain a copy of the decree or order, which it is his duty to file with the memorandum of appeal. As stated, it is open to the party in whose favour the decree or order has been made, to furnish a requisition in writing for the order or decree to be drawn up. If he does not do so within four days from the date of the decree or order, the other party may do so within one month thereafter. Consequently under the Rules of this Court, it is open to a would-be Appellant to have the decree or order drawn up.

It has been decided in the case of *Pramatha Nath Roy v. Lee* (1) by the Judicial Committee of the Privy Council affirming the judgment of the learned Chief Justice and Mr. Justice Chitty that "time which need not have elapsed if the Appellant had taken reasonable and proper steps to obtain a copy of the decree or order could not be regarded as 'requisite' time within sub-sec. (2) of sec. 12 of the Indian Limitation Act (IX of 1908)." Consequently it is now not open to question that a party who desires to prefer an appeal against a decree or order must apply for a copy of such decree or order within twenty days—the

(1) I. L. R. 40 Cal. 999; s. c. 27 C. W. N. 156 (P. C.) (1922).

(1) I. L. R. 40 Cal. 999; s. c. 27 C. W. N. 156 (P. C.) (1922).

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period of limitation for preferring an appeal. The point is whether or not, even though he may have applied for such copy within time, he may be excused if he has not within the prescribed period filed a requisition for the decree or order to be drawn up. In my opinion, the principle applies equally to the filing of the requisition to draw up the decree or order.

The case to which I have referred relates to the copy of the order but it was held there by the learned Chief Justice that if the Defendant desired to appeal from the order he should have applied to have the order drawn up and for a copy of the order in accordance with the Rules of this Court.

The principle, it appears to me, is incontestably equally applicable to the preparation of the decree or order. There cannot be one principle applicable to the decree or order and another applicable to the copy for which the would-be Appellant has to apply. It would be illogical and inconsistent to insist on his applying within twenty days for a copy of a document which it is within his power to have prepared and then to excuse him on the ground that he is not equally bound within that time to take steps for the preparation of the original.

Mr. J. K. Dutt, Solicitor for the Applicant.

Messrs. Fox & Mondal, Solicitors for the Respondent.

S. N. B.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE

No. 35 of 1921.

N. R. CHATTERJEA, J.
CHOTZNER, J.

1924,

Heard, 15, 22, 27,
28 and 29, May.
Judgment, 4, June.

KUMAR SANKAR ROY
CHOWDHURY and
ors., Plaintiffs,
Appellants,
v.
THE SECRETARY OF
STATE FOR INDIA IN
COUNCIL, Defendant,
Respondent.

Diara settlement—Permanently settled estate—Lands reformed, if could be separately assessed with revenue—Notification of sale of khas mehal—Purchaser, if acquires the entire estate or only the area mentioned—Construction of notification—Evidence of conduct.

Government by a notification put up to sale its zemindary right to a certain khas mehal which was purchased by the Plaintiff. The notification stated the name of the mehal, its area and the jama payable in respect thereof. Subsequently a considerable quantity of land appeared as reformation of the lands of the aforesaid permanently settled estate and was formed into a Diara estate with a revenue assessed on it which the Plaintiff took settlement of under protest:

Held, upon a construction of the notification and having regard to the evidence of conduct afforded by various diara proceedings—That it was the entire estate which was sold and not merely the quantity of land mentioned in the notification and the lands which reformed could not be again assessed with revenue.

GUNGA NARAIN CHOWDHURY v. RADHIKA MOHUN ROY (1), GHOLAM ALI CHAUDHURY v. THE COLLECTOR OF BACKERGUNGE (2), JOGUBANDHOO BOSE v. KOOMOODINNE KANT

KUMAR SANKAR ROY CHOWDHURY v. THE SECY. OF STATE FOR INDIA IN COUNCIL.

BANERJEE (3), KRISTO MOHAN BYSACK v. COLLECTOR OF DACCA (4) and THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NARENDRA NATH (5) *referred to.*

This was an appeal against the decree of Moulvi Osman Ali, Subordinate Judge, 5th Court of Zillah Dacca, dated the 30th of September 1920.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Roy, Atul Chandra Gupta, Satis Ch. Sinha and Dwijendra Krishna Dutt for the Appellants.

Babu S. N. Guha and Moulvi Nuruddin Ahmed for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit (Suit No. 81 of 1915) which was one for declaration that the lands in dispute, 784 acres, which Government formed into a Diara Estate No. 1503 with a revenue of Rs. 568, was part of the Plaintiffs' permanently settled estate, Char Alokdia, Touzi No. 1071 (present Touzi No. 174) held at a fixed revenue, that Government had no right to assess the lands in dispute with revenue, and for other reliefs. The disputed lands are shown in the case map in 2 blocks, the northern is called *ka* and the southern *kha*, both being coloured yellow. The proceedings which immediately led up to the institution of the present suit are the following :—

The Assistant Diara Survey Superintendent found that certain newly formed lands were not included in the settlement of the Estate Alokdia which was sold in 1863 to the predecessor-in-title of the Plaintiffs. The Plaintiffs objected to the Diara proceed-

ings, but those objections were rejected and the proceedings were forwarded to the Board of Revenue for sanction. They were accordingly sanctioned by the Board of Revenue, and a settlement of the lands for 12 years was made from the 1st April 1914 to 31st March 1916. The Plaintiffs took settlement under protest.

It appears that in 1844 a big *char* was thrown up on the bed of the river Brahmaputra. The Government took proceedings under Reg. II of 1819 and got possession of the lands. These lands constituted Char Alokdia and became the property of Government. In 1852, The Survey was made of those lands and it was found that 8,211 bighas appertained to the mehal. The Revenue Survey took place in 1854, in which also it was found that the same quantity of lands appertained to that mehal. The Government made temporary settlements of the mehal from time to time, and ultimately on the 30th May 1863 issued a notification in the Calcutta Gazette for sale of the mehal. The terms of the sale notification were these :—

" Notice is hereby given that zemindary right of Government to the undermentioned *khas* mehal, situated in the District of Pabna, and mentioned in the statement hereunto annexed, will be put up to sale."

The statement of the mehal was as follows :—

Touzi No. 1071.	Name of Mehal and Pergana.	Area.	Jama Assessed.	1 per cent for roads.	Total Sudder Jama.
	Island Chur Alokdia	5508-6-4	887-10-11	8 14-0	896 8-11
	Perganaha Berahimpur.	.	.	.	.

Upset price 1,793-1-10.

The mehal was purchased by one Mr. Trisandi on behalf of the Nathpur Indigo Concern, and the Plaintiffs' predecessor Gangamani Chaudhurani purchased the mehal from the owner of that Concern on

(3) 19 W. R. 89 (1878).

(4) 24 W. R. 91 (1875).

(5) 32 C. L. J. 403 (1880).

KUMAR SANKAR ROY CHOWDHURY v. THE
the 28th March 1878. Gangamani after
purchasing it applied for registration of
her name under the Land Registration
Act. Her name was registered in respect
of mehal "Jazira Char Alokdia, Touzi
No. old 1071, present No. 174."

In the General (A) Register (under secs.
6 and 7 of Act VII of 1876) the estate is
described as "Alokdia Jazira Char," the
Touzi No. is given as 174, the total area
2,726 acres 2 roods 27 poles, and the Gov-
ernment revenue Rs. 887-4 as. 11 pies.
The area corresponds exactly with the area
mentioned in the Revenue Survey Map.
It is true that the entry in the general
register does not affect the Government,
but it shows that the Government recog-
nized the area of the estate to be the same
as stated above.

There were three proceedings for assess-
ment of revenue with respect to some
lands of Char Alokdia before the proceed-
ings of 1913 referred to above. In 1874-75
certain lands were formed into a new
Estate No. 1141 on the ground that
those lands were newly formed *char* lands.
At that time Mr. Graham, the predeces-
sor-in-interest of the Plaintiffs, was the
owner of Char Alokdia. He objected that
the Government had no right to create a
new estate in respect of the lands which
had already formed part of Char Alokdia.
The Collector Mr. Rees recommended
the cancellation of the new estate on the
ground that the Revenue Survey and
other maps showed that the new estate
was really reformation of the lands of
Char Alokdia. The Board accepted the
recommendation of the Collector, and on
the 18th December 1875 they sanctioned
the removal of the estate Char Alokdia
from the revenue roll. The second pro-
ceedings were held in 1881. In that year
the Government again made a new estate
of certain lands of Char Alokdia and cer-

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tain other lands. This new estate was
numbered 10776, and a large portion of
the lands now in dispute was included in
that estate. Gangamani (who was then
the owner of Estate Char Alokdia) on the
10th July 1880 filed a petition objecting
to the inclusion in the new estate of lands
which according to the Revenue Survey
appertained to her estate Char Alokdia.
Thereupon one Jadu Kanongoe was
directed to compare the "Survey Map of
Char Alokdia whose lands are alleged to
have been measured and included in the
Jazira Char No. 10776 which is under
settlement." He submitted his report on
the 24th February 1881 that only 1,036
bighas and odd fell outside the Revenue
Survey area and should be brought under
settlement. The Deputy Collector found
on the Kanongoe's report and upon his own
enquiry that 1,926 bighas of land of Alokdia
had reformed on the original site and was
measured in the new mehal and recom-
mended that as the land was reformation
on original site, might be *kharijed*. The
settlement papers were accordingly sub-
mitted by the Collector to the Commis-
sioner of the Dacca Division and he in his
turn submitted the "settlement papers of
Government Estate No. 10776 Island
Char on the river Jumna received from
the Collector of Dacca with his letter
No. 1032, dated 26th October 1881" to
the Board of Revenue on the 20th March
1882. He recommended the settlement
of 1,036 bighas 11 cottas 17 drones only,
and the Board sanctioned the settlement
accordingly by its order, dated the 4th
April 1882 and directed the original papers
to be returned. The effect of this settle-
ment of 1,036 bighas of land will be con-
sidered later.

Lastly, there were proceedings in 1891
relating to lands within the Revenue Sur-
vey but which were sought to be again

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assessed with revenue. The matter came up to the Board of Revenue and was remanded by an order, dated the 26th April 1894. There were three plots in dispute in that case, namely, plots X, Y and Z. X was claimed by the Plaintiffs as part of Alokdia according to the Map of 1863; Y as part of another mouzah, and plot Z was claimed as being included in the Revenue Survey Map of 1854 of Alokdia. The remand order of the Board of Revenue, dated the 26th April 1894 directed certain Maps to be plotted on the Amin's Map. In para. 2 of the directions it was stated: "The Maps of Alokdia of 1854 and 1863. As to the latter it is to be remarked that the Collector admits the claim, and the question is whether the Appellant is entitled to hold in addition the lands covered by the former." The maps were accordingly plotted and the Commissioner of the Dacca Division reported that the Plaintiffs were entitled to hold the lands included in the Revenue Survey Map of 1854 in addition to the lands included in the Map of 1863; and that plot X, the south-western and plot Z, the north-western portions will have to be released as reformation of Estate Alokdia surveyed in 1854 and 1863. It is unnecessary to refer to what was said by the Commissioner with reference to the lands of Mehadinagar. The matter then came up before the Board and by a resolution, dated the 6th March 1896, they concurred with the Commissioner and held as follows:—

"It is plain that the three tracts of land which were indicated as X, Y and Z in the order of remand belong to the Appellants, and further that the Government has no claim to any part of the land as forming part of an island *char*. Whether the remaining portions ought to be assessed or not at the next Diara Survey is a matter which can more appropriately

be decided when that survey takes place. The Board do not see any means of assessing them now."

The proceedings of 1891 as well as those of 1874-75 do not relate to the lands in dispute in this case, but the Appellant relied upon them to show that the Revenue Survey Map was accepted by Government as the basis, upon which the lands were released. So far as the proceedings of 1881 are concerned, they relate directly to the lands in dispute. A large portion of the lands is no doubt covered by those proceedings, as 1,926 bighas were held to appertain to Char Alokdia. The other lands claimed in the suit were not the subject-matter of the proceedings of 1881. But they are claimed by the Plaintiffs in this suit on the basis of the Revenue Survey Map. So far as the 1,426 bighas are concerned they are covered both by the 1863 Map as well as the Revenue Survey Map.

The question of the Plaintiffs' title mainly depends upon the construction of the sale notification, dated the 1st May 1863. Government strongly relies upon the fact that the area was stated to be 5,508 bighas 6 cottas 4 chittaks in the sale notification, and it is contended by the learned senior Government pleader that that was the only land in existence in 1863 when the estate was sold to Appellants' predecessor-in-title, and it must therefore be taken that only 5,508 bighas passed to the purchaser under the sale.

Our attention has been drawn to the fact that the revenue of the mehal varied from time to time with the variation of the area under the temporary settlements. It appears from the resumption proceedings of the Settlement Officer of Dacca, dated the 22nd July 1913 that in 1852 the area was 8,271 bighas and the revenue was Rs. 897-9-10.

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	Area.	Revenue.
In 1854	8,149	.1,001.
In 1859	7,345	1,512-5-7.
In 1868	5,508	896-9-1.

It is contended by the learned Government pleader that when the mehal was sold in 1863 all that it contained was an area of 5,508 bighas. The sale notification, however, refers to the Touzi No. 1071, and had that Touzi been created for the first time in 1863 when the property was sold as consisting of 5,508 bighas only it could be contended that only that quantity of lands was put up to sale. But the Touzi No. 1071 was in existence from before the Revenue Survey. The Plaintiffs applied to the Collectorate for information on the point, and the information was given that in 1845 the estate bore the Touzi No. 1071 of the Faridpore Collectorate. That being so what was sold was Touzi No. 1071; and the notification having stated that the rights which the Government had in the estate was sold, it must be taken that all the interest which the Government had in the estate passed to the purchaser. In para. 7 of the written statement, the Defendant denied that the predecessors-in-interest of the Plaintiffs "possessed and became by virtue of their said auction-purchase entitled to all the right, title and interest of Government in all the lands (including the then existing as well as the submerged lands) of the Estate No. 1071, or that the Plaintiffs by virtue of their purchase, became entitled to all the lands of the said estate that were recorded in that Thak or Revenue Survey and to the lands that were under water at the time of those surveys." This indicates that there were submerged lands of Touzi No. 1071 and those lands must have been assessed with revenue. If the submerged lands were part of Gov-

ernment Zemindary No. 1071 in 1863, the Plaintiffs' predecessors-in-title having purchased Touzi No. 1071, all the lands of that Touzi including the land then existing as well as those submerged at the time of the sale passed to the purchaser, there being no reservation of the submerged lands at the sale in 1863.

So far as the proceedings of 1881 are concerned it is contended by the learned Government pleader that the only matter that was before the Board of Revenue was the matter of settlement of 1,036 bighas and that the release of 1,426 bighas of lands was not before them. But the Commissioner of Dacca along with his report, dated the 20th March 1882, submitted the "settlement papers of Government Estate No. 10776 island char on the river Jumna received from the Collector of Dacca with his letter No. 1032, dated the 26th October 1881." The settlement papers and the letter of the Collector of Dacca, dated the 26th October 1881, must have referred to the release of 1,426 bighas, as only 1,036 bighas and odd out of the entire quantity of land was going to be settled. But the letter of the Collector, dated the 26th October 1881, has not been produced by the Defendant, though called upon by the Plaintiff to do so and it is impossible to hold that the settlement papers which showed the release of 1,426 bighas were not before the Board of Revenue. The resolution of the Board of Revenue, dated the 26th April 1894 (para. 3), states: "The map of Babu Parbati Charan Roy (i.e., that map of Jadu Kanongoe) made in 1880-81 showing what was released to the Appellants in consequence of his proceedings were the lands actually released." The Board of Revenue therefore were aware of what was released in 1881, at any rate in 1894.

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It is contended that it was a case of misapprehension on the part of the Collector, but no such case was set up in the pleadings, and if, as we hold, these lands appertained to Touzi No. 1071, no question of misapprehension can arise.

A number of cases have been cited before us on the question as to what passed by the sale of 1863. The facts of the case of *Gunga Narain Chowdhury v. Radhika Mohun Roy* (1) resemble the facts of the present case. In that case the sale certificate stated that whatever zamindari right the Government had in the mehal was vested in the purchaser. Then there was a specification of the mehal under three heads:—The first—Char Jalalpur, etc., within Jalalpur No. 214; the second—the area 14,496 bighas and odd; and the third—the Jama, viz., Rs. 4,144-2-9 with a certain addition. When the Map of 1863 was made, the mehal No. 214 had an area of some 17,000 bighas, but subsequent measurement shows that by a diluvion that was diminished to 14,496 bighas. The learned Judges observed:—"We apprehend that the Collector as a public officer and an honest seller apprized the public that the existing area was only 14,496 bighas, and therefore the Government would not guarantee the old area of 17,000 bighas but only that which then existed, and that this specification in no way limited the import which the words of the certificate of sale bore, viz., that the whole of the zamindari rights which belonged to the Government passed to the purchaser. There are no words which tend in any way to restrict the right of the purchaser from claiming thereafter any accretion. The increment is always a contingent right which the zamindar has." They further observed that there

was nothing to show that "the present sudder jama is different from that originally assessed on the mehal." An application for review was under the ground, among others, that the mehal had been the subject of repeated settlements, the fifth of which was made in 1864, in which the area was declared to be 17,000 bighas, and the sixth of which was the settlement existing at the time when the Plaintiff purchased showed the mehal to consist of only 14,496 bighas and the rent had varied accordingly. The Court observed:—"Now it seems to us that these circumstances really have no bearing on the question which we pointed out as being unproved, viz., that on the sale, the absolute sale of the proprietary rights to Plaintiff, there had been any alteration in the fixed sudder jama or permanent rent payable to Government on account of the estate. The varying jamas fixed in 1854, and on the other settlements now referred to, were only temporary fluctuating rents of farming leases, and those leases being only for short periods, the rents would of course fluctuate (and might vary very greatly) with the quantity of land of which the farmer was on each occasion put into possession. That question, therefore, stands exactly as it did, when we last gave our judgment."

The case of *Gholam Ali Chaudhury v. The Collector of Backergunge* (2) is distinguishable, as in that case the Thak map, which was relied upon for claiming a larger quantity of land than that mentioned in the sale proclamation, "represented the char as bearing the Touzi No. 4569 which is a different Touzi number from that borne by the mehal which the Plaintiff bought in 1871, and as containing a much larger area than 3994 acres." There was moreover no evidence

(1) 21 W. R. 115 (1873).

(2) 2 C. L. R. 39 (1878).

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of conduct in that case such as is afforded by the several Diara proceedings in the present case.

In the case of *Jogubandhoo Bose v. Koomoodinee Kant Banerjee* (3), the question did not arise between the purchaser and the Government but between two private parties. The Defendant did not purchase the original *khas* mehal Kotibaree which had an area of 638 bighas with a rental of Rs. 164, but an estate consisting of 141 bighas, as was found by a measurement made for settlement purposes the year before the purchase, at rental of Rs. 13. The Defendant could have no claim to any reformation of land belonging to the mehal as it originally stood inasmuch as he did not buy that mehal, but a different one of much smaller area and greatly reduced rent." It is not stated whether a new Touzi number was given at the time of the settlement, but it seems that it was so, as a new and different estate is referred to in the judgment and the Defendant did not purchase the original *khas* mehal. The above case was followed in *Kristo Mohan Bysack v. Collector of Dacca* (4), but there also "the estate purchased by the Plaintiffs was not the originally settled estate bearing the same number on the Touzi. It was a newly constituted Touzi with a very reduced area and a very largely reduced *jama*."

In the case of *The Secretary of State for India in Council v. Narendra Nath* (5), the sale notification was to the following effect: Name of Estate and Pergana Sonakhali. Area in acres 3,562 acres 3 R. 26 P. Revenue assessed Rs. 5,865-3-6. Government Road Cess Rs. 58-10-6. Revenue

total Rs. 5,923-14-0. Upset price Rs. 11,847-12-0.

Remarks:—Under *khas* management.

The question for consideration was whether the Respondent was entitled to all the lands of the estate Sonakhali or only to 3,563 acres, the area mentioned in the notification.

Richardson, J., in construing the document observed: "In my opinion, the principal or governing description on the face of this document is the name of the estate. The mere addition of the area in acres and the revenue assessed on that area is not to my mind sufficiently precise or definite to impair the force of the general description 'Sonakhali.' No boundaries being expressed, whether you take the description 'Sonakhali' or the description '3,563 acres,' evidence might be necessary to identify the subject of the sale. But 'Sonakhali' implies the known, or supposedly known, boundaries of Sonakhali. It is equivalent to 'the estate known as Sonakhali' and the case seems to me very near the ordinary case of property described by boundaries with an area added which passes to be inaccurate and falls to be treated as false demonstration. If I am right, the sale certificate conveyed the accreted area."

On appeal under the Letters Patent (Richardson, J. and Greaves, J., having differed in opinion), Mookerjee, A. C. J., held (Fletcher and Teunon, JJ., agreeing with him) that "Richardson, J., had correctly held on a true construction of the sale certificate that the governing description is the name of the estate and that what passed to the purchasers was Sonakhali as it stood at the date of the sale."

Having regard to the description contained in the sale notification we think it was the entire Estate No. 1071 which was

(3) 19 W. R. 89 (1873).

(4) 24 W. R. 91 (1875).

(5) 82 C. L. J. 402 (405) (1920).

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sold and not merely 5,508 bighas of lands, and if there was an ambiguity, the conduct of the parties would go to show that what was intended to be sold and was sold was the entire estate as shown in the Revenue Survey Map as on three occasions the Government dealt with the Plaintiffs' predecessors-in-title on the footing of the Revenue Survey.

That being so and the lands having been found to be reformation of the lands of Touzi No. 1071 cannot be again assessed with revenue.

The result is that the decree of the lower Court is set aside and the Plaintiffs' suit is decreed with costs in both Courts.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

REF. No. 8 OF 1924

AND

APPS. NOS. 341 AND 400 OF 1924.

WALMSLEY, J.

MUKERJI, J.

1924,

Heard, 29 and

30, July.

Judgment,

1, August.

ALIKUDDI NASKAR and
ors., Appellants,
v.
THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 233, 235 and 239, joint trial of several persons for conspiracy, murder and arson—One joint charge against several persons for several offences of murder, legality of—Charge on the evidence of conspiracy—Prejudice to accused and confusion to Judge and jury, to be avoided in framing charge.

A charge was framed against several persons of murder of several persons, along with a charge against them for conspiracy for murdering them and for arson, and they were all tried together and the jury returned an unanimous verdict of guilty on all the charges against all the accused.

Held—That upon the allegation that all the offences were committed in pursuance of the conspiracy or at any rate in the course of the same transaction, such a joinder of charges was permissible. Applying the exception in secs. 235 and 239, Cr. P. C., all the charges could no doubt be legally joined, but the provisions of these sections are merely enabling and if there is risk of embarrassing the defence such joinder of charges should not be resorted to.

Where a conspirator is present at the commission of the offence he may under the provisions of sec. 114, I. P. C., be deemed to have committed the offence, but in such a case, he should be specifically charged with such offence as read with the provisions of sec. 114, I. P. C.

Held—That the accused were embarrassed in their defence and the jury misled and confused, and that there had not been a trial of the case upon charges properly framed in consonance with the facts alleged by the prosecution; a multitude of charges not having any proper foundation and obscuring the case which the accused had got to meet were put forward and therefore there was no proper trial which the accused were entitled to under the law.

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(2) followed.

This was a Reference under sec. 374, Cr. P. C., from the Sessions Judge of the 24-Pergannas (Mr. G. N. Roy), dated the 17th June 1924, for confirmation of the sentence of death passed upon some of the accused. There were also appeals against the conviction and sentence of transportation for life passed upon the other accused.

The facts will appear from the judgment of MUKERJI, J.

(2) I. L. R. 25 Mad. 61; s. c. 5 C. W. N. 866 (P. C.) (1901).

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In Reference No. 8 and Appeal No. 341.

Babu Bir Bhusan Dutt for the Accused.

Mr. B. M. Sen and *Mr. Syed Nasim Ali* for the Crown.

In Appeal No. 400.

Babus Bir Bhusan Dutt and *Sekhar Kumar Bose* for the Appellant.

Mr. B. M. Sen for the Crown.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—There are two appeals before us and a Reference under sec. 374, Cr. P. C. The circumstances are as follows: It is said that the accused had a quarrel with the family of one Momrez and that one night they went to his house and set fire to the hut in which Momrez and his two wives and some children were sleeping: the inmates of this hut were not allowed to escape and they were all burned to death. In other huts Intaz and Bibijan were sleeping and they were also killed.

The Committing Magistrate framed charges under sec. 120B read with sec. 302, I. P. C. and under sec. 302, I. P. C. and sec. 436, I. P. C. The learned Judge made changes in the charge under sec. 120B read with sec. 302, I. P. C. The jury was unanimous in finding all the accused guilty on all the charges. The Judge agreed with the verdict and sentenced two of the men to death, and the others to transportation for life. Hence the two appeals and the Reference. Objection is taken on behalf of the Appellants that the trial was vitiated by the charges. It is said that there has been misjoinder of charges and also of persons.

It must be conceded that a crime of such a wholesale nature presents considerable difficulty.

The charges framed by the Committing Magistrate were as follows:—

"(1) That you, between December 1923 and 7th January 1924, at Daria, P. S. Canning, did agree with one another and with other persons unknown to do and cause to be done an illegal act, to wit, commission of the offence of murder of Momrez Baddy and other members of his family by setting fire to his huts and by means of guns, daggers, spears and other deadly weapons and in pursuance of the said conspiracy caused the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi, his sons Intaz, Safed Ali, Javed Ali, Yunus and his grandson Jead Ali and mother Bibijan Bibi and thereby committed an offence punishable under sec. 120B/302 of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge." In this charge the conspiracy to commit and the actual commission, with the names of the persons killed, are mentioned.

(2) Of murder under sec. 302, I. P. C. In this one charge the names of the seven inmates of Momrez's hut are mentioned.

(3) Of murder under sec. 302, I. P. C., in regard to the killing of Intaz.

(4) Of murder under sec. 302, I. P. C., in regard to the killing of Bibijan.

(5) Of arson under sec. 436 in pursuance of the conspiracy in the first charge in respect of the hut occupied by Momrez.

These five charges were drawn up against all the accused.

The charge under secs. 120B and 302, I. P. C., drawn by the learned Judge differs from that drawn by the Magistrate in two respects, namely, that it refers to the date of the occurrence only, and that it mentions only the conspiracy to commit and not the commission.

It is merely a technical defect that the seven inmates of Momrez's hut are all

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named in one charge of murder instead of a separate charge of murder being drawn in regard to each. To that I attach no importance. It is more serious that all the accused are charged in regard to the killing of Intaz and in regard to the killing of Bibijan, for those deaths were caused by particular members of the attacking party, and it is possible that they lay outside the common intention, at any rate that the killing of Bibijan did so.

No objection, however, was taken at the trial to the charges as framed, and it appears to me that they gave the accused full information of what they were said to have done.

The learned Judge, however, in his address to the jury seems to have added difficulties. He says that "the first charge of conspiracy does not seem to be important in view of the main charge of murder." Again he says: "Since the murder was accomplished the charge of conspiracy is of no importance." He did, however, continue: "If you find that the accused agreed with one another to kill Momrez and the other members of his family then you can find them guilty under sec. 120B." With regard to the killing of Intaz he said that it was for the jury to decide whether any one but Belatali should be held guilty, and with reference to Bibijan he said that the murder may not have been in the programme, adding, "For that Alimuddi himself alone is responsible." Then he went on: "Against all the accused it is the charge of murder of Momrez and six others with him. That is the important charge."

These remarks show some confusion or carelessness, but it is clear that the Judge set the main issue before the jury—Was it proved that the accused were the men who shot Momrez in the burning hut?

The answer of the jury was free from all ambiguity, but it has this defect that it found all the accused guilty on all the charges, that is to say, the jurors ignored the Judge's reference to the individual responsibility in the case of Intaz and Bibijan.

The question is whether in these circumstances the defects in the charge have led to a miscarriage of justice. For the purposes of this case that question means whether the accused were prejudiced in their defence, whether the jury was confused as to the problem which it had to solve.

As to the defence the accused have not gone further than saying that they are innocent: they said that to the Magistrate and they declined to say more to the Judge: and cross-examination is devoted to showing that the assailants were not recognised and that witnesses are hostile. I find it difficult to believe that more perfectly drawn charges could have lightened the task of the defence.

As to the decision of the jury, when we look at the substance, what they held was this that the accused are the men who went to Momrez's house, who set fire to his hut, who prevented the inmates from escaping. Instead however of dealing with the individuals responsible for killing Intaz and Bibijan, they found all the accused guilty in respect of killing these two victims, and again they found all the accused guilty of committing arson.

The case is a very grave one, and it is most desirable that the charges should be framed in such a way as to render it beyond doubt that there was neither prejudice to the accused nor embarrassment to the jury. With some hesitation I have come to the conclusion that it cannot be said that the charges were framed with sufficient clearness, and I think, we

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must set aside the conviction and sentences and order a retrial. I agree with my learned brother in the remarks which he makes about the form which the charges should take. The retrial should take place as early as possible, and not be allowed to wait until after the vacation.

MUKERJI, J.—The occurrence which forms the subject-matter of the present case, though perhaps without a parallel in the history of crime in this part of the country, may yet be narrated in a few words.

In village Daria within the jurisdiction of P. S. Canning in the District of 24-Pergannahs there lived two families, the Baddys and the Naskars. They were neighbours, but for the last four years or so there has been bitter enmity between the families owing to causes, into the details of which it is unnecessary to enter.

On the night of Monday, the 7th January 1924, Intaz Baddy was up till about mid-night; he was doing some accounts and his wife Jasiman Bibi was sitting near him. In an adjoining hut slept Intaz's father Momrez Baddy, the two wives of Momrez, named Chandra Bibi and Dasi Bibi, three sons of Momrez named Safed Ali, Javed Ali and Yunus and Momrez's grandson Jead Ali. In a third hut there were Esharali, another son of Momrez and his wife Maurjan Bibi, and Bibijan Bibi, the mother of Momrez. Suddenly the huts were set fire to, the exits from some of them being barred by closing some of the doors from outside with iron bolts or clamps. Out of the inmates of these huts, Jasiman Bibi somehow or other managed to escape with a child in her arms, and took shelter in the house of a neighbour. Esharali and his wife Maurjan Bibi also succeeded in running away. Intaz stepped out with a gun which he had in the hut in which he

was, but while yet on the threshold he was speared in the leg and he fell on the courtyard. He tried to crawl and get up but injuries were inflicted on him and his head was almost severed from his body. Bibijan Bibi succeeded in coming out of her room, and on her saying that she had recognised all the accused and that there would be retribution the next day, she was shot dead. The villagers who came to the spot on hearing the noise of the crackling flames and report of guns or seeing the blaze were scared away by the culprits. Those who arrived in the early hours of the morning found nearly the whole homestead reduced to ashes. In Momrez's hut, close to the door, were seven charred dead bodies. There were the four children, the sons and grandson of Momrez; over them lay the two wives of Momrez as if sheltering them from the flames, and over them all lay Momrez with his hands outstretched as if in their protection. Intaz's deadbody was lying on a step to the threshold partly burnt, and his head almost severed from the body. Bibijan was lying dead on the verandah of her hut with her entrails out and blood flowing from the verandah into the yard.

The case for the prosecution was that the perpetrators of this horrible crime were the Naskars and their men. The accused Alimuddi Naskar, Belatali Naskar, Amir Naskar, Boinaddi Naskar, Farazali Naskar, Golam alias Golap Naskar are six brothers and the accused Dudali Molla is their servant.

The charges upon which the accused were tried were as follows: First of all there was a charge under sec. 120B, I. P. C., that the accused conspired with one another and with others unknown to commit the offence of murder of Momrez Baddy and other members of his family. Then there were three counts of charges

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under sec. 302, I. P. C., the first one for causing the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi, and his sons Safed Ali, Jabad Ali and Yunus and his grandson Jead Ali by barring the exit from their hut and setting fire thereto; the second one for causing the death of Intaz Ali, and the third one for causing the death of Bibijan Bibi. Lastly there was a charge under sec. 436, I. P. C., for setting fire to the huts of Momrez Baddy.

The jury unanimously found all the accused guilty on all the charges, and the learned Judge accepting the verdict, convicted the accused in respect thereof. Under sec. 302, I. P. C., he sentenced Alimuddi and Belatali to death, and Amir, Boinaddi, Farazali, Golam *alias* Golap and Dudali each to transportation for life. He passed no separate sentence for the offence under sec. 120B or under sec. 436, I. P. C. The matter has now come up before us on a reference for confirmation of the sentences of death as well as on appeals by the accused persons.

In dealing with this matter we are met at the outset with a serious difficulty arising out of the charges on which the accused were tried in the Court below.

As I have stated above the first charge against the accused was a charge of conspiracy. As amended in the Court of Sessions it ran as follows:—

“That you, on or about the 22nd Pous 1330 B.S. corresponding to 7th January 1924 at Daria, P. S. Canning, conspired with one another and others unknown, to commit the offence of murder of Momrez Baddy and other members of his family and thereby committed an offence punishable under sec. 120B of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct

that you be tried by the said Court on the said charge.”

It assumed this form on amendment of a charge of conspiracy, which the Committing Magistrate had framed in these words:—

“That you, between December 1923 and 7th January 1924 at Daria, P. S. Canning, did agree with one another and with other persons unknown to do and cause to be done an illegal act, to wit, commission of the offence of murder of Momrez Baddy and other members of his family by setting fire to his huts and by means of guns, daggers, spears and other deadly weapons and in pursuance of the said conspiracy caused the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi, his sons Intaz, Safed Ali, Jabad Ali, Yunus and his grandson Jead Ali and mother Bibijan Bibi and thereby committed an offence punishable under sec. 120B/302 of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge.”

It is difficult to see why this amendment was made; if anything, the charge framed by the Committing Magistrate was fuller and the more specific in details and gave the accused better notice of the case they had to meet. If instead of the words “you caused the death,” the words “death was caused” were substituted, and the allegation as to the huts having been set fire to was introduced it would have been an ideal charge of conspiracy consonant with the facts of the case. It would then have been on the lines of the charge of conspiracy in the case of *Abdul Salim v. Emperor* (1). The amended charge, however, is not open to any ob-

(1) I. L. R. 49 Cal. 573 : s. c. 26 C. W. N. 680 (1921).

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section which can be said to have vitiated the trial or caused prejudice to the accused.

Then as to the charges under sec. 302, I. P. C., the first count runs thus :—

“ That you on or about the 7th day of January 1924 at Daria committed murder by intentionally causing the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi and his sons Safed Ali, Javed Ali and Yunus and his grandson Jead Ali by barring the exit from their hut and setting fire thereto and thereby committed an offence punishable under sec. 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions.”

This charge on the face of it relates to seven offences of murder; causing the death of one person is one offence; there can be no question that seven offences were committed. Whether the offences were separable or not, so as to justify the application of sec. 71 of the Indian Penal Code is outside the purview of this enquiry. They may have been committed by one single act or set of acts, but the result has been seven different offences. That they are distinct offences cannot for a moment be doubted. Even under the Code of 1898 wherein in sec. 35 there was some apparent ambiguity in the meaning of the expression “ distinct offences ” Sir Henry Prinsep observed : “ Sec. 35, Cr. P. C., seems to have been intended to enhance the ordinary powers of a Court convicting, at the same trial, a person of distinct offences, rather than to declare what are to be distinct offences.” By Act KVII of 1923, the explanation and the illustration have been deleted, and there is nothing to suggest now at any rate that separate or different offences are not distinct offences. The first part of sec. 233, Cr. P. C., lays down that for

each distinct offence there shall be a separate charge. This provision is mandatory and seven different charges should have been framed for these seven offences of murder which appear to have been huddled into the first count as it stands. Whether this provision of the law is obligatory or merely directory, or whether the failure to comply with it is an illegality which vitiates the trial or is a mere irregularity, a question with regard to which there is a clear conflict of judicial opinion in this Court, is a matter upon which I need not express any opinion on the present occasion. Suffice it to say that it is clear that the practical effect of the charges has been to try the accused persons in respect of a charge of conspiracy, and on nine separate charges of murder and one of arson. I do not suggest that upon the allegation that all these offences were committed in pursuance of the conspiracy or at any rate in the course of the same transaction, such a joinder of charges was not permissible. Applying the exceptions laid down in secs. 235 and 239, Cr. P. C., all these charges could no doubt be legally joined; but it should be remembered that the provisions of these sections are merely enabling ones and if there is risk of embarrassing the defence such joinder of charges should not be resorted to.

It is therefore necessary to consider the facts and materials upon which these charges have been framed. So far as the charge of conspiracy is concerned, there is no direct evidence of it, but it is based upon some evidence as to preparation on the part of Alimuddi and perhaps of some of the other accused as well. The main evidence, however, is afforded by the presence of the accused at the house of Momrez and the acts done by them there and the learned Judge was right in directing the jury thus : “ To bring home

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the charge of conspiracy against them (meaning the accused) the prosecution rely on the same evidence on which they rely for their charge under sec. 302, I. P. C. If you believe that the accused went to the house of Momrez that night, you will not have much difficulty in holding that they agreed with one another to kill Momrez and the other members of his family.' So far then as the charge of conspiracy was concerned there was ample foundation for it.

The same, however, cannot be said in respect of the other charges framed in this case. As for the offences of murder as regards the seven persons named in the first count, there is no evidence against any of the accused such as would justify the framing of the charge. As to the offence of murder of Intaz there is nothing on which such a charge can be framed against any of the accused other than Belatali. As to the offence of murdering Bibijan none except Alimuddi can be charged with it. As for the offence of arson there is evidence only against Dudali. The charges, however, have been framed on the assumption that as they were all members of a conspiracy for committing these offences, and these offences were committed, they may be charged with having themselves committed the offences. This position is hardly tenable in law. It is true that where a conspirator is present at the commission of the offence he may under the provisions of sec. 114, I. P. C., be deemed to have committed the offence, but if that is the way in which the accused are all to be made responsible for the offences, they should be specifically charged with such offences as read with the provisions of sec. 114, I. P. C. There may arise a further question in that case in respect of some of the accused, namely, whether it

would be permissible to infer conspiracy from mere presence, and again to make them liable as principals by taking into account the fact that they were present at the commission of the offence.

The charges of murder and arson, apart from the weight and number of them which in itself is sufficient to crush the accused, relating as they do to such serious offences as murder and arson, must necessarily embarrass the accused all the more when there is really no foundation for them as regards most of the accused persons in this case. They are likely to be bewildered in their defence unable to discover how they are to meet the charges when there is no allegation upon which such charges could be based. They are equally apt to confuse the jury; and that they did confuse them is clear, for inspite of the fact that there is no evidence in support of these charges so far as many of the accused are concerned, as pointed out above, the jury returned an unanimous verdict of guilty against all the accused in respect of all the charges. The confusion could perhaps have been avoided by giving them proper directions discriminating between the different charges; but that does not appear to have been done in this case. On the other hand, the learned Judge observed as follows:—"The first charge of conspiracy does not seem to be important in view of the main charge of murder against the accused, for if you do not believe the charge of murder, I do not suppose that you will believe the charge of conspiracy against the accused." Then the jury were asked to consider whether they would not hold all the accused responsible for the murder of Intaz although the evidence was that Belat struck him on the neck with a *dao*, and that although Alimuddi shot Bibijan dead, whether they should not hold any of the others

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responsible for it, and it was also suggested to them they might not hold the others responsible, as the murder of Bibi-
 jan in the manner in which it was done might not have been in the programme; and further more they were told as regards the murder of Momrez and the other six persons that if they believed that the accused had a common intention to cause the death of these people in that way then they could find them all guilty. These directions had the effect of misleading the jury as to how they were to deal with the charges before them, and that that they were so misled is evident from the verdict which they returned.

In my opinion the accused were embarrassed in their defence and the jury misled and confused, and there has not been a trial of the case upon charges properly framed in consonance with the facts alleged by the prosecution, a multitude of charges not having any proper foundation, obscuring the case which the accused had got to meet, were put forward, and therefore there was no proper trial which the accused were entitled to under the law.

In my opinion the observations of the Lord Chancellor in the case of *Subramania Aiyar v. King-Emperor* (2) apply in substance to the charges framed in the present case. In that case though their Lordships were dealing with sec. 234, Cr. P. C., the importance and necessity of precision in the framing of charges was pointed out in the following passage in the judgment: "The reason of such a provision is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to Judges and the ac-

cused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure." The mischief sought to be averted by the statute has been done as is evident from the verdict of the jury and the acceptance of it by the learned Judge; and the effect cannot now be "averted by dissecting the verdict and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury."

I would therefore set aside the convictions of and the sentences passed upon the accused and direct that they be retried on a charge of conspiracy against all of them under sec. 120B, I. P. C., together with a charge under sec. 302, I. P. C., against Belatali for the death caused to Intaz Ali and a charge under sec. 302, I. P. C., against Alimuddi for the death caused to Bibi-
 jan Bibi.

J. N. R.

*Conviction set aside;
 Retrial ordered.*

(2) I. L. B. 25 Mad. 61: A. C. 5 C. W. N. 866 (P. C.) (1901).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.

LORD SUMNER.

SIR JOHN EDGE.

1924,

Heard, 25, 28, July.

Judgment, 23, October.

BARENDRA

KUMAR GHOSH,

Appellant,

v.

THE KING-EM-
PEROR, Respon-
dent.

Indian Penal Code (Act XLV of 1860), sec. 34, interpretation of—Different acts done by different persons with a view to committing a particular crime—Liability of all for the crime—Secs 33, 37, 38, 114, 149—Statute—Interpretation of the Penal Code—Privy Council, appeal to, against decision of Full Bench of High Court dismissing accused's application for review of sentence upon Advocate-General's certificate—Letters Patent (Calcutta), Arts. 25, 26, 41—Special leave in criminal case—Misdirection—Irregularity as distinguished from error affecting due course of justice—Point not raised at the trial.

Sec. 34 of the Indian Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself. "That act" and "the act" in the latter part of the section include the whole of the action covered by "a criminal act" in the first part of the section.

Secs. 33, 37 and 38 referred to and considered.

Secs. 149 and 114 distinguished.

Sec. 114 deals with the case where there has been the crime of abetment, but where also there has been the actual commission of the crime abetted and the abettor has been present thereat. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes by this section the very crime abetted. The section is evidentiary not punitive. Because participation de facto may sometimes be obscure in detail, it is established by the presump-

tion juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by sec. 114 brings the case within the ambit of sec. 34.

If to presence at the commission of the offence abetted, there is added proof of participation in the offence, the abettor may also be convicted under sec. 34.

The Indian Penal Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as the principal in the first or second degree, but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed.

EMPEROR v. NIRMAL KANTA ROY (1) and EMPEROR v. PROFULLA KUMAR MAZUMDAR (2) overruled.

THE KING-EMPEROR v. BARENDRA KUMAR GHOSH (15) affirmed.

The decision of a Full Bench upon a review of a judgment or sentence passed on an accused person by a Judge of the High Court exercising its Original Criminal Jurisdiction, held in pursuance of a certificate of the Advocate-General given under Art. 26 of the Letters Patent, is not a judgment, order or sentence of the High Court made in the exercise of its Original

(1) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).

(2) I. L. R. 50 Cal. 41 (1922).

(15) 28 C. W. N. 170 (F. B.) (1923).

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Jurisdiction within the meaning of Art. 41.

Quære:—Whether the accused has a right of appeal to the Privy Council under Art. 41 against the decision of the Full Bench rejecting on review his application for reconsideration of a sentence passed on him, in pursuance of the Advocate-General's certificate under Art. 26.

SUBRAHMANYA AYYAR v. KING-EMPEROR (14) referred to.

The Judicial Committee must not be understood as giving any encouragement to appeal in criminal matters under Art. 41 where no point of law has been raised by the trial Judge under Art. 25; nor are persons who have appealed in the usual way to the King in Council from a decision in review passed by the Full Bench upon a certificate of the Advocate-General to assume that an application for special leave to appeal as an alternative will be granted or even entertained by the Judicial Committee.

Quære:—Where the evidence is the same, the guilt the same and punishment the same, but error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, whether the error is more than an irregularity, specially when this error could have been corrected in time, if the accused had put his counsel in a position to raise his defence clearly and in due form at the trial:

Held—That there was no misdirection in the summing-up of the trial Judge to the jury; still less was it such a summing-up as affected the due course of justice and the right of the prisoner to be fairly tried according to law within the

strict and narrow limits which have long been laid down by the Judicial Committee when special leave to appeal is asked for in criminal matters.

Points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave.

This was an appeal from an order of the High Court, dated the 26th September 1923, which dismissed an application under cl. 26 of the Letters Patent and affirmed a conviction and sentence of the said Court passed at its Criminal Sessions on the 17th August 1923.

The Appellant was tried before Mr. Justice Page and a special jury on a charge of murder under the Indian Penal Code, sec. 302 and was found guilty and sentenced to death.

The Advocate-General of Bengal gave to the Appellant a certificate under cl. 26 of the Letters Patent that the High Court should further consider whether certain directions and omissions to direct the jury on the part of the trial Judge did not amount in law to a misdirection. The matter was heard by a Bench of five Judges (Mookerjee, Richardson, C. C. Ghose, Cuming and Page, JJ.) who delivered separate judgments dismissing the application. On the 8th October 1923, the High Court (Mookerjee and Chatterjea, JJ.) granted leave to the Appellant to appeal to His Majesty in Council under sec. 41 of the Letters Patent.

The facts of the case are fully set out in the judgment of their Lordships, and in the judgments of the learned Judges who constituted the Full Bench, reported in 28 C. W. N. 170.

Messrs. L. DeGruyther, K. G. and Wallach for the Appellant.—The trial Judge misdirected the jury when he said in his charge "I tell you in law that it

(14) L. R. 28 I. A. 257; s. c. I. L. R. 25 Mad. 61; 5 C. W. N. 886 (1900).

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is not necessary for you to find that it must have been the accused's pistol which fired the fatal shot." He should have directed the jury to acquit if they were of opinion that the accused either fired and missed or did not fire at all. If the accused was not proved himself to have committed the act which caused the murder he was entitled to an acquittal. Sec. 302 of the Indian Penal Code states that "whoever commits murder shall be punished, etc. . . ." In applying sec. 34 of the Indian Penal Code in conjunction with sec. 302 the meaning of "criminal act" in the former section is the act of murder.

The words "each of such persons is liable for that act in the same manner as if the act were done by himself alone" can have no meaning unless the person himself has committed the fatal act.

The words cannot be taken to include some person present who has not committed the "criminal act." *Emperor v. Nirmal Kanta Roy* (1). In Indian law each is not responsible for the acts of his confederates even though a common purpose is proved.

If all fire and hit, it is the act of several, and may be murder in all.

If one misses and another hits, the one who misses is only liable for attempted murder. If one hits and the other does not fire the latter can only be liable for abetment. In the present case there is nothing apart from the accused's own statement to show that he even abetted and it is essential that abetment should be proved. Supposing there could be a fresh trial for abetment other evidence might be produced and a different result arrived at. The framers of the Code intentionally analysed and enacted that

each phase should be placed in a separate compartment.

The construction of sec. 34 adopted by the High Court would make the enactments in secs. 114 and 149 superfluous.

Messrs. Dunne, K. C. and Kenworthy Brown for the Crown.—This appeal is not competent.

Sec. 41 of the Letters Patent does not include any appeal from a decision of the High Court which has given its decision after a certificate by the Advocate-General. The accused was entitled to come to the Privy Council direct but having elected to take the fiat of the Advocate-General and go to the High Court he is not entitled to come to the Privy Council now. Such an appeal is not considered by the Letters Patent and it is not within the powers of the High Court to grant leave in the circumstances.

The Crown would be unlikely to grant an appeal under the prerogative where five Judges have confirmed the findings of the trial Judge.

Sec. 34, I. P. C., must be construed in reference to sec. 33. The "act" consisted in the going with the determination to rob and if necessary to murder. There is no doubt as to the common intention. Stephen, J., in *Emperor v. Nirmal Kanta Roy* (1) has failed to appreciate the wider meaning of the expression "the act" and has fallen into the error of suggesting that each person should do the killing.

Even though there is no specific charge under sec. 114 there can be a conviction under either sec. 34 or sec. 114. (Secs. 235, 236 and 237, Criminal Procedure Code, 1898).

Mr. DeGruyther, K. C., in reply.—

(1) I. L. B. 41 Cal. 1072; s. c. 18 C. W. N. 723 (1914).

(1) I. L. B. 41 Cal. 1072; s. c. 18 C. W. N. 723 (1914).

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The jury have not found the accused guilty of abetment, therefore secs. 235, 236 and 237 of the Criminal Procedure Code do not apply.

Where a reference is made to the Advocate-General if the Court decide in favour of the accused the conviction is quashed.

If they decide otherwise no order is made. In the present case, the application was dismissed but no order was made and the appeal is from the order of the Sessions Court.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—This was an appeal from the High Court of Calcutta brought in a criminal matter under Art. 41 of the Letters Patent. The trial Judge reserved no question of law and the case came to the High Court on the certificate of the Advocate-General of Bengal under Art. 26. Objection was taken at their Lordships' bar to the competence of this appeal on the ground that Art. 41 does not give an appeal to their Lordships from the determination of the High Court, unless the case came before that Court at the instance of the trial Judge. Thereupon the Appellant applied in the alternative for special leave to appeal. The materials being the same in both proceedings though the questions arising are not identical, their Lordships were able to decide the appeal and the application together and, in view of the gravity and urgency of the case, they dispensed with a formal petition for special leave to appeal. After hearing the arguments, they announced last July the substance of the advice, which they would humbly tender to His Majesty, namely, that the appeal should be dismissed. At the same time their

Lordships intimated that they were unable to advise that the application for special leave to appeal should be granted. Their reasons are as follows.

On August 3rd, 1923, the Sub-Postmaster at Sankaritolla Post Office was counting money at his table in the back room, when several men appeared at the door which leads into the room from a courtyard, and, when just inside the door, called on him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places, in one hand and near the armpit, and died almost at once. Without taking any money the assailants fled, separating as they ran. One man, though he fired his pistol several times, was pursued by a post office assistant and others with commendable tenacity and courage, and eventually was secured just after he had thrown it away. This man was the Appellant; the others escaped. The pistol was at once picked up and was produced at the trial.

There was evidence for the prosecution, such as the jury was entitled to act upon, that three men fired at the postmaster, of whom the Appellant was one; that he wore distinctive clothes by which he could be and was identified; and that, while these men were just inside the room, another was visible from the room through the door standing close to the others but just outside on the doorstep in the courtyard. This man was armed but did not fire.

Except for a doubt as to the total number of the men concerned in the attack, most of the witnesses concurring in the above statement while ultimately the prisoner said they were only three in number, the evidence of the eye-witnesses was consistent and uniform. The pistol thrown away by the prisoner was a

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German automatic self-ejecting pistol. An ejected shell was found just inside the room near the door, and it fitted this pistol. The bullet which killed the post-master was cut out of his back and was produced, and it also fitted the ejected shell and the pistol carried by the prisoner. This bullet was distinctively of German make. It was not however conclusively proved that no other assailant had a similar pistol to that which the prisoner had or used a similar bullet to that found in the deceased.

The Appellant was defended by five counsel. A few of the witnesses were cross-examined by them but very sparingly, and only to test their adherence to their evidence given in chief. Most of them were not cross-examined at all. No affirmative defence was indicated in any part of this cross-examination and no witnesses were called on the part of the prisoner, but after the case for the prosecution was closed the prisoner made an oral statement, which of course was not on oath and was not cross-examined to. Here for the first time some foundation was laid, though vaguely, for what eventually became the case raised on this appeal.

According to the prisoner, he was the man outside the room. He said that he stood in the courtyard and was very much frightened. The prosecution had left his purpose to be inferred from his position and his action. Whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance on the case made for the Crown. What was singular was the prisoner's own reticence on these matters. He dealt with none of them. Why he was there at all and why he did not take himself off again he did not say, nor did he even in-

dicating his precise position in the yard. Accordingly the evidence called by the prosecution, that the man outside was close to the men inside and, being visible by those within, would also see what went on within, was never challenged at all. The Appellant's account was: "I took my stand on the portico"—this ran round two sides of the courtyard and according to the plan is consistent with a position on the steps of the doorway.

"After a minute I heard two sounds, *dum dum*; when I heard the sounds I was confused. I perspired heavily and could not remember anything. Afterwards I heard *chor chor*; not finding the others there, I ran away."

Finally he said (and it was to this that the only affirmative part of his counsel's cross-examination was directed)—

"I have never assaulted anyone in my life. This is my first offence. I throw myself on the mercy of the Court. I was married hardly three months ago."

The charges preferred were murder under sec. 302 of the Indian Penal Code, and voluntarily causing hurt under sec. 394, while jointly concerned in an attempted robbery. To the first charge he pleaded not guilty. To the second he pleaded guilty of robbery. Their Lordships do not pause to remark on the inconsistency of this latter plea with the argument subsequently advanced in the High Court. There were further charges of attempted murder and attempt to commit culpable homicide, which were abandoned by the prosecution at the outset.

The learned trial Judge, Page, J., directed the jury carefully, upon the footing, that the prisoner was one of the men inside the room, that he was one of those who fired, and might be the man who fired the fatal shot, and that in any event, if they were satisfied in terms of sec. 34 of

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the Code, that the postmaster was killed in furtherance of the common intent of all, then the prisoner was guilty of murder, whether he fired the fatal shot or no. He did not deal with the prisoner's statement until the prosecuting counsel reminded him of it, when he told the jury that its weight was for them, but it formed part of the evidence which they had to consider. He gave no express direction on the subject either of attempted murder or of abetting murder. It appears to their Lordships that, as the whole summing-up was rested, in sentences more than once repeated, upon the prisoner being one of those inside the room and on his firing at the postmaster, the direction to the jury to take his statement into account might well be understood as impliedly instructing them to acquit, if they believed his whole statement as to his action and his connection with the murder to be true, since in that case the conditions would not be fulfilled on which throughout the summing-up it was stated that the guilt of the accused must rest. This view, however, was not put forward in the Court below, and their Lordships are quite satisfied to deal with the matter as it was presented to the High Court upon the question of misdirection.

The note of the defence submitted, which was taken by the trial Judge is as follows: "No evidence of murder, because no evidence that prisoner killed him." This he overruled, saying quite rightly "there is evidence that accused fired the fatal shot." "If the defence subsequently raised before the High Court had been put before him intelligibly, it should have been a submission that the jury ought to acquit if they thought that the accused either fired and missed or did not fire at all, and

that they must not find that he fired the fatal shot without weighing the fact that the prosecution had not actually proved that neither of the other men fired from a German automatic pistol like the prisoner's, though there was evidence making it improbable that they were armed as he was. As to the subsequent defence resting on abetment, it does not appear to have been thought of at all. It would be a circumstance proper to be considered on the application for special leave, that, neither in cross-examination nor in argument before the verdict was found, was any point about abetment taken, nor was even any point as to an attempt clearly urged. It was not too late to have amended the charge and to have given further directions to the jury (Criminal Procedure Code, sec. 227) and points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave. In the present case, however, their Lordships think it unnecessary to dwell further on this matter.

In the period of over sixty years which have elapsed since the Indian Penal Code came into force, a very large number of cases have of course been reported, in which joint commission of crime, attempts to commit crime, and abetments of crime, in many and very various forms, have been the subject of judicial rulings. With insignificant exceptions the Code has been interpreted in all the Indian Courts down to a few years ago in conformity with the English law existing in 1860.

The learned Judges in the High Court examined the authorities so fully and exhaustively that it would serve no good purpose if their Lordships were to discuss them again *seriatim*. The chief

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authority for the Appellant is a decision of Stephen, J., in 1914, in *Emperor v. Nirmal Kanta Roy* (1), a case in which two men, obviously acting in concert, having both fired at a policeman, one hitting and killing him and the other failing to hit him at all, that learned Judge directed the acquittal of the latter, who was charged under secs. 302/34 with murder. He held that, applying sec. 34 to the case, the criminal act was the killing of the policeman: that only one man killed him, not both: that all the prisoner did was to try to kill him, and that the criminal act charged was not done by several persons at all, that is to say *was not under the circumstances a joint act*, and he added "the only act he can be liable for under the section is one done by several persons, of whom he was one, that is by the man who escaped and himself In order to make the accused liable for murder under sec. 34 it would be necessary to say that an offence and an attempt to commit it are the same 'act,' which seems to me not to be the case." This view of the meaning of sec. 34 was adopted in *Emperor v. Profulla Kumar Mazumdar* (2), the High Court observing that "sec. 34 does not create an offence—the provisions thereof merely lay down a rule of law." Reference may also be made to *Emperor v. Chandan Singh* (3), *Harnam Singh v. Emperor* (4) and *Bahal Singh v. Emperor* (5).

Before 1914 there seems to have been no case in Bengal in which the view of sec. 34 formulated by Stephen, J., in *Nirmal's* case (1) was adopted by any

(1) I. L. R. 41 Cal. 1072: s. c. 18 O. W. N. 723 (1914).

(2) I. L. R. 50 Cal. 41 (1922).

(3) I. L. R. 40 All 103 (1917).

(4) [1919] Punj. Rec. Cr. Rul. No. 21.

(5) [1919] Punj. Rec. Cr. Rul. No. 24.

Judge, while the cases to the contrary are numerous. It is evident that till then the view now contended for had a very small place in the voluminous body of criminal decisions, and it has since been as often criticised as followed, and more often than not has been disregarded altogether. This is so in all the Courts in India. The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result, is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime, as distinguished from mere presence at the scene of its commission, is often a matter not easy to decide in complex states of fact, but the rule is one that has never left the Indian Courts in much doubt. As illustrations of the course of decision, reference may be made to the cases of *Queen v. Jan Mahomed* (6), *Queen-Empress v. Mahabir* (7), *Keshwar Lal Shaha v. Giris Chandra* (8), *Gouridas Namasudra v. Emperor* (9), *Emperor*

(6) 1 W. R. Cr. R. 49 (1864).

(7) I. L. R. 21 All. 263 (1899).

(8) I. L. R. 29 Cal. 496 (1902).

(9) I. L. R. 36 Cal. 659 (1908).

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v. *Kanhai* (10) and *Manindra Chandra Ghose v. Emperor* (11).

The Appellant's argument is, in brief, that in sec. 34 "a criminal act," in so far as murder is concerned, means an act which takes life criminally within sec. 302, because the section concludes by saying "is liable for that act in the same manner as if the act were done by himself alone," and here is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim. Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself. Such a proposition was not worth enacting, for if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all. It follows from the Appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act, which one could do by himself. Criminal action, which takes the form of acts by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment. By way of illustration it may be noted that, in effect, this means, that, if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is

not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one.

This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough: there must be proved an act, which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another or the same as that other's act. The result is that sec. 34, construed thus, has no content and is useless. Before the High Court the Appellant's Counsel put an illustration of their own, which may be taken now, because, the whole range of feasible illustrations being extraordinarily small, this one is equally exact in theory and paradoxical in practice. Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under sec. 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, if done by himself alone, is precisely not the act done by the other person. There are two acts, for which both actors ought to suffer death,

(10) I. L. R. 25 All. 329 (1912).

(11) I. L. R. 41 Cal. 54 (1914).

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separately done by two persons but identically similar. Let us add the element, that neither act without the other would have been fatal; so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does: it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of sec. 34. To this the reply was made before the High Court, that in a case where death results from the cumulative effect of different acts, each actor must be deemed guilty of murder, though whether because it cannot be shown that it was not his act alone which took the victim's life, or because the absurdity of the argument had to be disclaimed somehow, it is not easy to determine. Yet absurd it is, and absurd it must remain. "Where two men have done a man to death," said the learned counsel (Record 127), "your Lordships will not inquire into the individual effect of each blow: but the point I am insisting on is that the doing to death must have been the joint acts of both." This concession, rational enough in itself, is another way of saying that the section really means "when a joint criminal act has been done by the acts of two persons in furtherance of a common intention each is liable for that joint criminal act, as if he had done it all by himself." On the other hand, if it is read as the Appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged the onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other

party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man. If, on the other hand, each were tried separately by different juries, either jury or both, taking the view that the violence used by the man before them killed the man, whom they knew to be dead, might return unimpeachable verdicts of murder, and then both men would be justly hanged.

As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of sec. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By sec. 33 a criminal act in sec. 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By sec. 37, when any offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the Appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait." By sec. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Sec. 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first

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part, because they refer to it. Sec. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Sec. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.

The other part of the Appellant's argument rests on secs. 114 and 149, and it is said that, if sec. 34 bears the meaning adopted by the High Court, these sections are otiose. Sec. 149, however, is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, viz., one of those named in sec. 141 [*R. v. Sabed Ali* (12)], and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of sec. 34, is replaced in sec. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but sec. 149 cannot at any rate relegate sec. 34 to the position of dealing only

with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all.

As to sec. 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; [*Abhi Misser v. Lachmi Narain* (13)]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Sec. 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitive. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by sec. 114 brings the case within the ambit of sec. 34.

The prosecution gave no evidence of any prior connection of the accused with the crime, but began the case at the time when the assailants appeared at the post office. The discovery of sundry pistols and daggers among the Appellant's effects, some hours after the crime, was proved but not that they were those used in the commission of the murder. There was nothing in the prosecution's case to show that he had instigated or aided the com-

(12) I. L. R. 27 Cal. 536; s. c. 4 C. W. N. 540 (1900).

(13) 11 Beng. L. R. 347 at p. 359 (1873).

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mission of the crime before the actual commission began. The evidence on this matter was wholly supplied by the prisoner himself. His statement was that earlier in the day, when he was reclining on his couch after a meal, "one, whom he knew to be a God-fearing man and a man of learning," came and took him to a house, where he found two young men. Here he was solicited to go with them in order to commit a dacoity, and when he reluctantly consented and was shown how to use the pistol with which, like the others, he was then supplied, he stipulated that he was not to be a party to any dacoity or murder and was told there was to be no murder and he was to be there merely for show. It is plain from his statement that these persons had some hold over him, for when, by way of excusing himself, he had said, "My brother is in Government service and draws large pay. The money I earn is enough for me," he states that the other man "looked at me for a time. I could not speak;" and when he had been told that he was to be there only for show, he adds, "I was not in a position to speak. I went with them." Thus his statement goes at most to abetting a dacoity, the crime to the actual commission of which he pleaded guilty, but, as he had stipulated with success that there was to be no murder, it is not itself a statement showing an abetment of murder. Strictly, therefore, there was no evidence of any such abetment as has to be proved before sec. 114 comes into operation. As to the Appellant's presence at the post office, it has been already pointed out that he gave no explanation of it at all, but his story was much more consistent with participation in the actual commission of the crime than with mere bodily presence after

previous abetment. Indeed, he says that, when he ran away, the others had already disappeared; thus it would seem that he covered their retreat. At any rate, his statement supports presence by way of actual participation in the criminal act or series of acts by which the post master was killed rather than such conduct as adds to previous abetment bodily presence at the commission of the crime abetted and nothing more, and sec. 114 was never really made applicable for want of proof of abetment of the very crime, at the commission of which the Appellant was actually present.

For these reasons their Lordships think that only the most unsubstantial foundation was laid for any discussion of sec. 114 at all, but, as it was fully considered by the High Court, they state their own concurrence in the conclusion of the learned Judges below. Even if it be the case that the accused could have been convicted as an abettor, present at the commission of the offence, this is not to say that, if to presence there is added proof of participation, he could not also be convicted under secs. 34 and 302. Participation must depend on the facts, but it is not negatived merely because actual presence and prior abetment are proved.

Their Lordships do not think it useful to go at length into the history of the preparation and enactment of the provisions of the Indian Penal Code, which played no inconsiderable part in the discussion of this subject in India. That the criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code; that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects; and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any

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assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though common-places, considerations which it is important never to forget. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as principal in the first or the second degree, but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed. One object which those who framed the Code had in view, was to simplify the law; and to get rid of the terms "principal in the first degree" and "principal in the second degree" and others was no doubt a step in that direction, but to introduce a general section, sec. 34, which has little, if any, content, and to attach a wholly new importance to abetments and attempts, was to complicate not to simplify the administration of the law, for participation and joint action in the actual commission of crime are, in substance, matters which stand in antithesis to abetments or attempts. If sec. 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether. If the Appellant's argument were to be adopted, the Code, during its early years, before the words "in furtherance of the common intention of all" were added to sec. 34, really enacted that each person is liable

criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words expressed all that the Appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. This got rid of questions about principals in the first or the second degree by ignoring them, and the object of the framers of the Code was attained. In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition, under which each might be criminally liable when there are several actors. Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amended section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section. Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, "a criminal act" means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.

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Their Lordships are accordingly of opinion that the Full Bench of the High Court rightly construed sec. 34 of the Indian Penal Code, and that the view taken of it in *Nirmal Kanta Roy's* case (1) is not correct. This disposes of the main question raised in the appeal and in the application for special leave. Assuming that Page, J., in taking the view of sec. 34 which he did take, directed the jury correctly on the subject, there is admittedly little left in the general objections to his summing-up. It was very fully examined by the Full Bench of the High Court, and the learned Judges were unanimously of opinion that it did not call for any review. Their Lordships do not think it necessary to re-examine it sentence by sentence, or to reiterate the reasons which the learned Judges gave for their conclusion. It is enough to say that, having fully considered the summing-up themselves, they entirely concur in the conclusion of the Full Bench. The learned Judge's direction was not erroneous in point of law, and it sufficiently dealt with the material facts. It therefore contained no misdirection: still less was it such a summing-up as affected the due course of justice and the right of the prisoner to be fairly tried according to law within the strict and narrow limits, which have long been laid down by their Lordships' Board when special leave to appeal is asked for in criminal matters.

The argument against the competence of the appeal was substantially as follows. Subject to the satisfaction of the conditions which Art. 41 contains, the appeal is a limited appeal as of right, and must, therefore, be strictly construed. It is given in two cases only, and beyond those

cases any appeal is incompetent. The two cases are these: first, that the High Court, in the exercise of its Original Criminal Jurisdiction, has passed a judgment, order or sentence; and, second, that there has been a criminal case where the Court, exercising Original Jurisdiction in that case, has itself reserved a point or points of law for the opinion of the High Court. The present case does not fall within the words "from any judgment, order or sentence of the said High Court of Judicature . . . made in the exercise of Original Criminal Jurisdiction" but it must be brought within the second alternative. Now, the Advocate-General of Bengal, under Art. 26 of the Letters Patent, granted his certificate that in his judgment "whether the alleged direction or the alleged omission to direct the jury do not in law amount to a misdirection should be further considered by the said High Court." After full consideration of the question so raised, the Full Bench of the High Court made its order in the following terms: "The order of the Court is that the application made by the prisoner under cl. 26 of the Letters Patent do stand dismissed;" and this is the order by which the Appellant is really aggrieved. It is true that in his petition to the High Court for a declaration of the fitness of his case for further review, he says "that, being aggrieved by the said dismissal of his application and by the judgment and sentence passed and pronounced upon him by the Hon'ble Mr. Justice Page, your Petitioner prays for leave to appeal therefrom to the King's Most Excellent Majesty in Council;" but this statement is doubly inexact. The High Court does not and does not purport to grant leave to appeal: it grants or withholds a declaration of its opinion on the fitness of the case for appeal. Fur-

(1) I. L. R. 41 Cal. 1072: s. c. 18 C. W. N. 723 (1914).

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ther, the appeal is from the order of the High Court itself refusing to exercise its power to interfere with the trial and sentence. If it had discharged the sentence and directed an acquittal to be entered, the Appellant would not have been aggrieved by the judgment and sentence of Page, J., at all. If it had altered the sentence, his grievance would have been that the alteration did not go far enough. The complaint is that the High Court dismissed the application, and this is the order from which he claims to appeal. Accordingly his application is made in a case which does not fall within the words "in any criminal case where any point or points of law have been reserved for the opinion of the High Court in manner hereinbefore provided by any Court which has exercised Original Jurisdiction;" for the points of law were not reserved by the Court which exercised Original Jurisdiction, nor did the Court exercise its discretion in the matter in terms of Art. 25. That article provides that, but for the case therein excepted, "there shall be no appeal to the High Court from any sentence passed in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the High Court," and although Art. 26, which states what is to be done with these points reserved, introduces a new reserving authority, the determination of the High Court on the question reserved is final, except only for the express provision of Art. 41. It says:—

"And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that in his judgment . . . a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority

to review the case . . . and finally determine such point or points of law. . ."

Now, Art. 41 names, as part of the defining limits of the right to appeal to His Majesty in Council, a reservation of points of law by a Court exercising Original Jurisdiction, which is not the reservation made in this case, and the fact that a reservation by the Advocate-General is mentioned and provided for in sec. 26, and is omitted from sec. 41, makes the intention clear. When an authority outside the High Court is empowered to bring about a right of first appeal by a certificate of his own, that appeal is to the High Court and is finally concluded by its determination. There is no second appeal. When the reservation originates within the High Court itself, then, subject to the approval of the High Court to the fitness of the case in that regard, a second appeal is competent. With Art. 41 the Advocate-General has nothing to do. The proceedings of the two tribunals, the High Court exercising Original Criminal Jurisdiction and the High Court determining by its judgment points reserved for its consideration, are strictly two proceedings, and, when the trial Judge is *functus officio* and the whole matter has passed to the Court in review, the conditions under which the further decision in review can be brought before His Majesty in Council under Art. 41 are strictly limited to those which that section prescribes for that very case. Such was the submission on behalf of the Respondent, and there can be no doubt that it was a weighty one.

Having arrived at the above-stated conclusion on the construction of the Code which goes to the root both of the appeal and the application for special leave, their Lordships do not, however, think it necessary to proceed with the question

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whether in this case an appeal under Art. 41 of the Letters Patent is competent. In 1901 an appeal [*Subrahmanya Ayyar v. King-Emperor* (14)] was heard and determined by their Lordships' Board, in which the decision under review was that of the High Court at Madras in a criminal matter, brought before it on the certificate of the Advocate-General under Art. 26. The terms of the Letters Patent of the High Courts of Calcutta and Madras are for the present purpose identical. No objection was taken by counsel that under these circumstances an appeal to their Lordships' Board under Art. 41 was incompetent, nor is any question raised on this point in the judgment of the Board, and the explanation of this circumstance probably lies in the fact, that, in addition to the appeal under Art. 41, special leave to appeal had been applied for and had been granted by Her Majesty in Council on 29th June 1900. The decision in that case does not therefore conclude this matter, but their Lordships think it inexpedient to deal with the objection now, since on the other grounds above stated the appeal itself in their opinion must fail. They desire, however, to say that they must not be understood as giving any encouragement to appeals in criminal matters under Art. 41, where no point of law has been raised by the trial Judge, nor are Appellants, who have chosen this mode of bringing their case before the Board, to assume that an application for special leave to appeal as an alternative will be granted or even entertained by their Lordships.

For similar reasons they do not deal with other considerations relating to the grant of special leave to appeal to His Majesty such as the following. Although

in general hardly anything could more conspicuously violate natural justice than to convict and sentence a man for an offence of which he was not guilty, it may be that irregularity alone is the proper term to use, when, the facts being the same, the evidence the same, the guilt the same, and the punishment the same, error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, especially when this error could have been corrected in time, if the accused had put his counsel in a position to raise his defence clearly and in due form at the trial. Upon this point also their Lordships express no opinion at present.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitor: *Solicitor, India Office* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1601 of 1921.

RANKIN, J.	} SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Appellant, v. SARAT SUNDARI DEBI, Plaintiff, Respondent.
PAGE, J.	
• 1923,	
Heard,	
19, December.	
Judgment,	
20, December.	

Newly formed chars—Liability of, to additional assessment—Reg. II of 1819, secs. 3 and 31—Reg. XI of 1825, 4th Rule of—Act IX of 1847.

Chars formed on beds of rivers proved to have existed at the time of the Decennial Settlement are liable to be assessed with additional revenue, notwithstanding the fact that the beds were declared at the time to belong to persons as proprietors.

(14) L. R. 28 I. A. 257; s. c. I.L.R. 25 Mad.

21, S. C. W. N. 936 (1900).

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MAHARAJAH OF BURDWAN (1) *relied on.*

This was an appeal preferred on the 14th July 1921 against the decree of the Subordinate Judge, 4th Court of Mymensingh (Babu Nalini Mohan Banerjee), dated the 21st April 1921, affirming the decree of the Munsif, 2nd Court, Tangail (Babu Phani Bhusan Banerjee), dated the 1st March 1920.

The facts of the case will appear from the judgment.

Babus Dwarkanath Chakravarti and Surendra Nath Guha for the Appellant.

Babus Jogesh Ch. Roy, Krishta Kumar Maitra and Nisith Nath Ghatak for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—The Plaintiff brings her suit for a declaration that the orders of the Board of Revenue whereby certain *char* land has been assessed to additional revenue under Act IX of 1847 are *ultra vires* and invalid. The land in question is an area of over 10 acres or 30 bighas. The mouza in which the Plaintiff is interested is a mouza called Chandigram and, on the opposite side of a certain river or rivulet, as to which I shall say something in a moment, there is another mouza called Pathrail. The Plaintiff's mouza lies within a Parganah called Kagmari and, on the opposite side of the river already mentioned, facing Kagmari is a Parganah called Atia. The 10 acres in suit are shown in the Thak and the Revenue Surveys of 1850 and 1851 in this manner :—There was at that time undoubtedly a river known as Alam. The Revenue Survey Map shows it in

1851 as a flowing river. Between the Plaintiff's mouza and the opposite mouza, the line of demarcation is put in the middle of that river; but, on other points in its course, the whole of the bed or area of the river is comprised, according to the Revenue Survey Map, within the mouza on one side. There is this difference between the Thak and the Revenue Survey that the Thak seems to show that in 1850 the river was very small, in parts had dried up and in parts was merely stagnant water. Both the Courts below have taken the view that on that point the Thak is more likely to be accurate than the Revenue Survey Map. It being common ground that the lands in dispute now are thrown up from or are part of the dried up bed of that half of the river Alam which has been allotted to the Plaintiff's mouza in the Revenue Survey, the question at issue in the suit was this: the Plaintiff maintained that the river Alam was a river which had come into existence very soon after the year 1800 as one of the effects of a large and well-known change in the course of the great river Bramhaputra. She conceded, therefore, that for something like hundred years the Alam had been in existence; but she maintained that at the time of the Decennial Settlement the Alam was not in existence, and that these lands which afterwards became part of the bed of the river Alam were dry lands at the time of the Decennial Settlement, were included as such in her revenue-paying estate, and were not liable to additional assessment. On the other hand, it was contended for the Secretary of State that these lands forming part undoubtedly for nearly hundred years of the bed of the river Alam were at the time of the Decennial Settlement part of the bed of that very same river which existed

(1) I. L. R. 49 Cal. 1103; s. c. 26 C. W. N. 619 (P. C.) (1921).

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from before the date of the Decennial Settlement and which did not come into existence for the first time after the year 1800. It was contended, moreover, that in 1793 this river was a navigable river; but on that point both the Courts below have held against the claim of the Secretary of State. Upon the issue whether a river flowed over these lands at the date of the Decennial Settlement, the main evidence—indeed the only evidence—was a map prepared by Major Rennell and belonging to the year 1764-1765. In his map, a small river is shown at or about this place. It is a map of river routes and inland navigation. The contest was whether that map shows that the Alam which is known to have flowed over these lands soon after the beginning of the nineteenth century was flowing over them in 1764-1765. The trial Judge came to the conclusion that the Alam came into existence as a result of the change of course of the Bramhaputra and the coming into existence of a great diversion of those waters known as the Jumna. The lower Appellate Court which is the final Court of fact has come to the conclusion on the basis of Major Rennell's map that the Alam existed over these lands at the date of the Decennial Settlement. Its reasoning on a matter of fact may be canvassed, but not in this Court. It is only fair to say, however, that the main fact upon which the learned Subordinate Judge relied was this that, according to everybody's case, the Alam as known during the 19th century was a dividing line not only between these two mouzas Chandigram and Pathrail but between the two Parganahs Kagmari and Atia throughout a very zigzag part of its course. As it is quite clear that these Parganahs became divided from each other at the time of the Permanent

Settlement, the learned Judge would appear to have great reason to conclude that there was a river there at that date. On this basis, he concludes that the existence of the river about that spot shown by the map of Major Rennell is sufficient to entitle him to find, as he does find, that the lands in suit form the bed of the Alam of Major Rennell's map. At this argument, it was contended by Babu Joges Chandra Roy for the Respondent that this finding had been arrived at by an error of procedure and he contended also on the basis of certain modest expressions in the judgment of the learned Judge that the finding as given was contradictory and improper. The only error of procedure suggested was that the learned Judge was obliged to have a Commissioner appointed to endeavour to relay from Major Rennell's map the exact course of this river in 1765. At the beginning of his judgment, the learned Judge says that he feels hesitation in upholding the finding of the Court of first instance. Later on he says: "I am inclined to believe and find that the unnamed river in Major Rennell's map was no other than Alam." And he says further: "So far as the land in suit is concerned, it can be said with a considerable degree of certainty that it formed the bed of Alam of Major Rennell's map." It seems to me that there is no error of procedure by reason of the fact that the learned Judge did not at the appellate stage order a commission to relay the map of Major Rennell. I am inclined to think that a more useless process could hardly be suggested. The learned Judge's language is language which suggests at certain stages difficulty and hesitation. But he does definitely say that he finds that the Alam existed over the lands in suit from before the Decennial Settlement.

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ment and he says that more than once. If one had reasonable ground for supposing that the learned Judge in making his finding in a case of this sort was abandoning himself to guess work and was unaware of the definition of "proof" in the Evidence Act, one might be inclined to reject his finding altogether. But I cannot think that in this case that would be a fair construction of the position. I have no doubt that the learned Judge balancing the considerations came to the conclusion for the reasons I have indicated that it was incredible that these lands between these two Parganahs were anything else than the bed of a river existing at the date of the Decennial Settlement.

The next question is whether that finding does not entirely conclude the case in favour of the Secretary of State and, in this connection, the decision of the Privy Council in *The Secretary of State for India in Council v. Maharajah of Burdwan* (1) has to be considered. Without travelling into any part of the Bengal Regulations which are not expressly dealt with in that judgment, the position may be seen to be this: first of all, at the Decennial Settlement, the principle applied was an ancient principle in this country to the effect that of the produce of every bigha of land some part—in money or in kind—should go to the ruling power. The next thing is that when the Decennial Settlement was made permanent, it was made permanent on certain terms to be found in the old Regulations. Some of those terms are written large in Reg. I of 1793 but only some of them. For example, Thana-dari jamas or grants are dealt with; *sair*

collections or internal dues are dealt with. There is an express saving of the right of Government to make laws for the welfare of the cultivators and so on. But after that Regulation when the Government came to work it, it was met with many difficulties arising from the fact that the Decennial Settlement was not one based upon a careful and accurate survey. Accordingly, for the purpose of distinguishing between lands in fact comprised in the Permanent Settlement and other lands unsettled or claimed to be held revenue-free, a Code of Regulations had to be formulated as early as 1819; and that is the basis of the legislation on the present question. Reg. II of 1819 was meant to do three things that are stated in its preamble. The chief thing was to make a workable system whereby the necessary enquiries into title to lands could be carried out. The Privy Council in *The Secretary of State for India in Council v. Maharajah of Burdwan* (1) founded their decision upon sec. 3 of that Regulation read with sec. 31 and also upon the 4th Rule laid down in Reg. XI of 1825 which was a Regulation amending and stiffening up the provisions of Reg. II of 1819 and they have held that, according to the statutory exposition of the rights of parties, land covered by water at the time of the Permanent Settlement, while it may be included within the ambit of a settled estate, was not land deemed to be already assessed but was land which, by the express words of these Regulations, was to be liable to additional assessment, if it appeared and came into existence as land subsequent to the settlement. Those conclusions are apparent on the face of the sections of the Regulations which they quoted and no

(1) I. L. R. 49 Cal. 108; s. c. 26 C. W. N. 619 (P. C.) (1921).

(1) I. L. R. 49 Mad. 108; s. c. 26 C. W. N. 619 (P. C.) (1921).

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good purpose will be served by going over them again.

Now, the Plaintiff's whole cause of action in this case is that the orders of the Board of Revenue are *ultra vires* of the Board of Revenue as conferred by Reg. 11 of 1819 modified by Reg. XI of 1825 and finally by Act IX of 1847. If, then, it be taken as a fact that, at the date of the Decennial Settlement a river was flowing over the lands in suit, it is not arguable that the Board of Revenue have acted illegally or *ultra vires* in applying to these lands the express declarations of Reg. II of 1819 and the Regulation amending that.

It was contended and very closely contended by Babu Joges Chandra Roy for the Plaintiff-Respondent, first, that there was a finding of fact by the lower Appellate Court that notwithstanding that at the date of the Decennial Settlement the suit lands were under the river, nevertheless at that date they had been specifically assessed to revenue and he contended further that if the finding does not amount to that, at all events that is a question upon which the case should go back for a finding. In my opinion, that contention is wholly misconceived. To begin with, there is no such finding. The lower Appellate Court was dealing with facts upon the law as laid down by this Court prior to the decision by the Privy Council in *The Secretary of State for India in Council v. Maharajah of Burdwan* (1). According to that law, although land was under water at the time of the Decennial Settlement, nevertheless if it was included within the limits of a settled estate it could not be assessed under Act IX of 1847 to additional revenue. On the question whether

these lands were within the limits of the Plaintiff's mouza it was important to consider whether at the date of the Decennial Settlement the river Alam was navigable or non-navigable because, *prima facie*, at all events, the bed of a navigable river is part of the public domain. In discussing that question, the learned Subordinate Judge gives many reasons for holding that the river was non-navigable, and then he adds some other circumstances in this connection which he omitted to refer to in the course of his reasoning. The circumstances he mentions are that in the Revenue Survey Map half of the river was included in the Plaintiff's mouza and half in the opposite mouza. He says: "This could not be a thoughtless work because in other places the whole of that river has been wholly included in one bordering village. Including this half in Gramchandi the area of the Gramchandi was shown as 186.2 acres in the Revenue Survey Map. That area was also reproduced in the mouzawari Register of the Collector which implies that the said area was treated or accepted as revenue-paying." Accordingly, he says that if one finds it treated or accepted as a part of the revenue-paying estate, that is fair evidence to show that it is not the bed of a navigable river which would be part of the public domain. I may confine myself, therefore, to considering the question whether this case should go back to enable the Plaintiff to allege and prove and obtain a finding that at the date of the Decennial Settlement the lands covered by the waters of the river Alam were assessed to revenue. The circumstance that in the Revenue Survey Map half of the area of the river shown as a flowing river is included within the limits of the estate is,

(1) I. L. R. 49 Cal. 103; s. c. 28 C. W. N. 619 (P. C.) (1921).

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of itself, no evidence to show that at the date of the Decennial Settlement, apart from *jalkar* rights or collections from ferries or *sair* rights of some sort, there could possibly be any produce of such lands in 1793. Everything that we know about the Decennial Settlement shows how impossible it is to suppose that, apart from such rights as those, lands covered with water would be producing crops, part of the produce of which would go to the ruling power; and the circumstance that in the mahal or mouzawari Register of the Collector under the Land Registration Act of 1876 the area figure is repeated from the Revenue Survey of 1851 takes the matter no further. It is perfectly true that half of the river bed would be included within the ambit of the estate settled. It is perfectly incredible that the revenue settled upon that estate on the basis of a share of the produce could have been on any principle assessed upon land over which water was flowing. The whole attitude of the Courts of law to these matters has been changed by the decision in *The Secretary of State for India in Council v. Maharajah of Burdwan* (1). If it is sufficient to show that land covered with water was part of the area of the estate, no doubt the Revenue Survey Map, the mouzawari Register would be most important things. The basis of the Privy Council decision is that property is one thing and assessability is another and that these titles were only made permanent upon an express declaration that whenever lands emerge from rivers, even from shallow rivers they are liable to additional assessment. In the present case, it seems to me that on the evidence

the Plaintiff has not made a beginning in the way of evidence in favour of the theory that contrary to what the Regulations say, contrary so far as I can see to the common sense probabilities of the matter, land lying under water on the margin of her mouza was actually treated as producing crops or other produce and that part of what it was supposed to produce was added to the revenue assessed. If it were true, I find it difficult to see how on the face of the Regulations it would make her any better off in her task of showing that the Board of Revenue have acted *ultra vires*. The truth is that if in such a case as this by the production of the Kanongoe's *dowl* at the time of the Decennial Settlement it could be shown that a particular small plot of land was specifically treated as producing crop that would be an admirable evidence to displace the contention that such land was covered by a river. But if it be true that the land was part of the bed of any existing flowing river at the time of the Decennial Settlement, this would seem *prima facie* to amount to an absolute contradiction between the facts as supposed by the Regulations and the facts as proved. In my judgment, on the materials in this case, to send it back to the Court below inviting it to find that, notwithstanding the whole principle of the Decennial Settlement, this ten acres in the bed of a river were specifically assessed in 1793 to revenue, on the basis of the fact that the Revenue Survey of 1850 included them within the limits of Plaintiff's estate, would be a wholly vain and idle procedure. For these reasons, it appears to me that in the long run the Secretary of State's defence must prevail, that the appeal should be decreed and that the Plaintiff's suit to have it declared that the orders of the Board of Revenue

(1) I. L. R. 49 Cal. 103: s. c. 26 C. W. N. 619 (P. C.) (1921)

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are illegal and *ultra vires* fails and must be dismissed.

The cross-objection of the Plaintiff-Respondent is also dismissed.

We make no order as to the costs of the parties in any of the Courts.

PAGE, J.—I agree both in the judgment which has been delivered by my learned brother and also in the reasons upon which it is based. I have, therefore, very little to add to the observations which have fallen from him. The issue of law raised in this appeal is, in my opinion, concluded against the Respondent by the decision of the Judicial Committee of the Privy Council in *The Secretary of State for India in Council v. Maharajah of Burdwan* (1). Prior to that decision a distinction had been drawn between the assessability of *chars* forming in a navigable river and those forming in a non-navigable river existing at the date of the Decennial Settlement, upon the ground that if such a river was non-navigable, the bed formed part of the settled estate, and must be regarded as having been taken into account at the time of the settlement. That distinction was disapproved by the Judicial Committee of the Privy Council in *The Secretary of State for India in Council v. Maharajah of Burdwan* (1). At p. 116, Viscount Cave in giving the judgment of the Board stated: "The ownership of the bed may determine the proprietary rights in the *chars*; but property is one thing and assessability is another. The Regulation declares in terms that new *chars* are to be included in the category of unsettled lands, and contains no exception for *chars* formed upon a river bed belonging to a settled estate. Such *chars* must, therefore, be treated as

unsettled. This conclusion is strongly supported by the terms of Reg. XI of 1825, which deals with the rules to be observed in determining claims to lands gained by alluvion or dereliction. The fourth rule laid down in that Regulation, while providing that 'in small and shallow rivers, the beds of which, with the *jalkar* rights of fishery, may have been heretofore recognised as the property of individuals, any sand bank or *char* that may be thrown up shall, as hitherto, belong to the proprietor of the bed of the river,' adds the words 'subject to the provisions stated in the first clause of the present section.' These last mentioned words refer to the proviso to the first clause, which prevents the owner of an increment of land gained from a river or the sea from being exempt from assessment to revenue under Reg. II of 1819; and they show conclusively that the intention of the Regulation was to provide that all *chars* newly formed since the Decennial Settlement, though upon a river bed which is recognised as the property of the owner of the settled estate, are to be treated as land gained since the settlement and liable to be assessed accordingly." The issues in this case, therefore, are these: first, was the river Alam in existence at the time of the Decennial Settlement; secondly, was the land in suit formed out of the bed of the river Alam since the date of the Decennial Settlement? Upon those issues of fact, the lower Appellate Court has given an answer in the affirmative in each case. Therefore, the only question, which can be raised before us is whether there was any evidence to support these findings. No doubt, with respect to questions relating to the situation of land and its condition in a District such as that in which are the lands in dispute in this

(1) I. L. R. 49 Cal. 103; s. c. 26 C. W. N. 619 (P. C.) (1921).

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case, it must be to some extent a difficult matter to arrive at a definite conclusion. But the lower Appellate Court after not unnatural hesitation has come to a definite finding of fact in favour of the Secretary of State in respect of each of these questions, and, in my opinion, it is impossible to hold that there was no evidence before the Court upon which it could reasonably have found in the sense that it did. Under those circumstances, there is an end of the matter, and I agree that the appeal should be allowed.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES

Nos. 75 AND 78 OF 1920.

N. R. CHATTERJEE, J.	} DINA NATH SAHA ROY and ors., Plain- tiffs, Appellants, v. JADU NATH BISWAS and ors., Defendants, Respondents.
GRAHAM, J.	
1924,	
Heard, 16, 17, 22	
and 23, July.	
Judgment,	
18, August.	

Limitation—Suspension of time—Suit for declaration of putni right, modifiedly decreed in second appeal in High Court pending second suit instituted for same relief in respect of other lands in same mouza—Amendment of plaint after decision of second appeal according to the view taken therein—Period between date of institution of suit and decree of High Court, if to be excluded in deciding if amended claim barred by limitation—Estates Partition Act (V, B. C., of 1897), sec. 99—“Portion of a share,” meaning of—Res judicata.

The proprietors of a share of a Touzi granted a putni of their share in 19 villages only to the Plaintiffs who subsequently obtained a sadar putni of one-fourth of the said proprietors' share in all the villages of the mouza including the villages already settled. By an ekrar-nama the Plaintiffs were given exclusive possession of the share in 20 villages and the lessors of the others. A

portion of the proprietors' share was purchased at auction by a person who granted a sadar jama of it to the Defendants. The Touzi was partitioned under the Estates Partition Act and the aforesaid share which passed by sale was formed into a separate estate of 4 villages. The Defendants settled certain lands of that estate with two persons who were recorded in the settlement proceedings in respect of those lands. The Plaintiffs relying on the ekrar-nama then sued for a declaration of their putni and sadar putni rights to the said lands and obtained a decree which was affirmed on appeal. While the matter was pending in second appeal in the High Court the Plaintiffs brought the present suit in respect of other lands claiming similar reliefs and alleging the same title. The second appeal before the High Court terminated in a declaration that any contract between the parties was extinguished by sec. 99 of the Estates Partition Act and that the Plaintiffs were entitled to $\frac{1}{4}$ th undivided share of the lands in the 4 villages. The Plaintiffs then applied for amendment of their plaint in the present suit claiming an undivided $\frac{1}{4}$ th share in 3 villages which was allowed. The Court below ultimately held that the claim in excess of the area originally claimed in the suit was time-barred:

Held—That the period between the date of the institution of the first suit and the date of the decree of the High Court in second appeal should be deducted, so that the amended claim was in time.

That the words “portion of an estate” in sec. 99 of the Estates Partition Act are wide enough to include a case where a co-owner's share in any definite plots of land included in a joint estate is let out, such share being as much a por-

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tion of a share as an aliquot part of a share.

The principle enunciated in the section follows the well-recognised principle that an encumbrance of an undivided share of an estate is transferred to the lands allotted to the share of the person who created the encumbrance on a partition with his co-sharers.

JOY SANKARI GUPTA v. BHARAT CHANDRA BURDHAN (9), BROJO NATH SAHA v. DINESH CHANDRA NEOGI (10), HRIDOY NATH SAHA v. MOHOBUTNESSA (11), SYED ABDUL LATIF v. AMANUDDI (12), NAGENDRA MOHAN ROY v. PYARI MOHAN SAHA (13) and TALIK SINGH v. JALAL SINGH (14) considered.

That the question whether sec. 99 was applicable to the present case was res judicata between the parties by reason of the decision in the first suit.

These were appeals preferred both by the Plaintiffs and the Defendants against the decree of Mr. Iradatullah, Subordinate Judge, 2nd Court, Faridpore, dated the 23rd of December 1919.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and Babus Hari Narain Roy Chowdhury and Prokash Chandra Majumdar for the Appellants in Appeal No. 75.

Babus Ram Chandra Majumdar, Abinash Chandra Guha and Shib Chandra Palit for the Respondents in Appeal No. 75.

Babus Ram Chandra Majumdar and

(9) I. L. R. 26 Cal. 434: s. c. 3 C. W. N. 209 (1899).

(10) 21 C. L. J. 599 (1910).

(11) I. L. R. 20 Cal. 285 (1892).

(12) 15 C. W. N. 426 (1909).

(13) I. L. R. 43 Cal. 103: s. c. 20 C. W. N. 319 (1915).

(14) 11 C. L. J. 136 (1909).

Abinash Chandra Guha for the Appellants in Appeal No. 78.

Dr. Sarat Chandra Basak and Babus Prokash Chandra Majumdar and Hari Narain Roy Chowdhury for the Respondents in Appeal No. 78.

Babu Shib Chandra Palit for the Minor Respondents.

The JUDGMENT OF THE COURT was as follows:—

These appeals arise out of a suit for possession of an undivided one-fourth share of three villages appertaining to Estate No. 6572 in *putni* and *sadar putni* rights.

It appears that two persons Nilkant and Umakant who were proprietors of a 19 gundas and odd share in Touzi No. 4515 let out their share in 20 villages in *putni* to Plaintiffs' predecessor at a *jama* of Rs. 142-8-0 on the 32nd Sraban 1272. All these 20 villages are situate on the west bank of the river Ghagar. Subsequently on the 23rd Bysack 1281 (5th May 1874) they granted a *sadar putni* in respect of one-fourth of their 19 gundas and odd share in all the mouzahs of the estate including the 20 villages (which had been previously granted in *putni*) at a rent of Rs. 25 to the Plaintiffs. On the next day (24th Bysack 1281—6th May 1874) an *ekrar* was executed between the lessors and the lessees by which it was agreed that the Plaintiffs (the lessees) would remain in possession of 19 gundas and odd share of all lands in the mouzahs and *kismats* (in the 20 villages) and an additional mouzah Kusla on the west bank of the river Ghagar in their *putni* and *sadar putni* rights, and that the lessors would possess the remaining mouzahs to the east of the river. Out of the 19 gundas and odd share which belonged to Nilkant and Umakant, 15 gundas were

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sold at auction and purchased by one Nanda Kumar who again sold the same to one Iswar Chandra, husband of Rashmoni and the predecessors of Defendants Nos. 11-25. After the purchase by Iswar, there was another *ekrar*, dated 27th August 1890, between him and the Plaintiffs by which the first *ekrar* was confirmed, and the Plaintiffs were in possession of the 21 *mowzahs* on the west bank of the river on payment of rent. Subsequently, however, Iswar Chandra on the Kartick 1297 (31st October 1890) granted a *sadar putni* of his 15 gundas share of all the lands on both banks of the river to the predecessors of Defendants Nos. 1 to 10.

In 1905 the parent estate (No. 4515) consisting of 68 villages was partitioned under the Estates Partition Act into 28 separate estates of which Estate No. 6572 represents the 15 gundas share of Iswar. 4 out of the 68 villages were allotted to Estate No. 6572—three, *viz.*, Dharapasail, Patiljhakra and Chota Dumaria on the east bank, and the fourth Majbari on the west bank of the river. On the 27th December 1905 the Defendants Nos. 1 to 10 settled 631 bighas of Majbari with one Chandra Kumar Mookerjee and Lalit Mohun Mookerjee. The Plaintiffs allege that they took possession of the whole 631 bighas of Majbari and its *kismats*, but that in the settlement proceedings although the entire lands were at first recorded in their names, as a result of a dispute raised by Chandra Kumar and Lalit Mohun only 36 bighas were recorded in the names of the Plaintiffs and the remaining lands were recorded in the names of the latter, and being accordingly dispossessed they brought Suit No. 3 of 1912 for declaration of their *putni* and *sadar putni* rights to the entire 631 bighas of

lands of Majbari. The suit was decreed on the 15th July 1913, the Court holding that *mouzah* Majbari had been allotted to the lessor of the Plaintiffs, and relied upon the *sadar putni putta* of 1281 read with the *ekrarhama*. The Defendants in that suit appealed, and on appeal the decree of the trial Court was confirmed on the 3rd July 1914. Then a second appeal was preferred by the said Defendants, and while the second appeal was pending the present suit was instituted in respect of 283 bighas being the difference between 914 bighas (to which the Plaintiffs' lessors were entitled) and 631 bighas for which the Plaintiffs obtained a decree in Suit No. 3 of 1912. The present suit was instituted on the 14th April 1917. On the 28th August 1918 the second appeal to the High Court was allowed. The material portion of the judgment of the High Court is as follows:—

“ It is now undisputed that the estate was held in common tenancy. The proprietors of the 19 gundas share in it had given a portion of their share in '*sadar putni*' to the Plaintiffs or their predecessors, and it follows that after the partition the tenure held good as regards the lands finally allotted to the share of such proprietors or their successors and only to such lands. That is to say, the interests of the Plaintiffs in 20 of the 21 *mouzahs*, that were the subject of the '*sadar putni*,' have been extinguished and the tenure holds good as regards the four *mouzahs* allotted to this share. Before the partition a portion only of the 19 gundas share was, as has just been observed, subject to the '*sadar putni*,' since it appears that the 21 *mouzahs* were a portion only of the undivided estate. Plaintiffs have therefore a right to a share of the rents of the above-mentioned four *mouzahs* but the extent of that share

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we do not at present know. All that can be said is that they have a '*sadar putni*' interest to some unascertained extent in the four mouzahs allotted to their landlords. The claim that they have put forward to an exclusive interest in one portion of this area, a portion of their own selection, is unfounded and in allowing it the Courts below have taken an incorrect view of the law.

"The Plaintiffs appear to have relied in the Courts below only on sec. 99 of the Estates Partition Act and it is on that basis that they have obtained their decree. But it has been argued in this Court that they can also rely on the terms of the contract under which they held this '*sadar putni*,' since, that contract gave them the said interest in mouzahs situated to the west of the river. This contract, however, in so far as it fixed the particular lands that were to be subject to the tenure was extinguished by the partition and by the operation of sec. 99 of the Estates Partition Act and the contract cannot assist the Plaintiff in securing an interest in any particular land in the new estate."

On the 30th August 1918, the learned Judges in view of certain statements and arguments, made a declaration that "the Plaintiffs are entitled to one-fourth undivided share of the lands in dispute and to joint possession thereof with Defendants Nos. 3 to 8." Thereupon the Plaintiffs applied for amendment of the plaint in the present suit on the 13th January 1919 by claiming $\frac{1}{4}$ th share in the three villages on the east bank of the river. The amendment was allowed on the 24th April 1919, but at the hearing of the suit the Court below held that the claim in excess of 283 bighas (originally claimed in the suit) was barred by limitation, and accordingly gave a decree for only

1 anna 10 gundas 2 karas and odd share of the 3 villages in *sadar putni* right.

The Plaintiffs have preferred Appeal No. 75 of 1920, and the Defendants are Appellants in No. 78 of 1920. The main question for consideration in both the appeals is, whether the amended claim is barred by limitation. If the amendment was properly allowed, the claim would not be barred, and the question therefore is whether the amendment was properly allowed. Now, at the date when the present suit was instituted the Plaintiffs had obtained a decree in their favour in respect of 631 bighas of land of Majbari, both in the trial Court and in the Court of Appeal (in Suit No. 3 of 1912). So long as that decree was not set aside they could not sue for lands in the three other villages. The Court in second appeal in that suit held on the 28th and 30th August 1918, that the *ekrars* had become inoperative by the partition, and the Plaintiffs then applied for amendment on the 13th January 1919 by claiming the lands of the three villages on the east bank of the river.

The Plaintiffs rely upon the principles of suspension of time which has been laid down in some cases. The question of suspension of the period of limitation is one upon which the authorities do not seem to be uniform. In the well-known case of *Mussamat Ranee Surno Moyee v. Shoshee Mokhee Burmonia* (1) the Judicial Committee in determining whether the cause of action accrued with reference to sec. 32, Act X. of 1859, at the end of each Fusli year when the rent became due, or at the date of the decree reversing the auction sale of the *putni* taluk belonging to the zemindar, decided in favour of the latter date. That therefore was a case in which the question was

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when did the cause of action arise for the suit, and it was not really a case of suspension of the period of limitation. The case of *Hukum Chand Boid v. Pirthi Chand Lal Chaudhury* (2) is also not a case of suspension of the period of limitation. Their Lordships held that the sale had not become final and conclusive; in other words, for the purpose of the question of limitation the sale had not become absolute. On the other hand in the case of *Soni Ram v. Kanhaiya Lal* (3) where there was a fusion of the interests of the mortgagor and the mortgagee for a certain period, and it was contended that limitation was suspended for that period, their Lordships observed:—"There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that by reason of the fusion of interests between 1883 and 1898 the period of limitation was suspended, they would—this not being a suit to which the proviso to sec. 9 of the Act XV of 1887 applies—be deciding contrary to the express enactment of that section that when once time has begun to run no subsequent disability or inability to sue stops it." But in the case of *Lakhan Chunder Sen v. Madhusudan Sen* (4) this Court acting upon the principle of the cases of *Rance Surno Moyee v. Shoshee Mukhee Burmonia* (1) and *Pran-nath Roy Chaudhury v. Rookea Begum* (5)

held that the Plaintiff's right to bring an action was suspended for a certain period. The decision of this Court was approved by the Judicial Committee in the case of *Nrityamoni Dasi v. Lakhan Chandra Sen* (6). In that case two out of three brothers were dispossessed of their shares in certain properties by the third brother. One of the brothers who were dispossessed brought a suit for recovery of possession of his share as against the other two brothers as Defendants. One of the Defendants supported the Plaintiff, and set up his own right to one-third share in the property. It appears that an issue was raised as between the co-Defendants as to whether the Defendant who supported the Plaintiff was entitled to a certain share. The Court actually passed a decree not only in favour of the Plaintiff but also declared that the Defendant had one-third share. On appeal the decree of the trial Court in favour of the Plaintiff was upheld, but was set aside so far as the Defendant was concerned. It was in these circumstances that this Court and the Judicial Committee held that limitation was suspended from the date of the decree of the first Court to the date when that decree was set aside on appeal. The Judicial Committee observed as follows:—"Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the Plaintiffs were *bond fide* litigating for their rights in a Court of Justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the Plaintiffs in that action and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim to which no objection seems

(1) 12 M. I. A. 244 (1868).
 (2) I. L. R. 46 Cal. 670: s. c. 23 C. W. N. 721 (P. C.) (1918).
 (3) I. L. R. 35 All. 227: s. c. 17 C. W. N. 605 (P. C.) (1913).
 (4) I. L. R. 35 Cal. 209: s. c. 12 C. W. N. 326 (1907).
 (5) 7 M. I. A. 323 (357) (1859).
 (6) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522 (P. C.) (1916).

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to have been made by the Appellant. It was an effective decree made by a competent Court and was capable of being enforced until set aside. Admittedly, if the period during which the Plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court." A Full Bench of the Madras High Court in the case of *Mathu Korarkai Chetty v. Madar Ammal* (7) considered the decisions of the Judicial Committee on the question of suspension of limitation and one of the learned Judges (Seshagiri Ayyar, J.) observed :—"The true rule deducible from these decisions of the Judicial Committee is this : That subject to the exemptions, exclusion, mode of computation, and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law. I would answer the reference as above leaving each case to be dealt with in the light of these observations."

It is contended on behalf of the Defendants that the decision of the High Court did not give rise to any new right, it merely declared what effect the partition had upon the rights of the parties, and that it was open to the Plaintiffs, and in fact they were bound, to claim according to the result of the partition, in the suit of 1912 as well as in the present suit, at any rate in the alternative. No doubt if they had brought the suits upon the result of the partition, no question of limitation would have arisen, but they obtained a

decree in two Courts. The question is, could they, when they brought the present suit, claim on the basis of the partition while that decree stood unreversed? Such a claim (until that decree was set aside) would have been infructuous. In *Bassu Koer v. Dhum Singh* (8), Lord Hobhouse observed :—"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not."

It is contended by the learned Pleader for the Defendants that the partition was sanctioned by the Commissioner on the 1st February 1905, and the Collector began to deliver possession to the sharers according to the partition from the 25th May 1905 (or 18th June 1905) so that the co-sharers were entitled to the respective allotments from the 1st February 1905, at any rate from the 25th May or 18th June 1905; that if time runs from the 1st February 1905, then the suit was barred on the 14th April 1917 when it was instituted and was in time if time ran from the 25th May 1905, but was barred on the 13th January 1919 when the application for amendment was made. It is urged that the cause of action for the suit arose when the partition was sanctioned by the Commissioner, at any rate, when possession was delivered, and no new cause of action accrued by reason of the decision of the High Court : there was no question of possession and dispossession, because the Plaintiffs were never in possession of any lands to the east of the river. That is so, but the delivery of possession in the partition proceedings among the proprietors did not disturb the actual possession of the Plaintiffs in the Majbari lands. It was only when the record-of-

(7) I. L. R. 46 Mad. 185 (F. B.) (1919).

(8) I. L. R. 11 All. 47 (56) (1898).

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rights recorded the names of Chandra and Lalit that dispossession of the Plaintiffs took place. Thereupon they brought the suit of 1912 and a competent Court gave them a decree (though subsequently held to be erroneous by the High Court), and so long as that decree was in force the Plaintiffs could not sue for the lands in the three villages on the basis of the partition.

It is further contended that the Plaintiffs ought not to have been allowed to amend the plaint because after the partition the claim in the previous suit cannot be said to have been a *bonâ fide* one. But it is difficult to hold that it was not *bonâ fide* when two Courts concur in decreeing the claim, although the final Court of Appeal held the decree to be erroneous.

If the period between the date of the institution of the suit of 1912 and the date of the decree of the High Court in second appeal, viz., 28th August 1918, be deducted, the amended claim would be in time. We are accordingly of opinion that the suit is not barred by limitation.

In Appeal No. 78 another contention is raised on behalf of the Defendants, viz., that sec. 99 of the Partition Act has no application to the present case, as that section applies only to cases where "the proprietor of an estate held in common tenancy" has given his share or portion thereof in *putni* or other tenure or on lease, and not as here, to cases where a specific portion of the estate is let out in *putni*. But in the first place the *putni* lease to the Plaintiffs was in respect of 19 gundas and odd undivided share, though by a subsequent *ekrar* they were to hold certain specific mouzals on the west bank of the river. In the next place, the question whether sec. 99 is applicable to the present case is *res*

judicata between the parties by reason of the decision in the suit of 1912 as pointed out by the Court below. Lastly, the words used are comprehensive enough to cover a case like the present. The construction of the section as pointed out in the case of *Joy Sankari Gupta v. Bharat Chandra Burdhan* (9) is not quite free from doubt. But the principle enunciated in the section merely follows the well-recognised principle, namely, that an encumbrance of an undivided share of an estate is transferred to the lands allotted to the share of the person who created the encumbrance on a partition with his co-sharers. The view put forward on behalf of the Defendants was taken by Mr. Justice Rampini in the case cited above; but he was overruled by the Court of Appeal. The learned Judges Maclean, C. J. and Banerji, J., observed as follows:— "The one reason urged in support of this view is that sec. 128 applies only to a case in which a share or a portion of a share, that is, an aliquot part of a share is let out and that it does not apply to a case like the present in which the share of lessor in certain definite plots of land is let out. The words 'portion of an estate' in the section are, however, wide enough to include a case like the present, a co-sharer's share in any definite plots of land included in a joint estate being as much 'a portion of share' as an aliquot part of a share is, though the illustrations to the section no doubt lend support to the opposite view." That principle was also followed in the case of *Brojo Nath Saha v. Dinesh Chandra Neogi* (10) and in the unreported cases, Appeals from

(9) I. L. R. 26 Cal. 434; s. c. 3 C. W. N. 209 (1899).

(10) 21 C. L. J. 599 (1910).

DINA NATH SAHA ROY v. JADU NATH BIS WAS.

Original Decrees Nos. 229 and 278 of 1915 decided on the 28th June 1917.

The learned Pleader for the Defendants relied upon the cases of *Hriday Nath Saha v. Mohobutnessa* (11), *Syed Abdul Latif v. Amanuddi* (12), *Nagendra Mohan Roy v. Pyari Mohan Saha* (13) and *Talik Singh v. Jalal Singh* (14). But in the first two cases there was a previous private partition, and the lands therefore were not held in common tenancy. In the third, the learned Judges held that sec. 99 applies only where the lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties, and observed that the view was not opposed to the decision in *Joy Sankari Gupta's* case (9) where the lands were held not in severalty but in common tenancy.

The last case was that of a mortgagee whose possession was disturbed and the main question was whether he could sue for the mortgage money. The learned Judges, however, made some observations that sec. 99 does not apply to a case where certain definite and specific lands marked by metes and bounds are given, but having regard to the latest case on the point (the unreported case referred to above), we think that sec. 99 applies to the present case.

Appeal No. 75 should therefore be allowed with costs and Appeal No. 78 dismissed, the result being that Plaintiffs would get possession of an undivided 4 annas share of the three villages in suit in *sadar putni* right.

The Plaintiffs will get only Rs. 400-1-3

(9) I. L. R. 26 Cal. 434: s. c. 3 C. W. N. 209 (1899).

(11) I. L. R. 20 Cal. 285 (1892).

(12) 15 C. W. N. 426 (1909).

(13) I. L. R. 43 Cal 108: s. c. 20 C. W. N. 819 (1915).

(14) 11 C. L. J. 136 (1909).

as costs of the Court below as directed by the decree of that Court. Hearing fee in Appeal No. 75 is assessed at 10 gold mohurs. We make no order for costs in Appeal No. 78.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
NOS. 136 TO 141 OF 1922.

GREAVES, J.

GRAHAM, J.

1924,

Heard, 6 and

9, June.

Judgment, 9, June.

MOFIZUDDIN CHOW-

DHURY and ors.,

Defendants,

Appellants,

v.

RAJENDRA NATH

SANYAL, Plaintiff,

Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 102 (b), 115 and 50—Entry of "settled raiyat" in record-of-rights, effect of—Presumption under sec 50, if ousted by sec. 115 when such entry is made—Sec. 30, enhancement of rent.

The Appellants were recorded as settled raiyats in the record-of-rights which was finally published in 1888. About 35 years after the landlords sued for enhancement of rent:

Held—That the entry in the record-of-rights meant that the Appellants were merely occupancy raiyats not holding at fixed rates and that being so the mere fact that the landlords did not think fit to enhance the rent since that record was made cannot be deemed to raise a presumption of fixity of rent in favour of the Appellants.

The making of an entry of "settled raiyats" was a sufficient compliance with sec. 102 (b) and when such an entry was made in the record-of-rights the presumption under sec. 50 of the Act was ousted by the operation of sec. 115.

KAMALUDDIN AHMAD v. KUMAR RAMANAND SINGH (1) distinguished.

(1) [1924] Pat. 1 (1922).

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If the entries in the record-of-rights do not record particulars under the provisions of sec. 102 (b) or do not record them rightly, then sec. 115 has no application and the presumption under sec. 50 applies.

The provisions of sec. 102 are not mandatory, but provide that certain matters may be included either without or in addition to the other particulars set out in the section.

These were appeals preferred on the 27th of April 1922, against the decree of T. J. Y. Roxburgh, Esq., Additional District Judge of Zilla Dinajpur, dated the 25th of January 1922, reversing the decree of Babu Bhupendra Nath Mukerjee, Additional Munsif of Balurghat, dated the 13th of September 1920.

The facts of the case will appear from the judgment.

Babus Brajajal Chakravarty (for Babu Joges Chandra Roy) and Bimal Chandra Das Gupta for the Appellants.

Dr. Basak and Babus Asitaranjan Ghose and Urukram Chakravarty for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

GREAVES, J.—These six appeals have been dealt with together and they were preferred against decisions of the District Judge of Dinajpur reversing decisions of the Munsif of Balurghat. All these appeals were dealt with by one judgment in the lower Appellate Court. The suits out of which these appeals arise were suits for enhancement of rent. They were brought at the instance of the landlords who claimed enhancement under the provisions of sec. 30, sub-secs. (a) and (b) of the Bengal Tenancy Act. At the hearing the claim under sub-sec. (a) was abandoned and only that under

sub-sec. (b) was pressed. The first Court decreed two of the suits granting enhancement at the rate of 5 annas in the rupee. The other four suits were dismissed on the ground that the Defendants were tenure-holders and that they held the lands at fixed rates. The lower Appellate Court decreed all the six suits granting enhancement at 3 annas in the rupee and negatived the decision of the Munsif that the Defendants were tenure-holders holding at fixed rates. The real contest arises with regard to an entry in the record-of-rights which was published in the year 1888 in which the Defendants are described in respect of the lands comprised in these six appeals as "Sthitiban," that is, "settled raiyats." This record was, as I have stated, published so long ago as the year 1888 and has never been questioned since. The Defendants either in the year 1888 or early in 1889 commenced suits against the present Respondents for a declaration that their rent was not liable to enhancement but they never ventured to assert in those suits that they were tenure-holders and apparently accepted at that time as correct the entry in the record-of-rights that they were settled raiyats. Judgments in those suits were given in November 1889 and we think that it is a matter of great significance in considering the claims which are now put forward on behalf of the Appellants that at that time they never ventured to assert that they were anything but raiyats.

Three main points have been urged before us on behalf of the Appellants. First, it is said that the lower Appellate Court was wrong in stating that the presumption arising under sec. 50 of the Bengal Tenancy Act did not arise. Secondly, it is said that the learned Judge in the Court below was wrong in holding

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that the holdings were raiyati holdings and not tenures, and thirdly, it was contended that even if the presumption under sec. 50 did not arise the Appellants were entitled to the presumption which would be raised from their having occupied the lands in question for a long period at a fixed rate, the period being at least 35 years. For an understanding of the first point it is necessary to refer to some provisions of the Bengal Tenancy Act and the references that I am making are to the provisions of the original Act of 1885 before it was amended. Sec. 102 of that Act provides that where an order is made under the provisions of sec. 101, that is, an order directing the preparation of the record-of-rights, the particulars to be recorded are to be specified in the order and that they may include either without or in addition to other particulars some or all of the following, namely, (1) what class the tenant belongs to, that is to say, whether he is a tenure-holder, raiyat holding at fixed rates, occupancy raiyat, non-occupancy raiyat or under-raiyat and if he is a tenure-holder whether he is a permanent tenure-holder or not and whether his rent is liable to enhancement during the continuance of his tenure. The next section to which I must refer is sec. 115, which provides that when the particulars mentioned in sec. 102, cl. (b) have been recorded in respect of any tenancy the presumption under sec. 50 shall not thereafter apply to that tenancy. The result is that if the entries in the record-of-rights do not record particulars under the provisions of sec. 102 (b), then the presumption under sec. 50 of the Bengal Tenancy Act applies and of course if the particulars to be recorded under sec. 102 (b) have not been rightly recorded equally then the presumption under sec. 50 arises and sec. 115 has no

application. Now what is urged before us on behalf of the Appellants on this point is that if you consider the provisions of sec. 102 (b) you do not find in it any provision for recording persons as settled raiyats. It is said that they must be recorded as raiyats holding at fixed rates or occupancy raiyats or under-raiyats and accordingly it is said that merely recording the Defendants as settled raiyats is no compliance with sec. 102 (b) and that consequently sec. 115 of the Act has no application. We have been referred to, and the Lower Appellate Court has also referred to, r. 22 of the Rules published under the provisions of the Tenancy Act and there it is undoubtedly provided that an entry can be made such as has been made in the present case, that is, an entry of persons as settled raiyats. Moreover, it is, I think, noticeable that if you consider the provisions of sec. 102 they are not mandatory but provide that certain matters may be included either without or in addition to the other particulars set out in the section. But the main contention which has been urged against the argument of the Appellant is that the entry "settled raiyat" is a compliance with the provisions of sec. 102 (b), it being said that settled raiyats are occupancy raiyats and that therefore the entry "settled raiyats" does comply with the provisions of sec. 102 (b). In this connection we were referred to the definition of "rai-yats" contained in sec. 4 of the Tenancy Act. Sec. 4, sub-sec. (iii) defines raiyats as being of three classes, namely, (a) those holding at fixed rates, (b) occupancy raiyats, and (c) non-occupancy raiyats, and what is said is this that if you consider the provisions of sec. 4 (b) with the provisions of secs. 20 and 21 of the Tenancy Act you must arrive at the conclusion that settled raiyats are in

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effect occupancy raiyats. Now if this is so then the entry of the Defendants as occupancy raiyats means that they are not raiyats holding at fixed rates for if they were, then they would be entered as such having regard to the provisions of sec. (4) (iii) (a) of the Bengal Tenancy Act. It is necessary now to turn to the provisions of secs. 20 and 21 of the Act. Sec. 20 provides that every person who has continuously held as a raiyat land of any village shall be deemed to have become a settled raiyat of that village and sec. 21 states that any person who is a settled raiyat of a village within the meaning of sec. 20 has a right of occupancy in all lands for the time being held by him as a raiyat of that village and consequently it is said that having regard to these sections the term "settled raiyats" connotes occupancy rights and consequently, as I have already stated, the provisions of sec. 102 (b) have been completely complied with and that the presumption under sec. 50 does not arise. We think that this contention is correct and that the entry of the Defendants as settled raiyats is a compliance with sec. 102 (b) and that consequently the presumption under sec. 50 does not arise. We were referred on behalf of the Appellants to the case of *Kamaluddin Ahmad v. Kumar Ramanand Singh* (1). There is no doubt that the Patna Court there held that the presumption under sec. 50 was not ousted by the provisions of sec. 115 as the particulars required under sec. 102 were not recorded but we do not think that that case has any bearing on the facts of the case before us. There the only entry made in the record-of-rights was that the tenants were recorded as tenure-holders without any specification whether the tenure was permanent or not and whether the rent was

(1) [1924] Pat. 1 (1923).

liable to enhancement or not. Now if you turn to the provisions of sec. 102 you find that sub-sec. (b) provides that where a person is recorded as a tenure-holder there must also be recorded whether he is a permanent tenure-holder or not or whether his land is liable to enhancement during the continuance of his tenancy. So clearly the entry with which the Patna Court was dealing did not satisfy the provisions of sec. 102 (b) and consequently the provisions of sec. 115 did not apply and the presumption under sec. 50 clearly arose. But if I am right in the view that I have just expressed the entry "settled raiyats" means the same as if there had been entered the words "occupancy raiyats" and such entry having regard to the definition in sec. 4, indicates that they do not hold at fixed rates and accordingly the provisions of sec. 102 (b) are, in my opinion, satisfactorily complied with. So much then for the first point raised in this appeal. We think that the lower Appellate Court was quite right in holding that the provisions of sec. 102 (b) had been complied with and that consequently under the provisions of sec. 115 the presumption under sec. 50 did not arise.

The next question urged is that the lower Appellate Court was not right in holding that the holding in suit was a raiyati holding and not a tenure. It seems to me that the lower Appellate Court has arrived at a finding of fact upon this point. That finding is to be found at p. 25 of the paper-book and is as follows: "I therefore hold that the Defendants are not tenure-holders in respect of any of the holdings" and this finding follows after the consideration in the previous pages of the paper-book of such contentions as were put forward on behalf of the Defendants on this point.

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The main argument, however, which has been urged on behalf of the Appellants is that the lower Appellate Court has excluded from its consideration the presumption arising under sec. 5 (5) of the Tenancy Act. In five of the suits out of which these appeals arise the holdings amount to over 100 standard bighas and accordingly it was urged on behalf of the Appellants that the presumption arising under the section to which I have just referred should have been applied and it is said that the lower Appellate Court was wrong in merely applying the presumption arising from the entry in the record-of-rights and in not considering such presumption as would arise from the fact that five of the holdings were over 100 bighas in extent, but a consideration of the judgment shows, I think, that it is not a correct criticism of the learned Judge's judgment. At p. 23 he states: "They are entitled too to take the presumption of sec. 5, sub-sec. 5 and throw it into the scale on their side." It therefore seems to me that the Appellants are wrong in saying that the learned Judge in the lower Appellate Court has merely relied on the provisions of sec. 103B and has not taken into consideration such presumption as may arise under the provisions of sec. 5 (5). On this point there is the further matter to which I have already referred, namely, that from the year 1888 the entry has never been questioned and that the Defendants from the year 1888 until now have never ventured to describe themselves as tenure-holders in respect of this land.

The third point urged was the presumption arising from the uniform payment of rent. I think that the learned Judge is quite right in saying, as he does, that the entry in the record-of-rights negatives this con-

tention and that if this presumption is to be relied on on behalf of the present Appellants it must be relied on in respect of the payment of rent before the year 1888. For the reasons that I have already stated I think that the entry in the record-of-rights means that the present Appellants were merely occupancy raiyats not holding at fixed rates, and this being so the mere fact that the landlords did not think fit to enhance the rent since that record was made cannot be deemed to cause a presumption in the Defendants' favour. There is no evidence at all of uniform payment of rent in respect of this land by the Defendants for the years prior to the year 1888. This is concluded by the finding of fact of the lower Appellate Court where that Court states that "they have no such proof and that they have only the suggestion that the Plaintiffs have papers on the subject and that they cannot prove any change of rent" . . . and the subsequent finding, "I find then that the holdings are not at fixed rates." This I think disposes of the appeals and it is not necessary for me to deal with the contentions raised on behalf of the Appellants with regard to the Appeals Nos. 1138 and 1139 in respect of which it was stated that the Munsif was wrong in the conclusion that he came to, namely, that there had been a change of rent. It is not necessary for me in this judgment to deal with this point in view of the conclusion that I have come to in the other appeals which apply equally to these appeals.

The result is that all these appeals fail and must be dismissed with costs.

GRAHAM, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
OF OUDH.]

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

1923,

Heard, 23, November,
7, December.

1924,

Judgment,

22, January.]

MIRZA ABID HUSAIN
KHAN, Appellant,

v.

MUSAMMAT KANIZ
FATIMA and ors.,
Respondents.

Mortgage executed before the Transfer of Property Act (IV of 1882) — Mortgage by conditional sale with possession — Liability of mortgagee to pay revenue and public charges imposed during the term — Mortgagee if may charge such payments in the accounts.

In British India, a mortgagee in possession of immoveable property under a mortgage made before the Transfer of Property Act of 1882 came into force was, under the ordinary law then in force, bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and was not entitled to charge such payments against his mortgagor in the accounts.

"This was a consolidated appeal from a judgment and decree, dated the 17th July 1919, of the Court of the Judicial Commissioner of Oudh, which partly affirmed and partly reversed a judgment and decree, dated the 31st July 1916, of the Subordinate Judge of Barabanki.

The Defendant-Appellant represented the mortgagee and the Plaintiffs-Respondents represented the mortgagor, and the

Courts below have decreed redemption of the mortgage. The Subordinate Judge allowed the mortgagee to add the amount of cesses paid by him to the mortgage debt, but disallowed the addition of the enhanced revenue paid by the mortgagee. The Appellate Court has held that the mortgagee was not entitled to add to the principal mortgage debt either the enhanced revenue or the cesses, and the sole question for determination on the present appeal is : whether the decision of the Appellate Court was right?

The facts of the case were not in dispute and shortly stated were as follows :—On the 15th May 1869, Zamin Ali, the father of Sheikh Farzand Ali, Plaintiff (since deceased), now represented by the Respondents, executed a usufructuary mortgage of the entire village of Pindra in favour of Mirza Agha Hasan Khan, the father of Mirza Sadiq Husain Khan, Defendant, now represented by the Appellant. The material terms of the mortgage were the following :—

" I have withdrawn my possession from the said mortgage village, delivered possession of the same to the mortgagee, and do hereby stipulate :—

" (1) That if I fail to redeem within one year, then I shall not be entitled to redeem for next 25 years, while the mortgagee shall have power to sue and effect redemption within the term of 25 years.

" (2) That I will cause mutation of names to be effected in favour of the mortgagee in the Government records, and when revenue is paid the *dakhilās* (receipts) shall be issued to the mortgagee, that in case the mortgagor acts negligently in the least degree, the mortgagee shall be at liberty to get his name entered in the Government registers through Court and the costs thereof shall be borne by the mortgagor.

" (4) That till redemption the profits

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of the villages with all zamindari dues shall be appropriated by the mortgagee, and if I directly or indirectly make any obstruction thereto, then I shall be liable to be dealt with by the Criminal Court.

“(5) That the power to enhance rent, to appoint and dismiss Patwaris, Maqaddams and Chaukidars and to resume Muafi land from the Muafidars who hold land as service grants, to populate Purwas (hamlets) and settle the tenants, to determine rights, etc., which has hitherto been exercised by the mortgagor, shall, in the same manner, be exercised by the mortgagee.

“(10) That in case of the breach of any of these conditions, the mortgagee shall be entitled to file a suit, without waiting for the expiry of any period, to recover his money with interest at Rs. 2 per cent. per month and costs, by sale of the mortgaged village and other moveable and immoveable property of the mortgagor.”

In 1869 no cesses were payable in respect of the mortgaged property, the mortgagee had to pay cesses since 1878. In 1869 the amount of Government revenue payable in respect of the mortgaged village was Rs. 1,300 per annum, but since the settlement in 1896, the revenue was fixed at Rs. 1,600 per annum for the first five years and at Rs. 1,900 per annum for the remaining period of 25 years.

On the 24th June 1878, the said mortgagor executed another mortgage by way of conditional sale in favour of the said mortgagee in consideration of a further debt of Rs. 28,200. Its material provisions were as follows :—

“(2) That just as the mortgaged property is liable for the money due under the mortgage deed, dated the 15th May 1869, similarly the same property is and

shall be liable for the money due under this deed, that if I, the executant, pay in one lump sum within five years from to-day, in a fallow season in the month of Jeth, the money due under this deed and the mortgage money of the mortgage deed as well as other amounts due, the mortgaged property shall be redeemed, otherwise the consideration of this deed and the mortgage money of the deed of mortgage shall be deemed to be the consideration money and this deed shall be deemed to be the sale deed, and on the expiry of the stipulated period, I, the declarant, shall have left in me no right of redemption nor any other rights in respect of the mortgaged property and the said Mirza Sahib shall be entitled to have it foreclosed at any time he pleases after the expiry of the stipulated period and to that I shall have no objection or claim whatever.

“That the said Mirza Sahib has been in possession and occupation of the said property as mortgagee from the date of the mortgage deed up till now and from to-day he has been put in proprietary possession thereof and just as no sort of land is excepted from the mortgage deed, dated 15th May 1869, similarly, no class of land which is situate within the full boundaries of Mauza Pindra and its hamlets is excepted from the operation of this deed, that I made no interference from the date of the mortgage in respect of any land, cultivated or uncultivated, Thana, houses and groves, etc., similarly I shall do nothing of this sort in future, and if I break this covenant I shall be liable to be dealt with by the Criminal Courts.”

The mortgagor instituted the present suit on the 19th May 1915, in the Court of the Subordinate Judge of Barabanki, against the mortgagee, claiming redemption of the two mortgages above mention-

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ed on payment of such amount as the Court might determine. The mortgagee filed a written statement in which he claimed, among other things, the amount of enhanced revenue and cesses which he had paid during the period of his possession of the mortgaged property. He pleaded that he was entitled to add the amounts he had so paid to the principal mortgage debt.*

The Subordinate Judge held that the mortgagee was not entitled to add the amount of the enhanced revenue he had paid, but that he was entitled to add to the mortgage debt the amount of rates or cesses he had paid.

In regard to the enhanced revenue the learned Subordinate Judge concluded his judgment as follows :—

" The Government revenue is a charge upon the land out of which it is payable and takes precedence of all other claims. Consequently a mortgage does not in fact pledge anything more than the receipts in excess of the revenue payable in respect of the land mortgaged. It is, therefore, *prima facie*, the duty of the person who is in actual possession of the property to pay the Government revenue. However, the law permits the mortgagor and the mortgagee to enter into a particular contract about the payment of the Government revenue. In that case their rights and liabilities are determined with reference to that contract. The mortgage deed in question contains no provision to the effect that the mortgagor should pay any sum on account of the land revenue, should it be enhanced at any time. It shows on the contrary that it was for the mortgagee to pay the revenue, whatever its amount.

" Under these circumstances I am not prepared to hold that the Defendant is en-

titled to claim in the present suit the enhanced revenue paid by him."

But the learned Subordinate Judge held that the mortgagee could add the amount of cesses he had paid to the mortgage debt for the following reasons :—

" The mortgage was executed in 1869. It appears that no cesses were payable at that time. It is admitted by the parties that the mortgagee has had to pay the cesses since 1878, under the mortgage deed the mortgagee was to enjoy the whole income minus the Government revenue only. It was contended by the parties that there should be no deduction on any account. The Defendant is therefore entitled to claim the cesses paid by him. A cess is not a land revenue. (See 3 Oudh Cases, 325.)

" However, it is recoverable in this Province as if it were arrears of land revenue. This is not denied by the Plaintiff. Under these circumstances the Defendant can, I think, claim the amount under sec. 72 (b), Act IV of 1882. Unless the cesses were duly paid the property would have been sold and the sale would have put an end to all the rights of the mortgagor and the mortgagee both."

The Subordinate Judge accordingly made a preliminary decree under Or. 34, r. 7, and sec. 33 of the Code of Civil Procedure, 1908, and from that decree the Plaintiff as well as the Defendant appealed to the Court of the Judicial Commissioner of Oudh.

The learned Judicial Commissioners heard the appeals together and delivered one judgment on the 17th July 1919. They held that the mortgagee was not entitled to add to the mortgage debt either the amount of the enhanced revenue or the cesses he had paid.

They gave three reasons in support of

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their view. The first is that under the provisions of sec. 76 (c) of the Transfer of Property Act, 1882, the mortgagee was bound to pay the Government revenue and all other charges of a public nature which included the cesses. They observed as follows :—

“It is to be noted that the obligations imposed by sec. 76 (c) only extends to paying the Government dues, out of income. If the income does not permit of this, sec. 72 (b) will be applicable. In this case it is admitted that the income was sufficient. No authority is quoted by the mortgagee's Counsel for the proposition that, even when paid out of the income under sec. 76 (c), Government dues can be recovered under sec. 72 (b). Had this been the intention of the legislature it must have been expressly so stated. In our opinion the permission given to the mortgagee by sec. 72 (b) must be read subject to the obligation imposed on him by sec. 76 (c).”

The second reason related to an entirely new proceeding which was adopted by the mortgagee Appellant for the first time in the Appellate Court. He endeavoured to file in evidence a deed of agreement alleged to have been executed by the mortgagor in his favour, on the 6th July 1871, which was not produced at the trial before the Subordinate Judge. The material term of the agreement was as follows :—

“This mortgage transaction has taken place between the said mortgagee and me on the basis of the present profits, or whatever the said mortgagee might add to it by his good management and on payment of Rs. 1,300, Government land revenue with *mal* and *sewai*.

“If there will be any enhancement in the land revenue assessed at the regular settlement, I, the declarant, shall conti-

nue to pay that enhanced amount from my own pocket till the time of redemption. If the said mortgagee will have to pay the enhanced amount in any year, then he shall realise the said money with interest at 2 per cent. from me and from moveable and immoveable property belonging to me by instituting a suit in Court, and I and, after me, my representatives and heirs shall have no objection to it. The said mortgagee shall not be liable to pay any amount enhanced by the Government except the amount of the land revenue specified above. I shall be liable for all (other amounts) with tax, etc., which I shall pay from my own pocket and I shall not raise objection or dispute in respect thereof.”

The learned Judicial Commissioners ruled without admitting the above agreement that it did not support the contention of the mortgagee, and observed as follows :—

“In the view which we take of this document it is immaterial whether it is on the record or not, for we are of opinion that it can in no way help the Defendant in the present case. . . . Now this agreement provides not that the mortgagee shall be entitled to add the extra revenue to the mortgage money, but that the mortgagor shall be liable to pay that extra revenue out of his own pocket and that the mortgagee shall have a right to sue him personally to recover the excess if he fails to do so. . . .

“This provision is incompatible with the mortgagee having a right to add the excess money to the mortgage money. The mortgagee cannot, therefore, plead sec. 72 of the Transfer of Property Act as enabling him to add any revenue paid to save the property from attachment to the principal, because there was a contract in existence to the contrary, namely, a con-

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tract that he should recover personally from the mortgagor."

The third reason given by the learned Judicial Commissioners for rejecting the mortgagee's contention was in the following terms:—

"An examination of the second deed (dated the 24th June 1878) indicates that it was the intention of the parties that the second deed should take the place of the first deed, although incorporating the mortgage money payable under the first deed by reference. The second deed indeed states that, although possession at the time of the execution of the deed was with the mortgagee under the first deed, yet the mortgagee was again put in possession under the second deed. Now the second deed cannot be deemed in any way to be affected by the agreement of 6th July 1871. The second deed is absolutely silent as to the extra revenue or cesses. It is, therefore, governed by sec. 76 (c) of the Act."

The result was that the learned Judicial Commissioners allowed the Plaintiff's appeal and dismissed that of the Defendant, and made a decree partly affirming and partly reversing the decree of the said Subordinate Judge, and from that decree of the Judicial Commissioners the Defendant appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellant.—The mortgagee was bound to pay the enhanced revenue and cesses to save the property from being sold and he is entitled to charge all enhanced revenue and cesses so paid by him in the mortgage accounts. Secs. 72 and 76, Transfer of Property Act IV of 1882 and Oudh Local Rates Act IV of 1878.

The word "revenue" in para. 2 of

the mortgage of 15th May 1869 must mean revenue at the time of the deed.

That this construction is clearly the true one is shown by the deed of agreement of 6th July 1871 which makes a distinct admission of the terms on which the parties contracted. This document was clearly admissible in the Appellate Court.

Indrajit Pratāp Sahi v. Amar Singh (1). Or. 41, r. 27, Civil Procedure Code, 1908.

The principle is clear that where a mortgagee has paid out money for the salvation of the property he is entitled to charge such payment against the mortgagor. *Nugendra Ch. Ghose v. Sm. Kaminee Dossee* (2), *Jaijit Rai v. Gobind Tewari* (3), *Giridhar Lal v. Bhola Nath* (4) and *Kamaya Naik v. Devapa Rudra Naik* (5).

Messrs. Dunne, K. C. and Hyam for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the representative of the Defendant from a decree, dated the 17th July 1919, of the Court of the Judicial Commissioner of Oudh, which varied a decree, dated the 30th September 1916, of the Subordinate Judge of Barabanki.

The suit in which this appeal has arisen is for the redemption of a mortgage with possession of the 15th May 1869 of the village of Pindra, and of a mortgage of the same village by conditional sale of the 24th June 1878. The original mortgagor and the original mort-

(1) L. R. 50 I. A. 183; s. c. 28 C. W. N. 277 (1923).

(2) 11 M. I. A. 241, 258 (1887).

(3) I. L. R. 6 All. 303 (1884).

(4) I. L. R. 10 All. 611 (1888).

(5) I. L. R. 22 Bom. 440 (1896).

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gatee died before suit. The suit was brought on the 21st August 1915, by the representative of the mortgagor against the representative of the mortgagee. The Plaintiff and the Defendant are now dead and each is represented in this appeal, but, for the sake of convenience, they will be referred to respectively in this judgment as the Plaintiff and the Defendant as if living.

After the granting of the mortgages the mortgagee purchased a $\frac{1}{4}$ anmas share in the village, and it is admitted that the Plaintiff is entitled to redeem the mortgages on payment of twelve-sixteenths of the amount which would otherwise be due under the mortgages. The questions now in dispute, which have to be considered in this appeal, are whether the Defendant is to be allowed in the account of the money due to obtain redemption payments of enhanced land revenue and payments of certain cesses which were made by the mortgagee after the 15th May 1869.

It is not disputed that under the mortgage of 1869 the mortgagee in possession had to pay out of the usufruct, the Government land revenue payable under the Settlement in force in 1869, but it is contended by the Defendant that he is entitled to charge in the accounts as against the mortgagor any enhancements of that land revenue which the mortgagee was obliged to pay.

In the mortgage of 1869 it was stated that the mortgagor had mortgaged the village to the mortgagee for a period of one year and had put the mortgagee in possession, and the mortgagor agreed, amongst other things, that if he failed to redeem within one year he should not be entitled to redeem for twenty-five years; that he would cause mutation of names to be effected in favour of the

mortgagee in the Government records, "and when revenue is paid the *dakhilas* (receipts) shall be issued to the mortgagee"; that until redemption the profits of the village, with all zamindari dues, should be appropriated by the mortgagee; "that power to enhance rent, to appoint and dismiss Patwaris, Maqaddams and Chaukidars, and to resume Muafi land from the Muafidars who hold land as service grants, to populate Purwas and settle the tenants, to determine rights, etc., which had hitherto been exercised by the mortgagor, shall in the same manner be exercised by the mortgagee"; and that after redemption the mortgagor should not be entitled to claim any mesne profits.

The mortgagor borrowed further moneys from the mortgagee, and, on the 24th June 1878, gave to the mortgagee a mortgage in the form of a deed of conditional sale, the second clause of which as translated is as follows:—

"2. That just as the mortgaged property is liable for the money due under the mortgage deed, dated the 15th of May 1869, similarly the same property is and shall be liable for the money due under this deed, that if I, the executant, pay in one lump sum within five years from today, in a fallow season in the month of Jeth, the money due under this deed and the mortgage money of the mortgage deed as well as other amounts due, the mortgaged property shall be redeemed, otherwise the consideration of this deed and the mortgage money of the deed of mortgage shall be deemed to be the consideration money and this deed shall be deemed to be the sale deed, and on the expiry of the stipulated period, I, the declarant, shall have left in me no right of redemption nor any other rights in respect of the mortgaged property and the said Mirza Sahib shall be entitled to have it foreclosed at any time he pleases after the expiry of the stipulated period

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and to that I shall have no objection or claim whatever."

It appears to their Lordships that the mortgage deed of the 15th May 1869, and the mortgage deed of the 24th June 1878, must be read together, and that the parties intended that the mortgagee should be treated as having held the mortgaged property from the 15th May 1869, as a mortgagee in possession under a mortgage in the form of a mortgage by conditional sale. .

At the time when the mortgage of the 15th May 1869 was made, the land revenue payable to the Government in respect of the village was Rs. 1,300 per annum, but in the settlement of 1896 it was increased to Rs. 1,600 per annum, to be further increased in five years to Rs. 1,900. The increased revenue was paid by the mortgagee.

The cesses, the payments of which the Defendant claims to charge against the Plaintiff in the account, were sums paid by the mortgagee in discharge of a local rate imposed on the village under Act IV of 1878, the Oudh Local Rates Act, 1878. By sec. 5 of that Act, "All sums due on account of any rate imposed under this Act, shall be recoverable as if they were arrears of land revenue due in respect of the land on account of which the rate is payable." Under that Act the "Landholder" was responsible for the payment of rates imposed upon the land, and by sec. 3 of the Act "Landholder" included the person in receipt of the rent of any land, and responsible for the payment of the land revenue, if any, assessed on the estate. The mortgagee was the "Landholder" within the meaning of the Act.

This suit to redeem the two mortgages already mentioned was tried by the Subordinate Judge of Barabanki, who

disallowed the Defendant's claim in respect of the payments of enhanced revenue, but allowing his claim to include as against the Plaintiff in the account the payments of the cesses, made a decree for redemption on payment of the amounts mentioned in the decree, and in default of such payment decreed that the 12 annas share in the village should be sold. From that decree the Plaintiff and the Defendant respectively appealed to the Court of the Judicial Commissioner.

After the hearing of the appeal to the Court of the Judicial Commissioner had commenced the advocate for the Defendant asked the Court to receive in evidence a document dated the 6th July 1871, which had been executed by the mortgagor in favour of the mortgagee and had not been previously produced in the suit. It related to the mortgage of the 15th May 1869. The learned Judges admitted the document in evidence, apparently on the ground that a provision in the document was incompatible with the mortgagee having a right to add the payments of the enhanced land revenue to the mortgage money. How that document could have assisted the Defendant's case their Lordships do not see, nor did the learned Judges who admitted it in evidence. Independently of the document of the 6th July 1871, the Judicial Commissioners held, to state their findings briefly, that the mortgagee as mortgagee in possession was bound to pay the enhanced revenue and the cesses out of the usufruct, and that the Defendant was not entitled to charge such payments against the Plaintiff in the account, and dismissed the Defendant's appeal to their Court and substituted for the decree for sale of the Subordinate Judge a decree for foreclosure if the amount which they found to

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be due was not paid on or before the 17th January 1920. This appeal is from that decree.

The art of conveyancing was in 1869 and in 1878 little, if at all, understood in India, except possibly by some English solicitors practising in the Presidency towns, and the mortgages in question were made before the Transfer of Property of 1882 came into force and afforded some information as to how mortgages of immovable property should be framed. Their Lordships have no doubt that the mortgagor and mortgagee intended that the mortgage of 1869 and the mortgage of 1878 should be read together, and that until they should be redeemed the mortgagee should be in possession of the mortgaged property in the position of a mortgagee by a conditional sale in possession, and that if the mortgages should not be redeemed the right to redeem should be determined by a decree of foreclosure.

In British India a mortgagee in possession of immovable property under a mortgage made before the Transfer of Property Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against his mortgagor in the accounts.

Their Lordships will humbly advise His Majesty that the time for payment of

the Rs. 32,268-2-0 redemption money into Court allowed by the Court of the Judicial Commissioner of Oudh should be extended to six calendar months after the receipt by that Court of His Majesty's Order in Council and that in other respects this appeal should be dismissed. The Appellant must pay the costs of this appeal.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

Solicitors: *Messrs. Barrow Rogers & Nevill* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 663 OF 1921.

RANKIN, J.

PAGE, J.

1923,

Heard,

28, November.

Judgment,

29, November.

SATISH CHANDRA CHATTERJEE, Plaintiff,
Appellant,

v.

KALI CHARAN CHOU-
DHURY and ors., Defend-
ants, Respondents.

Estates Partition Act (V of 1897), secs. 81, 119, scope and effect of—Partition—Splitting up of tenure and apportionment of rent by Deputy Collector under sec. 81—Order under sec. 81, if may be challenged by tenant by way of defence to rent suit.

A Deputy Collector while acting under sec. 81 of the Estates Partition Act exercises the powers of a quasi judicial officer. An order passed under that section, though unfounded in fact, is not a nullity. Such an order cannot be challenged by way of defence to a suit for rent in the absence of other parties to the partition.

Per RANKIN, J.—If a person has a right to challenge an order under sec. 81 by a suit or by any other means, sec. 119 leaves him that right.

On ordinary principles a suit in the Civil Court properly constituted and

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brought within whatever period of limitation may be applicable to set aside an order under sec. 81 would be necessary.

Per PAGE, J.—Quære, whether a tenant or other person aggrieved by an order under sec. 81 is entitled to challenge that decision otherwise than by the methods provided in the Estates Partition Act.

This was an appeal against the decree of Babu Upendra Nath Biswas, Subordinate Judge, 4th Court of Zillah 24-Parganahs, dated the 4th of September 1920, reversing the decree of Babu Kali Prosanna Piplai, Officiating Munsif, 2nd Court at Basirhat, dated the 26th of February 1919.

The facts of the case material to this report were as follows :—

This appeal arose out of a suit for rent. Plaintiff's case was that the Defendants held two *jamas* of Rs. 251-0-6 and Rs. 6-2 under him and his co-sharers, that the estate was partitioned between the Plaintiff and his co-sharers, that the mouzas in which the disputed lands are situate fell into Plaintiff's share, that the aforesaid two *jamas* were consolidated and then split up under the provisions of the Estates Partition Act, that the disputed *jama* of Rs. 90 8 as. 13 g. 3 k. 1 kr. fell to Plaintiff's share and that the rent and cess for the years 1321 to 1324 were in arrears and hence the suit. The Defendants pleaded *inter alia* that they did not hold the *jama* of Rs. 90 and odd under the Plaintiff as alleged, that the original *jama* of Rs. 251 and odd was split up long ago, that they separately held a part of this *jama*, that they held no *jama* of Rs. 6-2. Plaintiff subsequently admitted that the Defendants did not hold any *jama* of Rs. 6-2 under him or his co-sharers.

The Court of first instance decreed the suit. On appeal by the Defendants, the

Subordinate Judge of 24-Parganahs allowed the appeal, reversed the decision of the Munsif, and dismissed the suit. Against the decision of the Subordinate Judge the Plaintiff preferred this second appeal.

Babu Shib Chandra Palit and Babu Mani Lal Bhattacharjee (for Babu Nanda Lal Banerji) for the Appellant.

Babu Shib Chandra Palit for the Appellant.—The real question in this case is what effect is to be given to the order of the Deputy Collector made under sec. 81 of the Estates Partition Act. In preparing a record of existing rents and other assets of the lands included in the estate under Chap. VI of the Act, the Deputy Collector went through all the formalities necessary to be observed under the Act and came to his conclusion on the materials before him. After attestation of survey papers and record of existing rents, the Deputy Collector duly published a copy thereof in the locality and also furnished copies of the entries to the landlord and tenants. The Defendants did not object nor did they appeal, although they had a right to appeal under the Act.

In splitting up the holding in question the Deputy Collector served the tenants with a notice and duly notified the apportionment of rent to the tenants concerned under sec. 81. None of the tenants, save one, objected; the objection of the objecting tenant was overruled and against that there was no appeal although an appeal lay under sec. 111. The order of the partition officer made under sec. 81 therefore stands as not having been set aside on appeal or in a suit or other proceeding properly framed and brought in a Civil Court for the purpose. The Defendants are therefore not entitled to question the apportionment in a suit brought after the partition by one of the landlords for his share of the rent as determined in the

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partition proceedings. No doubt sec. 119, Estates Partition Act, excludes an order made under sec. 81 from the group of orders that may not be contested or set aside by suit or by any means other than those expressly provided in the Act; and therefore it may be said that an order under sec. 81 is liable to be contested or set aside in a proceeding properly framed for the purpose. But unless that is done, it cannot be impeached collaterally by way of defence in this case, especially as there is no suggestion anywhere that the Deputy Collector acted improperly or irregularly in making the partition. The case of *Janki Dobey v. Kirtarath Roy* (2), relied on by the Subordinate Judge, does not at all help the determination of the present question. The analogy from the record-of-rights prepared under the Bengal Tenancy Act does not hold good.

Babu Biraj Mohan Majumdar for the Respondents.—The Deputy Collector has got to take into account the existing rent at the time of making the partition. The finding is that the *jama* of Rs. 251-0-6 was not existing at that time but had been split up long ago into several separate *jamās*. The judgment in the rent suit No. 1316 of 1913 was passed before the partition proceedings and the Deputy Collector could not certainly have ignored it. Possibly it was not brought to his notice. It cannot be said that an entry in the *butwara* papers as to apportionment of rent payable by a tenant is final. The Act nowhere says so. The utmost that can be said of such an entry is that it is evidence in the same way as entries in the record-of-rights under Chap. X, Bengal Tenancy Act. So, there is only a presumption in favour of such entry, which has been rebutted by the rent receipts,

(2) 13 C. W. N. 93 (1908).

Exs. A to A (8) and the judgment in rent suit No. 1316 of 1913 (Ex. B). I rely on the decision in *Janki Dobey v. Kirtarath Roy* (2). No separate suit is necessary to set aside the order under sec. 81.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—This is the Plaintiff's appeal in a suit for rent for the years 1921 to 1924 B. S. The Plaintiff claims that he is the landlord of the Defendants in respect of a *jama* of Rs. 90-8-0 and odd *gandas*, the superior interest in which fell to his share upon a partition made in the year 1914 under the Bengal Estates Partition Act V (B. C.) of 1897. The Munsif of Basirhat decreed his suit; but the Subordinate Judge of 24-Parganahs, on appeal, has dismissed the suit.

The facts upon which the case has been decided by the learned Subordinate Judge may be stated as follows :—Originally the Plaintiff with a number of co-sharers was the landlord in respect of a tenancy comprising lands in a number of mouzas, of which tenancy the rent was Rs. 251-0-6 pies. In course of time, the tenancy by arrangement, in the first instance, was split up; and about the year 1913, if not much earlier, the tenants were claiming that the original *jama* of Rs. 251 odd had entirely gone and that in point of fact and law, there were created twelve separate *jamās*, certain of the landlords having the superior interest in each of those *jamās*, and certain of the tenants having the tenants' interest in them. It appears further that in 1913 a decree was obtained which proceeded on the basis that by this time at all events the claim that the original *jama* had been legally split up was well-founded. In these circumstances in 1914, the sharers entitled to the superior

(2) 13 C. W. N. 93 (1908).

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interest effected a partition under Act V of 1897. The Deputy Collector, so far as appears, proceeded quite regularly under that Act. He made out the necessary lists of assets, he gave the necessary notices and he found that the original *jama* of Rs. 251 odd still subsisted. Accordingly, it became necessary for him in making the partition to exercise the powers conferred by sec. 81 of the Act and there again proper notices were served on the tenants concerned. None of the tenants concerned with a single exception appeared to object. One tenant did appear and did object but his objection was overruled and he did not appeal. The learned Subordinate Judge in the present case has found that the decree of 1913 was not brought to the notice of the Deputy Collector, so that in exercising his powers under sec. 81 the position is that, having jurisdiction to enquire into the facts, he did enquire into the facts and came to a conclusion which, on the evidence adduced, was correct enough. But it now turns out by reason of a further piece of evidence that his conclusion was in fact incorrect. Now, in these circumstances, the view taken by the learned Subordinate Judge in the present rent suit is that it being established that there was no one *jama* of Rs. 251 but that this had, at the time of the partition, been split into twelve different *jamias*, the Deputy Collector had no jurisdiction to amalgamate the different *jamias* and then to sub-divide them again; that his order was entirely without jurisdiction; and that, therefore, the Plaintiff's claim which is based upon that order must fail.

In answer to this contention, the learned vakil for the Appellant relies, in the first place, upon sec. 119 of the Estates Partition Act. That section provides that no order of certain kinds therein enu-

merated "shall be liable to be contested or set aside by suit in any Court or by any means other than those expressly provided in this Act." The orders which are so guarded include orders made under Chap. IX. But when Chap. IX is mentioned, there is introduced this exception "except sec. 81." It is to be noticed that with regard to certain orders made under secs. 84, 86 and 88, an express right is given to bring a suit to modify or set aside the order. The first question is whether sec. 119 imports that nobody can challenge an order under sec. 81 except by bringing a suit. In my opinion that is not a possible construction. All that is done here is to exclude orders made under sec. 81 from the wide prohibition against bringing a suit or doing anything else to challenge. Another question arises upon this section. As sec. 81 is excepted from a provision which forbids not only the bringing of a suit to set aside but forbids the use of any means other than those expressly provided in this Act, is it a correct inference to say that this impliedly means or imports that, in the case of sec. 81, it is liable to be challenged not only by bringing a suit but by taking the point in any other fashion? There again, in my judgment, the inference would be unsound. Sec. 119 does not, in my opinion, prejudice the question either way. It seems to me that if a person has the right to bring a suit or to challenge the order by any other means, the section leaves him that right. But the section gives no right in respect of sec. 81. I have, however, no doubt at all that a suit does lie to set aside an order made under sec. 81 if it turns out that by that order a tenure or holding has not been split up but an amalgamation of tenures and holdings has been divided contrary to the meaning of the section. In such a suit

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I am fairly clear that it would be no answer at all to say that the Deputy Collector had jurisdiction to enquire into the facts and that if he has found the facts wrongly his order cannot be interfered with. For the purposes of such a suit, it seems reasonable to say that the Deputy Collector could not give himself jurisdiction under sec. 81 by coming to a wrong finding of fact. In my opinion, the question in this case, since no suit has been brought to set aside the order under sec. 81, is really whether in the circumstances and upon the facts found the tenants are entitled to treat this order as a mere nullity—an order which no man is required to pay any attention to, and an order which does not even require to be set aside. That question, in my opinion, in view of the draftsmanship of the Act, has extraordinary difficulty and to resolve it, it is necessary to make a careful study of the scheme of the Estates Partition Act.

Before embarking upon that it may be observed that in the reports there are two cases only which seem to be of any assistance. In the case of *Nandlal Pathak v. Mohunth Chanurpat Das* (1), Sir Lawrence Jenkins was plainly of opinion that the records of the partition proceedings under the Act of 1897 would be evidence under sec. 35 of the Evidence Act, notwithstanding that the *butwara khasra* under the previous Act of 1876 was held not to be such a record. In that conclusion the Court was fortified by the decision in *Janki Dobey v. Kirtarath Roy* (2). I think that the scope of this decision has been somewhat misunderstood. The case there was a suit for arrears of rent and, as a proof that the

Defendant held the *jama* sued upon under the Plaintiff there was tendered in evidence certain *butwara* papers, that is to say, papers prepared by the Deputy Collector acting under Chap. VI of Act V of 1897. The Court in that case remarked on the provisions of sec. 44 of the Act and observed that the procedure as to the preparation of the rent roll and the publication thereof was analogous to the procedure under secs. 103 and 103A of the Bengal Tenancy Act; and the conclusion was that entries in the partition papers as to the amount of the rent are evidence in the same way as entries in the record-of-rights prepared under Chap. X of the Bengal Tenancy Act are admissible in evidence under sec. 103B. "*Primâ facie* they are evidence against the tenant, though that evidence may not be very valuable." I put aside for a moment whether the record of existing rent is or is not entitled to the presumption of correctness given to the record-of-rights under sec. 103B. There can be no doubt that a record-of-right made under Chap. VI is evidence, at all events, under sec. 35 of the Evidence Act. Now, in these circumstances the learned *vakil* for the Respondents naturally contends that if this is all the effect that the *butwara* papers have, then at all events the learned Judge of the lower Appellate Court could not be wrong in finding on the basis of the decree that the *butwara* papers were all wrong and that he was entitled to dismiss the suit. The question is whether that point of view is really correct.

Now, under the Estates Partition Act there are various stages and these stages have by the Act been separated out and dealt with very conveniently in different chapters. By sec. 44, Chap. VI is introduced which deals with "proceedings

(1) 17 C. W. N. 770: s. c. 17 C. L. J. 462 (1913).

(2) 13 C. W. N. 93 (1908).

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up to the determination of the partition " which I understand to mean up to the time when the decision dividing the property has to be come to. It begins by saying that every Deputy Collector shall have the powers of a revenue officer under Chap. X of the Bengal Tenancy Act. It orders him to make a survey and prepare a record of the existing rents and other assets. He has to record several things: the rents payable for all rent-paying lands, first, as stated by the landlord, secondly, as stated by the tenants, and thirdly, as taken by the Deputy Collector for the purposes of the partition. Notices have to go to every body. The record has to be published and, after providing for that, the Deputy Collector is told to record an order fixing a date on which to come to a decision as to the partition of the estate. When we come to Chap. VIII, we come to the chapter which deals with making of the partition and at that stage we find that the Deputy Collector has to consult all the proprietors who are present and dispose of any objection that they may urge. He has then to proceed to determine how the lands of the parent estate shall be partitioned into separate estates and various precautions are provided to safeguard against injustice. The important thing to notice for the present purpose is this—That the record prepared under Chap. VI is a record which in no way affects the tenants of the holdings save as a matter of evidence. If there is any question and doubt about the tenants' possession or the amount of rent, the Deputy Collector has to take down the two views and has to come to a decision for the purposes of partition only. When the partition comes to be made in the usual course, it is made only in the presence of the proprietors of the estate under

partition and, if one proprietor thinks that the Deputy Collector has over-estimated the rent of a particular tenant, then for the purposes of the partition he may have his say and the fact may be taken account of when the lands are divided up. Under Chap. VI, the Deputy Collector is not a person who is authorised to change or affect the status of a tenant. He has no power over the tenant's *jama* but he is to act as a person whose duty is to make a true record of the existing rights and to estimate truly for the purposes of a partition between the proprietors. If, therefore, the matter stops there, it is fairly plain that the mere entry of a tenant's *jama* in such a record would not, at any rate, have higher value than an entry in the record-of-rights under the Bengal Tenancy Act: it might not have as much but it would not have more. While this, therefore, is the *prima facie* position, the position is manifestly changed when, in the course of making the partition it becomes necessary to consider the exercise of the powers given by sec. 81. A Deputy Collector considering this question is not merely a person making a record. He is a person who, on certain conditions, is authorised not merely to record but to alter or affect the right of a tenant, to make an order that whereas up to this moment the tenant held so much land of a proprietor, now hereafter he shall hold such and such land of one proprietor and such and such land of another proprietor. I do not think that analogies from the Bengal Tenancy Act are anything but fallacious for the present purpose, but the kind of duty under sec. 81 is not so much analogous to the duty of revenue officer under the first part of Chap. X as to the duty of a revenue officer who is exercising the power

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to alter the right of a tenant given by the second part of Chap. X. No useful analogy, however, can be derived because under the second part of Chap. X there is not only provision for a suit before the revenue officer but there is ample provision for appeals to the Civil Court and under sec. 107 there is a definite enactment as regards finality.

Leaving aside all questions of mere analogy, we have to come to the position of the Deputy Collector under Chaps. VIII and IX of the Estates Partition Act, and to ask as to sec. 81 whether, if the enquiry which he makes is properly made but the conclusion of fact to which he comes is unfounded the tenant is entitled not merely to bring a suit to have it set aside but to treat it as null and void for all purposes and to take no notice of it. Now, under Chap. VIII, the Deputy Collector is ordered to be guided by the provision of Chap. IX: he is performing a task which is ordinarily the task of a Civil Court. When the statute comes to deal, in sec. 118, with the powers of officers with regard to false evidence, it speaks of "a Collector or other officer exercising jurisdiction under this Act" and it deals with him in language which is closely analogous to the language which one uses when dealing with a judicial officer acting judicially. There is a series of appeals provided for by Chap. X. There is also by sec. 106 (a) provision made that "if the directions of the Act are in substance and effect complied with, no proceedings thereunder shall be affected by reason of any mistake or informality unless any person has suffered or is in danger of suffering material injury in consequence." That provision certainly does not cover the present case but it is an indication of the nature of the duties which the Collector has to perform.

It appears to me that when under sec. 81 a Deputy Collector summons the tenants and proceeds to enquire into the necessity of splitting up a holding and to make an order that the tenure or holding be split up, he is acting, at all events, as a *quasi* judicial officer. An ordinary executive order proceeds upon the assumption that people's rights are readily ascertainable and does not purport or attempt to alter proprietary rights. An order under sec. 81 is not adequately described as being of that character. A Deputy Collector has to find out what the holdings are and he is given power to affect the proprietary rights not only of proprietors but upon due notice of tenants. If he were acting as an ordinary Civil Court, the consequence of any wrong finding of fact would have to be corrected either by review, revision or appeal. But if he is not a person making an executive order and is not functioning as an ordinary Civil Court but is functioning in a *quasi* judicial capacity as a special tribunal for certain purposes, then, upon the whole it seems to me that the distinction in the case of *Hriday Nath v. Ram Chandra* (3) must be taken and there is difference between the existence of jurisdiction and the exercise of jurisdiction. [See also *Krishna Kishore v. Amarnath* (4).] One has to look to the position created by the Act. Now, what is it? The question whether this large *jama* of Rs. 251 odd existed or not may well have made all the difference in the world to the partition effected in 1914. If the tenant makes no objection, what happens? What happens is that each of the proprietors is given a certain *jama* as his superior interest. If it is to

(3) I. L. R. 48 Cal. 138: s. c. [24 C. W. N. 723 (F. B.) (1920).]

(4) I. L. R. 47 Cal. 770, 781: s. c. 24 C. W. N. 633 (1920).

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be said that on a wrong finding of fact the order is a mere nullity then that partition may become a mere nullity; the whole basis of the partition may well be gone. In any case, as there is no saving such as is provided for by sec. 89 for other cases, one proprietor would be liable in the suit of another to have the partition ripped up again. If the order under sec. 81 is a mere nullity when I take it that a proprietor to whom a particular *jama* has not been given would still be entitled to insist upon his proprietary rights as a co-sharer in respect thereof. In a case like this where the error is merely an error in the ascertainment of the fact by the person whose duty it was to ascertain it and who did ascertain it correctly enough on the evidence before him, the consequences which flow from the idea that the order under sec. 81 is absolutely null and void, not needing even to be set aside, are certainly very alarming. It seems to me that the correct view is that on ordinary principles a suit in the Civil Court to set aside such an order would be necessary because it is an order which as between the proprietors certainly has some value in the circumstances of this case at least and which ought only to be set aside in the presence of all the proprietors, every one of whom is vitally interested in the matter. In short, if a tenant is allowed at any time—ten years later it may be—to take this point by mere defence in a rent suit under a system of procedure which does not recognize counter claims, and to take it in the presence of one only of the proprietors' party to the partition, the consequences are so manifestly impossible that the legislature in providing a scheme as it has done by Act V of 1897 cannot readily be supposed to have intended it. My opinion, therefore, is that while in such a

case as this, in a suit properly constituted and brought within whatever limitation period may be applicable the Plaintiff would on the facts found have a complete right to have the order made under sec. 81 set aside, yet on that footing, it is going too far to say that, that order is to be regarded as a mere nullity, so that, although, the tenants have had notice and although the landlords have had to act upon the order for a substantial time it can be ignored or set aside as against a single landlord in answer to a suit for rent. For these reasons, it appears to me that this appeal should be allowed, the judgment and decree of the Subordinate Judge should be set aside and those of the Munsif restored with costs.

PAGE, J.—I agree that the appeal should be allowed. Sec. 119 of the Estates Partition Act V (B. C.) of 1897 provides that certain orders under the Act "shall not be liable to be contested or set aside by suit in any Court or by any means other than those expressly provided in this Act." Sec. 119, in my opinion, does not confer a right to challenge an order under sec. 81. All it does is to exempt sec. 81 from the prohibitive provision of sec. 119. If a right is conferred upon an aggrieved person to challenge the decision of a Deputy Collector under sec. 81 it must be found elsewhere. I agree with what has fallen from my learned brother with respect to the scope and object of the Estates Partition Act, and, having regard to the view which he has expressed, and in which I concur, as to the object of the Act, I should expect to find in the Act some provision analogous to secs. 104J and 107 of the Bengal Tenancy Act making an order of the Deputy Collector under sec. 81 final and conclusive for all purposes or for such purposes as might be deemed to be fit and proper.

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But, so far as I can ascertain, there is no such provision in the Act and having regard to the provisions of sec. 119 it may be that the legislature intended that there should be some mode in which an order under sec. 81 should be challenged. I desire in this case to reserve my right to reconsider the question as to whether, if a tenant or other person is aggrieved by an order under sec. 81, he is entitled to challenge that decision otherwise than by the methods provided in the Estates Partition Act, because I agree with my learned brother in thinking that it is not open to a tenant, in any event, to challenge such an order by the mode which he has adopted in this case. If any right exists which entitles a tenant to challenge an order under sec. 81, in my opinion, it cannot be challenged by way of defence to a suit for rent in the absence of the other parties to the partition. If that were so, for the reasons given by my learned brother, Mr. Justice Rankin, the scheme of the Act would be or might be rendered nugatory. Therefore, in these proceedings, constituted as they are, in my opinion, it is not open to the Defendants to challenge the correctness of this order. Upon these grounds I agree that the appeal should be allowed with costs.

H. C. S.

Appeal allowed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

• No. 91 of 1922.

WALMSLEY, J.	}	JOLFA BIBI,
MUKERJI, J.		Plaintiff, Appellant,
1924,		v.
Heard,		AJALADDIN and ORS.,
10, April.		Defendants,
Judgment,		Respondents.
16, April.		

Partition suit—Partition for convenience of pos-

session irrespective of shares, if a bar to decree for partition.

A partition for convenience of possession by itself cannot stand in the way of a decree for partition so long as it is not found that it was in conformity with the shares of the respective parties.

This was an appeal admitted on the 31st March 1922 against a decree of the Officiating Subordinate Judge of Zillah Chittagong (Babu Kumud Nath Ray), dated the 14th of May 1921, modifying a decree of the Munsif at Patiya (Babu Upendra Chandra Majumdar), dated the 20th February 1920. • •

The facts of the case will appear from the judgment.

Babus Girija Prasanna Sanyal and Charu Chandra Sen for the Appellant.

Babu Narendra Coomar Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of a suit for partition instituted by the Plaintiff Jolfa Bibi to have her 3 as. 11-12/27 p. share in the lands of Sch. I and 10 as. 2 p. share in the lands of Sch. II of the plaint after partition by metes and bounds.

The Plaintiff's case was that one Pela Gazi left 3 sons, Baksha Ali, Kamar Ali and Safar Ali, that Baksha Ali predeceased his two brothers, that Defendants Nos. 1 to 8 are the descendants of Baksha Ali and Kamar Ali, that Safar Ali left a son Nijamat Ali, that Nijamat Ali died leaving a widow named Sabjan, a daughter (*viz.*, the Plaintiff) and a son who subsequently died leaving a widow, the Defendant No. 9, and a daughter, the Defendant No. 10, and that last of all Sabjan died. According to the Plaintiff the lands of Sch. I were owned by Pela Gazi,

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and those of Sch. II belonged to Nijamat Ali. Defendants Nos. 11 to 26 are said to have purchased portions of the lands from some of the aforesaid Defendants.

Of the Defendants only Nos. 1, 9, 10, 11, 12, 13, 16 and 18 filed written statements and the others did not appear in the suit. Of these again all gave up the contest except Nos. 1 and 18.

The main defence of the Defendant No. 1 was that the lands did not belong to Pela Gazi but to Baksha Ali, that Plaintiff's grand-father Safar Ali was not a son of Pela Gazi but of one Munshea, that Munshea purchased some lands of lots Nos. 1, 2 and 7 of Sch. I, that his two sons Chand Mia and Safar Ali were in possession thereof and as such the names of Makbul Ali (Chand Mia's son) and Nijamat Ali (Safar Ali's son) are to be found in the Khatians, but that the entries are not quite correct, and that in the lands of lot No. 2 of Sch. II, Nijamat Ali's vendor Jinnat Ali had no title.

The defence of the Defendant No. 18 was much on the same lines with that of the Defendant No. 1, and he further alleged that the Plaintiff was already in possession of her share in the lands that she had inherited from her father.

The learned Munsif gave the Plaintiff a decree declaring her right to the shares claimed and a decree for partition and mesne profits. He gave certain directions as to how the partition was to be effected without disturbing present possession as far as practicable and suggesting that equality of division was to be secured by awarding compensation if that was necessary.

Against this decree the Defendant No. 1 alone preferred an appeal, and he impleaded the Plaintiff alone as Respondent in that appeal. The learned Subordinate Judge allowed the appeal and dis-

missed the Plaintiff's suit in its entirety. He came to the findings that Safar Ali was a son of Pela Gazi, that lots Nos. 1 to 5 of Sch. I belonged not to Pela Gazi but to Baksha Ali, that Nijamat Ali's vendor Jinnat Ali had no title to the lands of lot No. 2 of Sch. II; and as a result of these findings he came to the conclusion that Safar Ali inherited 1/6th share in lots Nos. 1 to 5 of Sch. I, and Nijamat Ali had 1/3rd share in lots Nos. 6, 7, 7 (*ka*) and 7 (*kha*) of Sch. I and lot No. 1 of Sch. II.

Apart from anything else it is difficult to appreciate on what materials this distinction is made between the properties acquired by Baksha Ali and those acquired by Nijamat Ali; at any rate none are disclosed in the judgment of the learned Subordinate Judge.

The learned Subordinate Judge then proceeds to observe that "the Plaintiff's title is hence found to her legal share in the said lots of the said schedules." What he means by this is not clear, whether the shares claimed by her, which could not be correct in view of the finding that lots Nos. 1 to 5 of Sch. I were the properties not of Pela Gazi but of Baksha Ali or shares which she was entitled to under the Mahomedan law on the footing of the findings of fact referred to above.

The learned Subordinate Judge has found that there was some sort of partition for convenience of possession. He has not found that any of the parties acquired any right by adverse possession; on the other hand, his findings as they stand suggest the contrary. A partition for convenience of possession such as has been found by the learned Subordinate Judge does not appear to have been suggested in the pleadings of the contesting Defendants; in any case, that by itself

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cannot stand in the way of a decree for partition so long as it is not found that it was in conformity with the shares of the respective parties. It is unnecessary to refer in detail to the other findings, for instance, as to some of the dāgs being in the possession of strangers and as to the Plaintiff not having been really dispossessed of her paternal lands, and as to other matters, for they are too obscure and indefinite.

I have carefully considered the pleadings in this case and have also analysed the findings of the two Courts below and while on the one hand the judgment of the Court of first instance is not altogether free from comment that of the Court of Appeal below, to say the least of it, is not less unsatisfactory.

The case must therefore go back to the lower Appellate Court so that the appeal of the Defendant No. 1 to that Court may be dealt with afresh and disposed of in accordance with law.

Costs to abide the result.

Before parting with the case I only wish to add that it is desirable that every effort should be made to dispose of the appeal as early as possible.

WALMSLEY, J.—I agree.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

DEATH REF. No. 13

AND

APPS. NOS. 583 AND 584 OF 1924.

NEWBOULD, J.	} THE KING-EMPEROR
MUKERJI, J.	
1924,	
1, December.	
	v.
	ALIMUDDI NASKAR and
	anr., Accused.

Criminal Procedure Code (Act V of 1898), sec. 342, cl. (1), 2nd part—Nature of questions that must be put to the accused—Insufficient examination of accused, effect of.

Per NEWBOULD, J.—A formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of sec. 342, Cr. P. C., since it enables the accused to explain any circumstance appearing in the evidence against him. To what extent the Court when complying with the mandatory provisions of the section should also exercise its discretionary powers under the other provisions of the section is a different question. The exercise of this discretion must vary with and depend on the circumstances of each particular case but in the majority of cases it is neither necessary nor desirable that there should be any detailed questioning of the accused.

** MUKERJI, J.—In questioning the accused under sec. 342, Cr. P. C., the Court must point out to the accused the salient points appearing in the evidence against him in a succinct form and he must be asked to explain them if he wishes to do so. If on a general question as to whether he wishes to say anything, being put the accused answers in the negative it will be no use asking him any further questions. If on the other hand it does not appear that he would refuse to answer questions put to him or it appears that he desires to respond, his attention should be called to the salient points appearing against him so that an opportunity is really afforded to him to explain them if he can do so. In such examination every precaution should be taken not to entrap him to make incriminating answers, and all questions in the nature of cross-examination should be avoided.*

'A refusal to give the accused an opportunity to make a statement at a stage

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when the mandatory part of sec. 342, Cr. P. C., is operative vitiates the trial, but an insufficient examination at that stage does not necessarily invalidate it.

This was a Reference under sec. 374, Cr. P. C., made by the Additional Sessions Judge of 24-Parganas, for confirmation of sentence of death passed by him on the Appellants on 20th September 1924. The accused also preferred an appeal against the said sentence.

The facts of the case will appear from the judgment.

Babu Debendra Narain Bhattacharji for the Accused.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—Alimuddi Naskar, Belatali Naskar, Amir Naskar, Boynuddi Naskar, Farazali Naskar, Golam alias Golap Naskar and Dudali Molla were tried by the Second Additional Sessions Judge of 24-Parganas with the aid of a Jury. All of them were tried on a charge under sec. 302/120B, I. P. C., for having conspired to commit the offence of murder of one Momrej Boddy and other members of his family, and Belatali Naskar was tried also on a charge under sec. 302, I. P. C., for committing the offence of murder by causing the death of one Entaz Boddy, a son of the said Momrej Boddy. The Jury brought in a unanimous verdict of guilty on both the charges; and the learned Judge, agreeing with and accepting the verdict, convicted all the accused persons in accordance therewith and sentenced Alimuddi Naskar and Belatali Naskar to death, and the others to transportation for life. The cases of Alimuddi Naskar and Belatali Naskar

are before us on a reference made by the learned Judge under sec. 374, Cr. P. C., as well as on appeals preferred by them.

The facts of the case are fully set out in the learned Judge's charge to the Jury and the occurrence in all its gruesome details is graphically portrayed therein. A bare outline of the main features of the case, however, is necessary in order to visualize the evidence that is on the record.

In village Daria, within the jurisdiction of P. S. Canning in the District of 24-Parganas, there lived two families the Boddys and the Naskars. Of the seven accused persons named above, the first six are brothers and belong to the family of the Naskars, and the one named last is their servant. The victims of the alleged conspiracy were the members of the family of the Boddys. The homestead of the Boddys was enclosed by a compound wall with two entrances, one on the north-west and the other on the east, and consisted of a number of thatched huts, a kitchen, some sheds for the poultry and several *golas* or granaries; and just outside the compound and to the south-east of it there was a *khankaghur*. To the south-west of the said homestead and separated from it by a big tank were the houses of the Naskars.

On the night of Monday, the 7th January 1924, at about midnight or shortly thereafter, took place the occurrence out of which the present case has arisen. At that time the five dwelling huts in the homestead of the Boddys were occupied thus: In the western one of the two huts on the north were Momrej Boddy, his two wives Chandra Bibi and Dasa Bibi, one of whom was pregnant, his sons Javed Ali, Safed Ali and Yunus and his grandson (son of his eldest son Entaz) Jiadali, the ages of the four boys varying from ten years to two years and a half. On the

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verandah of that hut slept one Baburali Boddy. In the other hut on the north, there were Momrej's mother Bibijan, a son of Momrej named Esharali and his wife Maurjan. In the hut that stood on the west of the homestead there was Entaz Boddy doing some accounts, and his wife Jasimon Bibi was sitting near him preparing betel and smoke for him; and there was also an infant girl of theirs sleeping. The hut to the south which used to be occupied by another son of Momrej named Momtaz and who on that particular night is alleged to have been away at Basanti Abad, was occupied by one Sarafat Naskar, a nephew of Momrej. In the hut on the east there lived one Saria Bibi who was a relation of Momrej, but with her, it is said Momrej was not on very good terms. In her hut were one Kanch Ali and a servant Nasarali. In the *khahkaghur* just outside the compound and to the south-east of it there were two Mohamedan and four Uriya servants who used to guard Momrej's paddy in the *khamar*.

The prosecution case, shortly stated, was that suddenly the huts were set fire to, the exits from some of them being barred by chaining them up from outside, or closing them from outside with iron clamps, and the stamps of feet of several persons were heard as also loud sound of blows on the doors of the huts of Momrej and Entaz. Entaz called out that there were men on the *daba*: the reply was received that their *jamas* (messengers of death) had come. Entaz entreated that their lives might be saved, but he was told in reply that it was not their money but their lives that were wanted. Entaz stepped out with a gun which he had in the hut, after forcing open the door; but while yet on the threshold the gun was snatched away from him, he was speared in the leg, and he

fell on the courtyard. He tried to crawl and get up, but was pressed down, and notwithstanding the entreaties of his wife Jasimon Bibi was cut on the neck with a *dag* and killed, his head being almost severed from his body. Jasimon Bibi made entreaties to be allowed to reach her son who was in Momrej's hut and was shrieking out for her but was prevented and threatened, and with the child in her arms she ran to the house of a neighbour. Bibijan Bibi succeeding in forcing open the door of the hut in which she was, and on her saying that she had recognized all the accused and that there would be retribution the next day, she was shot dead. Esharali and Maurjan Bibi managed providentially to escape. Sarafat failing to open the door of the hut he was in, made an opening to the thatch and got out through the same. The villagers who came to the spot on hearing the noise of the crackling flames or the reports of guns which were being fired or on seeing the blaze or hearing the cries of others, were scared away.

The whole homestead of the Boddys with the exception of the *khankaghur* was reduced to ashes. Those who arrived in the early hours of the morning found only ashes or burnt or molten materials there. In Momrej's hut close to the door were seven charred dead bodies lying in a heap; there were the four boys, the sons and grandson of Momrej, over them lay the two wives, and over them all lay Momrej himself. Entaz's dead body was lying near the threshold partly burnt and his head almost severed from the body. Bibijan was lying dead on the *verandah* of her hut with her entrails out and blood flowing from the *verandah* into the yard. The hut in which Saria Bibi used to live was also burnt down, but her property was pre-

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served being kept on a *machan* near a tank and even her poultry was saved.

The motive alleged for the crime is bitter ill-feeling which is said to exist between the families of the Boddys and the Naskars. This enmity is not disputed, and on the other hand is relied upon by the defence as a motive for falsely implicating the accused persons. It would appear upon the evidence that the two families are related to each other, and up till about four years before the occurrence good relations and amity subsisted between them. As deposed to by P. W. 9 Aynaddi Naskar whose house is on the west side of the homestead of the Boddys with a path intervening, the quarrel between the two families arose over a small plot of land which belonged to the witness' uncle. The land adjoins the homestead of the Naskars. It was mortgaged to Entaz, but was subsequently sold for arrears of rent and purchased by Alimuddi Naskar in the name of his wife. Momrej took up the cause of the witness' aunt, helped her with advice and money, got her to institute a suit for setting aside the sale and himself looked after the litigation on her behalf. From the evidence of P. W. 24, the President *Panchayet*, P. W. 46, Assistant Sub-Inspector Basanta Kumar Singh, P. W. 47 Sub-Inspector Razai Robbani and P. W. 48 Sub-Inspector Sashi Bhusan Rai and the papers produced by P. W. 38 the Record-keeper of the Magistrate's Court at Alipur as also other documents proved in the case, it appears that this quarrel led to a series of incidents and cases between the parties. On the 25th November 1920, when the aforesaid suit was pending Momrej was shot with a gun. In consequence of this occurrence Belatali Naskar and another person were ar-

rested but a final report was eventually submitted by the police on the 25th January, 1921. On the 1st February 1921, Momrej was shot again, this time in his house. For this Alimuddi Naskar was sent up, tried in the Court of Sessions but acquitted on the 24th August 1921. On the 30th May 1922, Alimuddi Naskar was attacked and brutally wounded, receiving no less than 22 injuries on his person. Entaz and two others were tried by the Court of Sessions for this offence, but were acquitted on the 25th April 1923. When this case was pending, on the 2nd June 1922, Amr Naskar lodged an information that Esharali Boddy and Mountaz Boddy had assaulted him with knives, but they were not sent up for trial. The prosecution case is that the Boddys were nursing a grudge against the Naskars in consequence of these events and were not unreasonably cherishing in their minds a feeling of dependency begotten of an idea that recourse to law would yield no satisfactory result, and that this conspiracy was hatched to redress the wrongs done to them and put an end to the source of their troubles. The defence on the other hand urges that there is nothing on the record suggesting any fresh quarrel after April 1923, and that it is not likely that after such a long period as had elapsed since then, the old grievances would burst out. There is, however, some evidence on the record that the Naskars used to threaten the Boddys even during this period; but whether we take that evidence to be literally true or not, for it must be admitted that that evidence is not sufficiently specific, it is abundantly clear that the Boddys were mortally in terror of their enemies, whoever they were, for they fitted corrugated iron sheets against the walls and windows of their huts, removed

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the rings that were on the doors on their outside, and kept guards in the house for the nights. The defence contends that the Boddys had other enemies as well. That is undoubtedly so, for it appears that they had litigation with their zemindar, one Radhika Mohan Roy, and during the police investigation into the occurrence a village doctor named Jatin Chakravarti and also Saria Bibi were suspected and arrested. It may be that there were reasons for the suspicion; and indeed so far at least as Saria Bibi is concerned, the treatment accorded to her properties was suspiciously preferential. The whole question, however, is this: Whether the state of feeling between the Boddys and the Naskars was such as might induce the latter to commit the offences they are alleged to have committed; and on a careful consideration of the facts and circumstances connected with the different incidents that transpired, I find myself unable to answer this question in the negative. This, in my opinion, is sufficient for our present purposes.

The main facts of the occurrence have been deposed to by a very large number of witnesses who, for the sake of convenience, may be classified into three groups, viz., the inmates of the homestead who survived or managed to escape, the villagers who came to the spot at the time when the huts were on fire, and the persons who came there after the occurrence was over and could only see the condition of things as it was when they came.

[After discussing the evidence and the arguments relating to it the judgment proceeds as follows.]

There remain now for consideration a few other arguments that have been put forward on behalf of the defence.

Objection has been taken to the ad-

missibility of the statement contained in the first information to the effect that Alimuddi was a C. T. convict. It is said that this statement is inadmissible in evidence as being evidence of bad character of the accused and should not have been let in, but should have been expressly excluded when the first information was proved in evidence; and that in any event, the learned Judge should have directed the Jury to leave it out of consideration or to use it only for the limited purpose for which the defence used it in the cross-examination of the Chowkidar P. W. 16. Now, the expression used in the first information is "C. T. *Dagi*." It is not very clear whether by it was meant that Alimuddi was a convict or that he was merely a member of a Criminal Tribe and so came under the purview of the Criminal Tribes Act and was thus a *dagi* in the sense of a branded person who is looked up by the police during nights. If used in the latter sense, it would not necessarily imply that he himself was of bad character. Be that what it may, the first information was proved in evidence during the examination-in-chief of the Chowkidar and was presumably read out to the Jury. In cross-examination, the defence made the fact clear and evidently relied upon it as would appear from the following answer of the witnesses:— "Alimuddi is a C. T. Act *dagi*. I used to look him up every night, but on the night of the occurrence, I did not look him up." After this cross-examination I do not think the learned Judge need have given any special directions in this matter, and in any event, I have no reason to think that, in this case, this statement in the first information affected the verdict of the Jury in a way prejudicially to the accused.

It has been argued that believing all

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the evidence as to the occurrence the case would not go beyond a conspiracy to commit the offence of culpable homicide, and that it has not been proved that the object of the conspirators was to commit murder. This argument overlooks some very important circumstances which appear in the case. It is quite clear even discarding the theory of the prosecution "as to the clamps having been put on the doors of Momrej and Entaz that the egress of the inmates out of the said two huts was barred, and Entaz when he got out and even after the gun was snatched away from him and he was powerless, was killed, and the position of the seven dead bodies in Momrej's hut indicated not confusion but deliberation due to despair on the part of inmates when they had failed to get out after making all possible endeavours for the purpose. There is also the fact that Jasimon was prevented from rendering assistance to her son who was in Momrej's hut, and that the chains of the door of the hut in which Sarafat was at the time were put up to prevent his exit. These facts to my mind conclusively prove that the intention of the conspirators was to burn the inmates to death and that is nothing less than the offence of murder.

Lastly, it has been contended that there has been no adequate examination of the accused under the mandatory provisions of sec. 342, Cr. P. C. The matter is one of considerable importance and is constantly coming up before the Court and I desire to deal with it here.

Sec. 342, sub-sec. (1) is divided into two parts. The opening words of the sub-section "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" governs both the clauses that follow. It

is with the latter clause, which is mandatory, with which we are concerned here. Reading the aforesaid words into this clause in the place of the words "for the purpose aforesaid" the clause would run thus:—"The Court shall for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." The precise question for consideration is what is the nature of this questioning that the legislature had in view.

Under Act XXV of 1861 and Act VIII of 1869 the examination of the accused person was discretionary with the Court. Sec. 202 of Act XXV of 1861 which appeared in the Chapter headed "On preliminary enquiry by the Magistrate in cases triable by the Court of Session" ran thus:—"It shall be in the discretion of the Magistrate, from time to time, at any stage of the enquiry to examine the accused person, and to put questions to him as he may consider necessary. It shall be in the option of the accused person to answer any such question." Sec. 373 of Act XXV of 1861 which was in the Chapter headed "Trial before the Court of Session" ran thus:—"The Court, at the close of the evidence on behalf of the accused person, if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person, which it may think proper. It shall be in the option of the accused person to answer such question." In Act VIII of 1869 a slight variation was made. Sec. 203 of the earlier Act being left untouched and sec. 373, being altered as follows:—"The Court at the close of the case for the prosecution and at the close of the evi-

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dence on behalf of the accused person (if he produces any evidence), may put any question to the accused person which it may think proper. It shall be in the option of the accused person to answer such questions, and after such questions shall have been answered by the accused person, he or his Counsel or agent may address the Court on the subject thereof."

A new section, namely, sec. 262A was also introduced which provided that the Magistrate might examine the accused person subject to the provisions of secs. 202, 203, 204 and 205. The discretion thus vested in Courts was often not exercised and this led to the following instructions being issued by this Court by a letter, dated 28th July 1864: "Although the Code of Criminal Procedure does not make it imperative on a Magistrate to examine an accused person at any stage of the enquiry before committing him to stand his trial at the Court of Session, the Court thinks it necessary to impress upon all Magistrates the expediency of the general adoption of this course at some stage or other of the enquiry. In these few and exceptional cases, in which the guilt of an accused may be beyond reasonable doubt, the practice in force may be permitted without risk: but inasmuch as it is discretionary with a Magistrate to discharge or commit an accused person, according as he finds that the evidence is, in his opinion, sufficient for his conviction by the Court of Session or otherwise, it is obvious that the truth of any ordinary case will be best elicited and obscure points will be cleared away by any explanation that the accused may wish to give, when, after hearing all the evidence against him or at any time in the discretion of the Magistrate he may be subjected to an examination before the Magistrate on points requiring elucidation,

it being clearly explained to the accused that it is his option to answer such questions or not. The Court, however, desires to explain that in issuing these directions, it in no way sanctions any proceedings of an inquisitional nature." The italics in the above extract are mine. It is clear upon the words used that the examination was to be on points requiring elucidation, was not to be of an inquisitorial nature, and the object aimed at was to elicit the truth by enabling the accused to explain matters and also clearing up obscure points by means of such explanations.

Then came Act X of 1872 in which the discretionary nature of the examination was retained so far as enquiries into cases triable exclusively by the Court of Sessions were concerned, and in the trial of those cases the examination was also made compulsory, and a provision was introduced allowing a discretion in Courts for the examination of accused persons in all other enquiries and trials. The relevant sections in that Act were as follows:—

Sec. 193 in the Chapter "Of enquiry into cases triable by the Court of Session or High Court" ran thus:—"The Magistrate may, from time to time, at any stage of the inquiry and without previously warning the accused person, examine him and put such questions to him as he considers necessary. The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal." To this there was an explanation in these words:—"The answers given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials

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for any other offences which his replies may tend to shew he has committed."

Sec. 214 in the Chapter "On the trial of warrant cases by Magistrates" made the provisions of sec. 193 to apply to trials conducted under that Chapter.

Sec. 250 in the Chapter headed "Trial by Court of Session" ran in these words:—"The Court may, from time to time at any stage of the trial, examine the accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

Sec. 342 in the Chapter headed "Evidence how taken" was in these words:—"In all inquiries and trials a Criminal Court may, from time to time, and at any stage of the proceedings, put any questions to the accused person which such Court may think proper."

Sec. 343 ran thus:—"The accused person shall not be liable for any punishment for refusing to answer or for answering falsely questions asked under sec. 342, but the Court shall draw such inferences as seem just from such refusal."

The above was the law introduced by Act X of 1872. To say the least the wording of the Statute was dangerously wide. For some time it went on being administered in the Courts producing all the consequences that the departure from the general policy of the English criminal law was bound to bring on and more than fulfilled the expectations embodied in the view of Sir George Campbell as contained in his reported speech on the Bill. He is reported to have said as follows:—

"Not only were those provisions (meaning the rules of English law) now unnecessary in England but they are specially out of place in a country where it was not pretended that the subject enjoyed that liberty which is the birth-right

of an Englishman: and it was not intended to introduce rules into the criminal law which were designed with the object of securing the liberties of the people. That being so, His Honour thought that they might fairly get rid of some of the rules the object of which was to secure for the people that jealous protection which the English law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any Code of fair play, but that their object should be to get at the truth, and anything which would elicit the truth was regarded to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty. That being so, he would say that he had no sympathy whatever for those things which his honourable friend Mr. Stephen had called superstitions. For instance, His Honour did not see why they should not get a man to implicate himself if they could: why they should not do all they could to get the truth from him; why they should not cross-question him, and adopt every other means short of absolute torture, to get at the truth." The way in which the law was administered was fraught with dangerous consequences and was found unsuitable in course of time and the different High Courts laid down a series of rulings in which it was held that the power that the law gave should be used to ascertain from the accused how he can explain the facts adduced in evidence against him and not to drive or entrap him into making self-incriminating statements, and it was enjoined that questions must not be put to the prisoner when there was nothing against him on the evidence adduced by the prosecution or in the middle of the case for the prosecution, so as to make out a case against the accused when there was none or so

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as to supplement the case for the prosecution when it was defective. These series of rulings made it necessary to amend the law when the Code was revised in 1882. In the amendment made by Act X of 1882 the provisions relating to the examination of an accused person, which were scattered in different chapters in the previous Acts were removed from those chapters and brought under the chapter headed "general provisions relating to inquiries and trials." One noticeable alteration was made by the addition of the words "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him;" another was the substitution of the word "may" for the word "shall" as regards the drawing of inference against the accused: and there were other changes made as well. The result of the amendment was to frame the scattered provisions into one comprehensive section, *i.e.*, sec. 342 of Act X of 1882 and it has retained its shape in Act V of 1898 and has not been affected by the amending Acts of 1923. The object of the amendment is stated in the following extract from the Report of the Select Committee on the Bill of 1882: "We think that the present law gives too great a latitude to the Courts with regard to the examination of an accused person. The object of such an examination is to give the accused an opportunity of explaining any circumstances which may tend to criminate him, and thus to enable the Court, in cases where the accused is undefended, to examine the witnesses in his interest. It was never intended that the Court should examine the accused with a view to elicit from him some statement which will lead to his conviction. We have therefore limited the power of interrogating the

accused by adding to the first paragraph the words, 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' We think the accused should always have this opportunity of explaining and we have, therefore, required the Court to question him generally for the purpose before he enters on his defence."

The section as it stands is undoubtedly for the benefit of the accused, the provisions embodied in it enable him to explain the circumstances appearing against him in the evidence. I cannot, however, concur in the view that it is intended merely for his benefit. It is a part of a system for enabling the Court to discover the truth and it constantly happens that the accused's explanation or his failure to explain, is the most incriminating circumstances against him. The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him; it may, however, be injurious to him if no explanation or a false or unsatisfactory explanation is given. These conclusions, to my mind, follow from the words "without previously warning the accused" which appear in the first part of sub-sec. (1) and the provision as to the drawing of inference contained in sub-sec. (2). If that be the intention of the legislature, as I have no doubt it is upon the words of this section, it inevitably follows that the Court should not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation, but that it must out of fairness to the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against him.

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To this interpretation three main objections are suggested. It is said that the expression "question him generally" indicates, as contradistinguished from the expression "put such questions to him as the Court considers necessary," that the points need not be put to the accused but a general question will suffice. In my opinion the word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it. It will be seen that the word "generally" appeared in sec. 250 of Act X of 1872 when the intention of the legislature was quite clear as to why they were departing from the English rules or procedure. There is no foundation for the argument that the word "generally" was put in out of solicitude for the accused with a view to protect him against a detailed examination by the Court; and indeed when a detailed examination is permissible under the first part of the section, even without previously warning the accused there is no reason why it should not have been intended in the latter part as well. A second argument relates to the provision enabling the Court and the jury, if any, to draw an inference. It is contended that the expression "circumstances appearing in the evidence" means those that appear to the accused, and it is urged that there is no point in requiring the Court to point out to the accused what appears to it as calling for explanation, for in a trial with the jury, the jury will also be entitled to draw inferences against the accused if the circumstances are not explained, and it is asked how can a Judge be expected to put to the accused what

circumstances are weighing in the mind of the jury. At first sight, this seems to be a difficulty, but it will be observed that, sub-sec. (2) provides for inference being drawn from the refusal to answer the questions and also from the answers given to the questions themselves and not from the omission to explain the circumstances. The Court can always frame questions dealing with such salient points in the case as in its opinion call for explanation. Lastly, it is argued that it will be extremely difficult to frame questions such as would not elicit incriminating answers or be questions of a catching nature. To this the answer is that the incompetency of a tribunal in administering the law or the difficulty in administering it is no ground for whittling down its provisions. Besides, I do not see why it would not be possible to put before the accused the salient facts and circumstances as there appear in the evidence against him and ask if he has any explanation to offer.

There is scarcely any reported decision which directly bears upon the question of sufficiency of an examination under the mandatory provisions of sec. 342, Cr. P. C. There are three unreported decisions of this Court to which I shall presently refer. In *Rez. Mahamud v. The Emperor** where it appeared that the question put to the accused was "what is your defence?" It was argued that the question was not of the nature contemplated by the section. This Court (Newbould and Chakravarti, JJ.), refused to follow the decision of a single Judge of the Patna High Court in the case of *Bhokari Singh v. The King-Emperor* (1) and held that the question was sufficient. In

(1) [1924] Pat. 198.

* Cr. Rev. No. 237 of 1924, decided on 24th June 1924. Unreported.

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Criminal Revision No. 182 of 1923 decided by this Court on the 19th December 1923, the question put to the accused was "what is your defence?" In that case Greaves, J. (Panton, J., concurring) observed as follows:—"I think there is no doubt that the proper method under sec. 342, Cr. P. C., is to put at the close of the prosecution case and before the accused enter on their defence shortly and succinctly the main points which appear upon the prosecution evidence bearing against the accused. But what we have got to consider in this case is whether what has been done is sufficient compliance with sec. 342 or whether sec. 342 has been complied with.

"We do not for a moment suggest that the course adopted here is a desirable course and we think that the Magistrate should have followed the course which I have already indicated. But we are not prepared to interfere in the present case on the ground that sec. 342 has not been complied with, for all the accused had an opportunity of stating what their defence was upon the evidence as given, and it was open to them to do, as they have done, and instead of answering the general questions put to them to rely on the written statement for the purpose of meeting the case for the prosecution." In Criminal Appeal No. 547 of 1923 decided by this Court on the 15th January 1924, the accused had been asked if they desired to make any further statement to what they had done before the Committing Magistrate and they refused to do so. Greaves and Panton, JJ., observed thus in their judgment in that case:—"Now, we have had occasions to point out more than once that the proper method of applying sec. 342 is to bring to the attention of the accused specific matters which appear in the evidence

against them and that merely questioning them generally as to whether they have anything to say or to add to what was said before the Committing Magistrate is not a satisfactory method of applying sec. 342 and we hope that the Courts in future will bear this in mind when the time comes to question the accused under the provisions of sec. 342, but we are not prepared to say that what was done in this case necessitates a new trial."

As I have said there is no reported decision in which the question directly arose for consideration but there are a series of cases in which the section has been interpreted by the different Courts which have had occasion to administer it, and though most of these decisions are not to be treated as binding on us, it is not undesirable to refer to them as they throw some light on the question. In the case of *Hossein Buksh v. The Empress* (2) in dealing with sec. 250 of Act X of 1870 quoted above Prinsep, J., observed (Morris, J., concurring) that the real object in the power given to the Court was to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged. In the case of *Queen-Empress v. Hargobind Singh* (3), Sir John Edge, C. J., and Tyrell and Knox, JJ., observed that it required no knowledge of law to understand the section and to understand that it is not for the purpose of ascertaining what witnesses the accused intends to call, or what evidence they will give or what his defence is, that a Court is justified or authorised in examining an accused under that section. In the case of

(2) I. L. R. 6 Cal. 96 at p. 102 (1880).

(3) I. L. R. 14 All. 242 at p. 253 (1892).

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Raghu Bhumij v. Emperor (4) Sultan Ahmed, J., observed thus: "The real object of the latter part of sec. 342, cl. (1) is to ascertain from the prisoner how he can meet what the Judge may consider to be damnatory evidence against him." The same view has been taken by a later decision of the same Court in the case of *Bhokari Singh v. The King-Emperor* (1) in which Kulwant Sahay, J., observed that it was compulsory for the Court under sec. 342, to question the accused in such a way as to enable him to explain any circumstances which appear in the evidence against him. It was held in that case that the mere asking the accused as to whether he has anything further to say is not a sufficient compliance with the second part of the section, and that the questions must be framed in such a way as to enable the accused to know what he is to explain and as to what are the circumstances against him and for which an explanation is needed. In another case of the same Court, namely, the case of *Panchu Choudhuri v. Emperor* (5) in which the Committing Magistrate had put a specific question to the accused as to whether he had committed the offence and the accused answered in the negative, and then in the trial Court he was asked whether he wished to add anything to the statement which he had made before the Committing Magistrate, Bucknill, J., observed as follows:—"It can easily be seen that if it is to be said that a judicial officer must ask this or that question or this or that series of questions under the provisions of section 342, Cr. P. C., the practical effect of the working

of that section could be criticised in revisional applications on every possible occasion. I can well understand that where an accused is undefended the tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation; but where an accused is defended by a legal practitioner, it would, I think, be altogether impossible to expect or desirable to contemplate a tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into, what would be far worse, some sort of cross-examination." With all deference to the learned Judge, I should observe that this distinction between a defended and an undefended case ignores the object of the section itself which has been so forcibly pointed out by Rankin, J., in his judgment in the case of *Promotho Nath Mukhopadhyay v. King-Emperor* (6) that this examination is a matter entirely between the accused and the Court, and that the legal advisers do not come in or count in this examination at all. In another case of the same Court, namely, that of *Fatu Santal v. Emperor* (7) Sir Dawson-Miller, C. J., and Adami, J., observed as follows:—"In the present case, it does not appear that any question whatever was asked of him or that his attention was directed to any portion of the evidence which might appear to call for an explanation and in these circumstances it seems to us that the trial was entirely irregular and that the verdict cannot stand." In this case, the accused had been examined by the Committing Magistrate, but there was no examination by the trial Judge. The Lahore High Court in the recent case of

(1) [1924] Pat. 198.

(4) 5 P. L. J. 430; 21 Cr. L. J. 705 at p. 709 (1920).

(5) 23 Cr. L. J. 233 (1921).

(6) 27 C. W. N. 389 at p. 406 (1923).

(7) 6 P. L. J. 147; 22 Cr. L. J. 417 (1921).

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Harnam Singh v. Emperor (8) had to deal with the effect of non-examination of the accused when he filed a written statement and declined, when asked, to add anything to it. Broadway, J., while holding that the omission was not fatal, observed as follows: "Although it would have been better for the Magistrate to have put definite questions to the Appellants, I am unable to hold that the procedure adopted in the case was so illegal as to vitiate the whole trial." In the case of *In re Basrur Venkata Row* (9) of the Madras High Court, Spencer, J., dealing with a letter from which an inference adverse to the accused was drawn by the Court, observed as follows: "If it was intended to treat this letter as a circumstance appearing against the 1st accused and to draw inference from it against him, it would have been a fair and natural procedure for the Judge, in the exercise of the power which he had under secs. 342 and 289, Cr. P. C., to examine the accused about it and put such questions as would enable him to explain its significance. As it was, he was asked no question and he made no statement relative to the document." The precise point came up for consideration in a case in the Central Provinces, where the procedure seems to be well-settled, in the case of *Mussammat Tani v. Emperor* (10) in which Batten, A. J. C. and Kotwal, J. C., following an earlier decision of the Nagpur Judicial Commissioners' Court *Emperor v. Katay Kisan* (11) held that the object of sec. 342, Cr. P. C., is (1) to communicate to the accused to the full extent what may be found necessary in each particular case, what is alleged against him in the

evidence for the prosecution, and (2) to ascertain from him what explanation or defence in law or in fact, he wishes to put forward in respect thereof. It was expressly laid down by the Court that it is necessary that the attention of the accused should be drawn to all the vital parts of the evidence against him and that it was not a sufficient compliance with the provisions to ask the accused the general question, "Have you anything more to say in this case?" or "You have heard the prosecution witnesses against you: what have to say?" I have not been able to find any opinion of the Bombay High Court in this matter, but specimens of examinations that are to be found in some of the reported cases point to a detailed examination being the practice that obtains in that Presidency. In one of the cases in that Court, *viz.*, *Basappa Ningapa v. Emperor* (12), Hayward, J., characterised the examination of the accused person held by the Committing Magistrate as perfunctory, indicating that something more than a general question is necessary and observed that the law requires that an opportunity shall be given to the accused himself to explain and not that this important step in the procedure should be left to his pleader. The same view has been endorsed by the Courts in Burmah. In the Court of the Judicial Commissioner of Upper Burmah, Rigg, J. C., in the case of *Nga San Nyein v. Emperor* (13) held that the object of examining an accused person is to afford him an opportunity of explaining away evidence against him, that each point appearing in evidence should be put to him and he should be invited to offer his explanation or comment on it, anything in the nature of cross-examination being avoided. The

(8) 22 Cr. L. J. 276 (1921).

(9) 13 Cr. L. J. 226 at p. 232 (1911).

(10) 20 Cr. L. J. 12 (1918).

(11) 17 C. P. L. R. 118.

(12) 17 Bom. L. R. 592; 16 Cr. L. J. 765 (1915).

(13) 3 U. B. R. (1917) 2, 13 Cr. L. J. 773 (1917).

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Burmah High Court, in the case of *Maung Hman v. Emperor* (14), had to deal with this question very recently and May Oung, J., held in that case that a Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point, otherwise it will be impossible for the accused to know what is in the Court's mind and he cannot be reasonably expected to explain it, and that it is not sufficient to put a general question to the accused such as, "What have you to say regarding the statement of the complainant's witnesses."

In the present case, Alimuddi Naskar was asked by the Committing Magistrate, "What is your defence?" He replied, "I am innocent, what I have to say I shall say in the Sessions Court." In the Court of Sessions the said statement was read to him and he was then asked, "Do you wish to say anything more?" He then made a statement. Belatali Naskar was put the same question in the Committing Magistrate's Court and he gave the same reply as Alimuddi Naskar. He was asked by the Judge the same question that was put to Alimuddi Naskar and he then made a statement. I am of opinion that the examination of the two accused persons was perfunctory and not a sufficient compliance with the provisions of the law. In my opinion the law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so. It may be that when a general question as to whether he wishes to say anything is asked, he will reply in the negative. If he does so, it will be no use asking him any further questions. If,

(14) 25 Cr. L. J. 486 (1924).

on the other hand, it does not appear that he would refuse to answer questions put to him, or it appears that he desires to respond, his attention should be called to the salient points appearing against him, so that an opportunity is really afforded to him to explain them, if he can do so. In such examination every precaution should be taken not to entrap him to make incriminating answers and all questions in the nature of cross-examination should be avoided. In my opinion it is not impracticable to conduct the examination in the manner indicated above.

Though the examinations of the accused persons have not been adequate, the statements made by them indicate that they were not altogether ignorant of some of the salient points appearing in the evidence against them. Alimuddi endeavoured to explain that he had no motive, that he was not concerned in the earlier incidents, that the Naskars were named as accused out of enmity and that at a subsequent stage, and that the prosecution witnesses were relations and servants of Momrej. He also wanted to create an appearance in his favour by stating that the Naskars spent the whole day after the night of the occurrence at the spot but none named them then. Belatali stated that he was absent from the village and was falsely implicated. In the present case I am unable to hold that there has been any prejudice to the accused persons. A refusal to give the accused an opportunity to make a statement at a stage when the mandatory part of sec. 342, Cr. P. C., is operative vitiates the trial, but an insufficient examination at that stage does not necessarily invalidate it.

For the above reasons, I am of opinion that the two accused persons have been rightly convicted. I accordingly uphold the conviction of Alimuddi Naskar and

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Belat Naskar under sec. 302/120B, I. P. C., and also the conviction of Belat Naskar under sec. 302, I. P. C.

As to the sentences, giving the matter my most anxious consideration and taking into account all the circumstances of the case, I am unable to find any reason for passing a lesser sentence on either of the two accused than the maximum penalty which the law provides for the offences of which they are guilty. The offences committed by them are most diabolical in their conception and brutal in their execution, and I accordingly confirm the sentences of death passed on the two accused and dismiss their appeals.

NEWBOULD, J.—My learned brother in his judgment which he has just delivered has dealt fully with the facts and the evidence in this case. It is sufficient for me to say that I am in entire agreement with his finding that the convictions of Alimuddi Naskar and Belat Naskar under sec. 302 read with sec. 120B, I. P. C. and of Belat Naskar under sec. 302, I. P. C., are right and that the sentences of death are necessary. The appeals are accordingly dismissed and the sentences of death are confirmed.

As regards the point of law that was raised in this case that there has been no adequate examination of the accused under sec. 342 of the Code of Criminal Procedure, we are in agreement that the trial has not been vitiated by any failure to comply with the mandatory provisions of this section. But with the utmost respect for the opinion of my learned brother I am unable to agree with him that the examinations of the accused persons at the present trial were not adequate. I adhere to the view expressed by Chakravarti, J., and myself in the unreported case of *Res Mahamud Shekh v. The Em-*

*peror**. We then held in agreement with the decision of Rankin, J., in *Promotho Nath Mukhopadhyaya v. King-Emperor* (6) that what is necessary is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. We further held that the question put in that case "what is your defence" was a sufficient compliance with the mandatory provisions of sec. 342, Cr. P. C. One of the reasons given for this decision was that for many years it had been the more usual practice for Courts when examining an accused under this section to put to him questions of a formal nature in words similar to those which had been used in that case and we applied the maxim *optimis legis interpretes consuetudo*.

I still think that a formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of sec. 342, Cr. P. C., since it enables the accused to explain any circumstances appearing in the evidence against him. To what extent the Court when complying with the mandatory provisions of the section should also exercise its discretionary powers under the other provisions of the section, is a different question. The exercise of this discretion must vary with and depend on the circumstances of each particular case. But in the majority of cases it is in my opinion neither necessary nor desirable that there should be any detailed questioning of the accused. The point at which the Court

(6) 27 C. W. N. 389 at p. 406 (1923).

* Cr. Rev. No. 237 of 1924, decided on 24th June 1924. Unreported.

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is bound to question the accused is after the witnesses for the prosecution have been cross-examined. From the cross-examination it will usually appear that the accused understands what are the circumstances appearing in the evidence which require explanation. If this is apparent it is unnecessary for the Court to tell the accused what those circumstances are. The superior Courts of this country have repeatedly emphasised that the examination of the accused under this section should not be of an inquisitional nature. There is great danger, if the lower Courts are required to depart from the usual practice of putting a formal question and in all cases to specify the circumstances appearing in evidence against the accused, that something of the nature of cross-examination will frequently result. There is a very thin line of distinction between stating the circumstances which require explanation and asking the accused to explain those circumstances.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD ATKINSON.	} NARASINGERJI GYANAGERJI, since deceased (now represented by Raja Dhana- rajagirji), Appellant, v. PANUGANTI PARTHA- SARADHI RAYANIM GARU and ors., Respondents.
LORD SHAW.	
LORD BLANESBURGH.	
SIR JOHN EDGE.	
MR. AMEER ALI.	
1924,	
Heard, 6, 7 and	
10, March.	
Judgment,	
19, June.	

Evidence Act (I of 1872), sec. 92—Sale or mortgage—Oral evidence of surrounding circumstances admissible to show that ostensible sale with condition of repurchase really mortgage—Law, how far changed by statute.

The question being whether two documents executed between the parties con-

stituted a mortgage by conditional sale or an absolute sale with an agreement to reconvey;

Held [with reference to oral evidence of surrounding circumstances such as are clearly required by *BALKISHEN DAS v. JEGGE* (1) to show in what manner the language of the documents was related to existing facts]—*That the transaction though phrased ostensibly as a sale with a right of repurchase in the vendor was in reality a mortgage, it being proved by the evidence that the purchase price was absurdly low and, within the intendment of the documents themselves, time not appearing to be of the essence of the repurchase and the option to purchase being coupled with the obligation to buy if the purchaser required him to do so.*

By sec. 92 of the Evidence Act, there has not been introduced into the law of India such a radical change in the laws of evidence as would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class.

This was a consolidated appeal from a decree of the High Court, dated the 24th February 1921, varying decrees of the Court of the Subordinate Judge of Nellore, dated the 5th and 7th October 1919.

In August 1905 Defendant No. 2 became owner of Pamur Taluk subject to a mortgage in favour of Venugopal created in 1893.

Venugopal had sued on his mortgage in 1899 and obtained a decree for sale, in execution of which 27 villages were sold for about 3½ lakhs leaving 6 lakhs remaining secured on 196 villages. The sale of this residue was to take place in

(1) L. R. 27 I. A. 58; s. c. I. L. R. 22 All. 149; 4 C. W. N. 153 (1899).

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August 1908. Defendant No. 2 was anxious to stop the sale and on 4th August 1908 he agreed with the Appellant to sell to him the 196 villages for Rs. 6,00,000 providing at the same time for the resale of the property to himself on the 31st August 1912, 1913 or 1914. In execution of a money decree against Defendant No. 2 the property was sold to a nominee of the Appellant on the 25th August 1914, but the sale was not confirmed and no certificate was issued.

The Defendant No. 2 tendered on the 31st August 1914 the Rs. 6,00,000 to save his rights, which was refused by the Appellant.

The interest of Defendant No. 2 was again put up for sale under the said money decree on the 22nd February 1915 and was purchased by the Plaintiffs-Respondents who obtained a sale certificate on the 23rd April 1915. In July 1915 the Respondents wrote to the Appellant offering to pay off the sum of Rs. 6,00,000 paid by him but their offer was refused and on the 27th August 1915 they filed the present suit against the Appellant joining as Defendant No. 2 the zemindar of Kalahasti. They prayed for an account and for a reconveyance by the Appellant of the 196 villages on payment of the 6 lakhs, and for possession and mesne profits. The Appellant denied that the transaction was a mortgage or that there had been any tender and denied the Respondents' right to a reconveyance. The Subordinate Judge held that the transaction was a mortgage and decided in favour of the Respondents. He passed a preliminary decree for redemption which was converted into a final decree on payment of the money into Court by the Respondents.

On appeal the High Court (Wallis, C. J. and Oldfield, J.) held that the transaction was not a mortgage but a sale

with a collateral agreement of resale. The learned Judges agreed with the findings of the Subordinate Judge that there was a valid tender by Defendant No. 2 on the 31st August 1914 and that he had the right to make such tender, but in view of their finding that the transaction was not a mortgage they modified the decree of the subordinate Court with regard to interest and mesne profits.

Messrs. Clauson, K. C. and Narasimham for the Appellant.—The transaction contained in the two documents constituted an out and out sale with a contract for repurchase.

The construction of the documents must be had with regard to local legislation, which has rendered English principles inapplicable. Sale and resale can only be a mortgage if it is shown on the face of it that the mortgagor is seeking to give security for a loan. No evidence may be given to show that this was intended as a mortgage.

Sec. 92, Indian Evidence Act I of 1872.
Balkishen Das v. Legge (1).

If evidence is not excluded then the evidence shows no mortgage was intended. Time was of the essence of the contract with regard to repurchase. The time for repayment was fixed.

They also referred to *Jhanda Singh v. Wahid-ud-din* (2) and *Maung Kyin v. Ma Shwe La* (3).

Messrs. Upjohn, K. C. and Kenworthy Brown for the Respondents.—The transaction was a mortgage by conditional sale assuming that the documents fall within sec. 58 (c) of the Transfer of Property Act IV of 1882. There is an ac-

(1) L. R. 27 I. A. 58; s. c. I. L. R. 22 All. 149; 4 C. W. N. 153 (1899).

(2) L. R. 43 I. A. 284; s. c. I. L. R. 38 All. 570; 21 C. W. N. 66 (1916).

(3) L. R. 44 I. A. 236; s. c. I. L. R. 45 Cal. 320; 22 C. W. N. 257 (1917).

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tual sale, therefore an "ostensible sale." If the document showed all the characteristics of a mortgage it would not be an "ostensible sale." On the statutory assumption of an ostensible sale you must go outside the documents to find the true character of the transaction. Parole Evidence is admissible under sec. 92, provisions (1) and (6), of the Evidence Act. The evidence is not to contradict the terms of the documents but to explain the status of the contracting parties under the law, and give the terms their full effect.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 24th of February 1921, modifying a decree of the Subordinate Judge of Nellore, dated the 6th of October 1918, and made in the Original Suit No. 1 of 1917.

Issues raised by the Appellant necessitated in the Courts below, and particularly in the Court of the Subordinate Judge, whose judgment their Lordships would at once observe is conspicuous for its ability, care and completeness, a prolonged investigation and examination of conflicting evidence. Concurrent findings against the Appellant on every issue of fact raised by him have, however, greatly narrowed the ambit of the dispute as presented to the Board, and no more than two questions—difficult and important questions it is true—have survived for discussion before their Lordships.

Of these one only has so far been argued. But it raises the fundamental dispute between the parties, which may be described as an issue as to the true nature of the transaction of the 4th of August 1908, between the Appellant and the late Rajah of Kalahasti (now repre-

sented by the Respondents, his assignees) as a result of which the properties in suit passed to the Appellant. The transaction is evidenced by two documents referred to throughout the proceedings as Exs. X and U. Did it effect, as contended for by the Respondents, merely a mortgage by conditional sale of the properties in suit, or was it, as contended by the Appellant, an absolute sale of these properties to himself, with an agreement on his part to reconvey on the strict performance by the Rajah of certain defined conditions?

In this suit the Respondents, who as already indicated had succeeded as auction-purchasers to the outstanding rights in the properties of the Rajah, claimed to redeem them on the footing that the transaction in question was a mortgage. Alternatively, they claimed to have the properties reconveyed to them upon payment of the purchase price on the ground, that if, contrary to their main contention, the transaction did amount to an out and out sale, the conditions entitling the Rajah to a reconveyance had been all complied with by him, and in his shoes they now stood.

In the trial Court, the Respondents succeeded on their main case. In the Court of Appeal they succeeded on their alternative case. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale. The High Court on appeal felt themselves constrained upon the authorities to hold that, in view of the terms of Exs. X and U, the transaction must be held to have been an absolute sale of the properties to the Appellant. But they found also, agreeing in this with the learned Subordinate Judge, that the conditions entitling the Rajah to a reconveyance on that footing had been performed and that the Respondents, as his succes-

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sore-in-interest, were entitled to have the properties assured to them on payment of the prescribed price.

From that order of the High Court the present appeal is brought. Mr. Clauson for the Appellant did not ask their Lordships to review the conclusion of the High Court that all the conditions entitling the Rajah to a reconveyance had been performed. That conclusion—strenuously contested in the Courts below—now rested on concurrent findings of fact, which he could not before the Board seek to displace. The Appellant's sole ground of appeal, indeed, was that the right to a reconveyance reserved by Ex. U was personal to the Rajah and did not pass to any assignee. As, however, the Appellant's views on this matter raised very difficult questions of law, and as Counsel recognised that no success with them would avail him anything if the Respondents were to establish before the Board, as they had done before the Subordinate Judge, that the transaction with the Appellant did in truth amount to a mortgage, Mr. Clauson, with the approval of the Board, confined his argument to that question on the understanding that, if their Lordships ultimately accepted upon it the view in his favour taken by the High Court, the substantive issue raised by the Appellant in his appeal would become the subject of subsequent discussion before the Board.

In accordance with that arrangement the vital question whether the transaction in question did or did not amount to a mortgage has been fully argued before their Lordships, and with that problem alone they now propose to deal.

It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such

as in Lord Davey's words in *Balkishan Das v. Legge* (1) are clearly required to show in what manner the language of the documents was related to existing facts.

To a consideration of these circumstances their Lordships now proceed.

The Rajah of Kalahasti—party to the transaction in question—succeeded in 1905 to the Taluk of Pamur. The Taluk consisted of 223 villages, and at the succession of the Rajah it was in a state of the utmost embarrassment.

It had been for some time in the hands of the Court of Wards, but earlier in the same year that Court had handed it back to the Rajah's nephew and predecessor. The property was heavily encumbered. It was subject to a mortgage of the 20th of June 1893, in favour of Rajah Venu-gopal, who in 1899 had obtained a mortgage decree in respect of his debt amounting then to about 6 lakhs. In March 1908, in pursuance of his decree, he had proceeded to a Court sale of 27 villages, part of the Taluk, and had realised thereby a sum of about 3½ lakhs, but that price was being challenged by the Rajah for inadequacy, and inadequate it seems to have been. Nor was the decree-holder content with his partial realization, and his purpose was to bring the remaining 196 villages to sale for the balance of his debt which, with interest, then amounted to nearly 6 lakhs, and he had actually obtained an order fixing that sale for the 8th of August 1908.

Such was the position when the transaction now in question was entered into. It was carried out four days earlier—on the 4th of August 1908. Six lakhs were required by the Rajah to avert a Court sale. The Appellant, a rich money-lender of Allahabad, provided that sum.

(1) L. R. 27 I. A. 58; s. c. I. L. R. 22 All. 149; 4 C. W. N. 153 (1899).

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It was provided after very slight, if any, inquiry. The transaction, whatever it was properly called, was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid. The six lakhs were required and they were found. That was all.

That sum had no relation to the value of the 196 villages comprised in the deed of assurance. On this matter the Board are in full agreement with both Courts below. As the learned Chief Justice points out, the 27 villages had in the previous March fetched as much as Rs. 3,46,000 and that price was being challenged for inadequacy. There was no evidence and no reason to suppose that the 27 villages differed materially from the 196 villages still remaining unsold, still less that they differed to such an extent as to make the value of these 27 villages equal to two-thirds of the value of the 196. The evidence as to the gross income of the 196 villages led to the same conclusion. It was the view of the learned Subordinate Judge that the value of these 196 villages amounted in 1908 to 15 or 16 lakhs at the least. The learned Chief Justice had no hesitation in concurring so far in that view as to hold that in August 1908, 6 lakhs would have been a most grossly inadequate price and much less than could have been realised by private sale or even by a Court sale. Their Lordships have examined the evidence on this subject for themselves and they are in entire agreement with the learned Chief Justice as to its result. And that is sufficient. They desire to add, however, that had it been necessary they would have been prepared to endorse in its entirety the finding of the learned Subordinate Judge on this point.

Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to

examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect.

Ex. X, described as an indenture made by way of conveyance—their Lordships will refer to it as the conveyance—describes the Rajah as vendor and the Appellant as purchaser. It begins with a recital of the title of the Rajah to the 196 villages in question; it goes on to recite the mortgage of June 1893; the decree for sale and the sale of the 27 villages; and the fact that the remaining villages are proclaimed for sale on the 8th of August then current. The final recital is as follows:—

“And whereas the vendor has, in order to prevent the property being sold in public auction and realising much less than what they are actually worth, agreed to convey by private sale the said villages to the said purchaser for Rs. 600,000.”

Their Lordships will return to this recital in due course. The conveyance then witnesses that in consideration of Rs. 5,60,445 paid to the decree-holder in satisfaction of his debt and Rs. 39,554-7 paid to the vendor, the vendor as beneficial owner grants and conveys the properties, “subject to the conditions and reservations mentioned below,” to the purchaser, “his heirs, executors, administrators and assigns in fee simple absolutely.” Then follow covenants for right to convey, quiet enjoyment, and further assurance and for indemnifying the purchaser, &c.

“Against all losses, damages, expenses, claims and liabilities whatsoever if any which he or they may pay, sustain, incur, or be put to by reason or in respect of the purchase thereof.”

The principal conditions and reservations are:—

1. All rents are to belong to and be en-

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joyed by the purchaser as from 1st July 1908.

2. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in the villages and the right

“To repurchase the said villages as per the agreement of this day's date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August 1912, and on or before the 31st August 1914, and to be in strict accordance with the terms set forth in the document above referred to.”

In Ex. U, the agreement just referred to, the Appellant appears as vendor and the Rajah as purchaser. It is expressed to be made for the reconveyance of the 196 villages specified in the schedule attached to the conveyance, and cl. 1 provides that

“The vendor agrees to sell and the purchaser to purchase the villages mentioned in the conveyance for Rs. 600,000, the said sum to be paid by the purchaser to the vendor on the 31st August 1912, the 31st August 1913, or the 31st August 1914, and not earlier.”

By cl. 2 the vendor is to execute a deed of sale in favour of the purchaser as soon thereafter as the said sum of Rs. 6,00,000 is paid to the vendor, and the vendor is to be entitled solely to the possession and enjoyment of the villages till such sum is paid and a conveyance in due form executed.

By cl. 3 it is provided that if the purchaser fails to pay the amount mentioned in cl. 2 before the 31st August 1914, as above mentioned, the purchaser shall lose all his right of repurchase and that agreement shall then cease to be operative and valid. In case the purchaser pays to the vendor the said sum of Rs. 6,00,000 on the 31st August 1912, 1913 or 1914, as above set forth, and a conveyance in due form is executed, the purchaser is to be

come entitled to all the rents and profits derivable from the villages as from the 1st day of July 1912, 1913 or 1914 respectively.

Cl. 4 is very important. Its terms are these :—

“If after the date of this agreement and before the sale deed is executed, the Government take up any portion of the land hereunder agreed to be conveyed under the Land Acquisition Act and award compensation therefor, any compensation so awarded shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years' rent of the land acquired, and the vendor and the purchaser shall be entitled each to his proportionate share of the purchase money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 600,000 already mentioned and agreed upon.”

Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale with a right of repurchase in the vendor. This appearance, indeed, is labouriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of repurchase bear the appearance of rights in relation to the exercise of which time is of the essence.

But a closer examination of the documents discloses their real character. Take for example the final recital of the conveyance to which reference has already been made. What is its true implication? A consideration of the facts known to both parties makes it, their Lordships think, reasonably plain. The parties knew two things quite well. First, that 6 lakhs was an absurd purchase price. Secondly, that even at public auction the properties could be expected to realise a larger sum than that. What then was the implication? Surely that the transaction in

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which they were engaging was not a sale but a loan. For notice how that principle is worked out. The Rajah has not only an option to repurchase. He is put under an obligation to buy if the Appellant thinks fit to require him so to do. The Appellant's 6 lakhs can be recovered by him if he chooses to sue upon the Rajah's contract to repurchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid.

Again, is time of the essence of the exercise by the Rajah of his rights in this matter? Cl. 4 of the agreement already set forth indicates to their Lordships that it is not. That clause seems also to be clear enough although it describes an arrangement very unusual in character. The clause is providing for the possibility of the Appellant being compulsorily expropriated by Government from some part of the property in suit, and the receipt by him of the compensation in respect thereof. The compensation is to be treated as the equivalent of 20 years' rent; it is to be treated as belonging to the Appellant and the Rajah according to what would have been their rights *inter se* to possession of the expropriated lands during these years; the money is to be received by the Appellant as being in possession, but, *if need be*—these are the critical words—credit is to be given to the Rajah for his share by a deduction from the 6 lakhs otherwise payable by him on repurchase.

These words show that in certain circumstances such credit will not be his. But what must these circumstances be. They can only be a repurchase more than 20 years after the expropriation. But if time was of the essence for such repurchase it could in no circumstances be postponed beyond six years from the date of

the conveyance. Clearly, therefore, and within the intendment of the documents themselves time is not of the essence in this matter; and so soon as that is established all pretence for holding this ostensible sale and repurchase to be anything else than a mortgage by conditional sale disappears, and its establishment reinforces several other considerations leading to the same conclusion such as the reservation of the right in the conveyance itself; the reservation of minerals which is directed, in their Lordships' view, to a restriction on the Appellant's usufructuary privileges; the strange covenant of indemnity and the inconsistent and almost unintelligible provisions as to the actual time limited for the exercise of the Rajah's so-called right of repurchase. When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view, irresistible that here a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

Such was the conclusion of the Subordinate Judge. Such was apparently the belief of the learned Judges of the High Court, but they felt themselves precluded from giving effect to that belief by their hesitation to attribute, what their Lordships hold to be their real result, to the considerations emerging from the terms of the documents to which attention has here been drawn.

In these circumstances their Lordships find it unnecessary to deal with the numerous authorities upon this subject which they have examined. The case in their view is abundantly clear. They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India

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such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class.

The present case with the shifts and devices, to which the Appellant resorted to deprive the Respondents of all their rights in the property, if the character of a mortgage could not be attached to the transaction, show how serious such a conclusion would be.

Without most careful consideration their Lordships would hesitate to accept a view which would bear so hardly on many mortgagors expressing their contracts of borrowing in long accepted Indian forms.

The Respondents in their Lordships' judgment are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent. per annum from the 1st of September 1914, down to the date when the six lakhs were paid into Court. The Appellant will be entitled to the interest earned by that sum since it was so paid in.

On the other hand, the Appellant must account to the Respondents for mesne profits of the properties as from the 1st of July 1914, until actual delivery of possession to the Respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in their Lordships' opinion, be restored.

Their Lordships will humbly advise His Majesty accordingly.

The Appellant must pay all the costs of the Respondents in the High Court and their costs of this appeal.

Solicitor: Mr. H. S. L. Polak for the Appellant.

Solicitor: Mr. Douglas Grant for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 103 of 1922.

SUBRAWARDY, J.	}	SAROJINI DEBYA and
DUVAL, J.		ors., Plaintiffs,
1924,		Appellants,
29, July.		v.
		LAKHI PRIYA GUHA and
		ors., Defendants,
		Respondents.

Civil Procedure Code (Act V of 1908), sec. 11, Explan. IV—Res judicata, constructive—Ex parte decree for rent, if and when operates as res judicata in regard to pleas which ought to have been taken—Separate tenancy, plea of, if maintainable in future suit.

'A joint ex parte decree for the entire rent of a tenure against all the tenants operates as res judicata in a subsequent suit against them for such a joint decree, disentitling any one of them to object to the passing of a joint decree and estops him from setting up the case of a separate tenancy in respect of his own share in the tenure, on the ground that this question of separate tenancy should have been raised in defence in the previous suit, within the meaning of Exp. IV, sec. 11, Civil Procedure Code, whereby the decree in the said previous suit could have been defeated, varied or affected.'

MADHUSUDAN SHAHA MUNDAL v. BRAE (1) and WOOMESH CHANDRA MAITRA v. BARADA DAS MAITRA (2) explained.

There can be no estoppel against a statute, and what is illegal cannot be legalised by operation of the doctrine of res judicata.

(1) I. L. R. 16 Cal. 300 (F. B.) (1889).

(2) I. L. R. 28 Cal. 17 (1900).

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KAILAS MONDOL v. BARODA SUNDARI DASYA (3) *not approved*.

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHOWDHURY (4) *approved*.

The decision in a previous rent suit, whether ex parte or contested, operates as res judicata in a subsequent rent suit even for a different period, if it decides any question which arises in the suit or omits to decide a question which ought to have been decided if objection were taken by a party.

HIRANMOY KUMAR SHAHA v. RAMJAN ALI DEWAN (5) *referred to*.

This was an appeal against the decree of Babu Narayan Chandra Ghose, Subordinate Judge, 2nd Court of Zillah Backergunj, dated the 9th of August 1921, modifying the decree of Moulvi M. Ahmed, Munsif, 7th Court at Barisal, dated the 31st of May 1920.

The Plaintiff (Appellant) brought a suit against several Defendants for arrears of rent and only two out of those several Defendants, *viz.*, Nos. 3 and 4, appeared and contested the suit on the ground that the lease on which the Plaintiffs had based their claim for arrears of rent, though granted by one *pottah*, was not one lease, but in reality comprised 25 leases in respect of the 25 parcels of land let out and as they had purchased only a fourth share of the leasehold property they were liable to pay only one-fourth of the whole and entire rent claimed. They also pleaded that shortly after their purchase they got *kharij* (division of rent) upon payment of their share of the entire rent separately and obtained separate *dakhilas* (rent receipts) for the same. The Court

of first instance held that the lease was a single lease and that there had been no *kharij*. The lower Appellate Court reversed the decision of the trial Court on both points.

Babus Brojendra Nath Chatterjee and Ramgati Sarkar for the Appellants.

Babus Gunada Charan Sen and Nil Kanto Ghose for the Respondents.

Babu Biraj Mohan Majumdar for the Minor Respondent.

Babu Brojendra Nath Chatterjee for the Appellants.—As the terms of the *pottah* are free from any ambiguity, the learned Subordinate Judge erred in law in considering the evidence of conduct in construing the same. See *Midnapur Zemindari Co., Ltd. v. Jagendra Kumar Bhaumik* (6). As to the question of *kharij*—the findings are not sufficient to prove *kharij*. Mere separate collection by the landlord from some co-sharer tenants of the tenure, in proportion to their respective shares therein, does not deprive the landlord's right to make all the tenants of the tenure jointly and severally liable for the whole and entire rent payable in respect thereof. Landlord's right is protected by sec. 88 of the Bengal Tenancy Act. That section enacts that any division of a tenancy or distribution of rent payable in respect thereof is not binding on the landlord, unless the same is made with his express written consent. There must at first be a division or distribution of rent amongst all the tenants and then there must be an express written consent to the same by the landlord. In this case there is no finding nor is there any allegation even that there has been any sub-division of tenancy or distribution of rent amongst the tenants. The learned Subordinate Judge does not even refer to sec.

(3) I. L. R. 24 Cal. 711 : s. c. 1 C. W. N. 565 (1897).

(4) I. L. R. 35 Cal. 979 : s. c. 12 C. W. N. 862 (1908).

(5) 20 C. W. N. 48 (1915).

(6) 33 C. L. J. 186 (1920).

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88. He seems to think that separate collection and granting separate *dakhilas* are quite sufficient to prove *kharij*.

[SUHRAWARDY, J.—The 'Subordinate Judge has come to a finding of fact and there is some evidence in support of that finding; we cannot go behind it in second appeal.]

I do not want your Lordships to go behind that finding. I submit these findings are not sufficient to prove "*kharij*" (division of tenancy and distribution of rent), under the said sec. 88 with the landlord's written consent. There are authorities that mere *dakhilas* (rent receipts) showing separate collection are not sufficient.

Aubhoy Charan Maji v. Shoshi Bhusun Bose (7), *Pyari Mohun Mukhopadhyaya v. Gopal Paik* (8), *Jnanendra Mohan Chowdhury v. Gopal Das Chowdhury* (9) and *Benipershad Koeri v. Ram Dahin Pandey* (10).

[*Babu Biraj Mohan Majumdar* on behalf of the Minor Respondent.—Cites *Abinas Chandra Chowdhury v. Purnananda Khan* (11).]

This case supports my contention. In it there was distribution of rent amongst the tenants with the landlord's written consent. And in the present case the *dakhilas* relied upon were granted by a *pardanashin* lady and it is established that if reliance is placed upon a document executed by a *pardanashin* lady, the onus is upon the person producing the document to prove that the executant understood the consequences of her act, that the document was explained to her.

(7) I. L. R. 16 Cal. 155 (1888).

(8) I. L. R. 25 Cal. 531: s. c. 2 C. W. N. 875 (F. B.) (1898).

(9) I. L. R. 31 Cal. 1026: s. c. 8 C. W. N. 923 (1904).

(10) 10 C. W. N. 216 (1905).

(11) 18 C. L. J. 174 (1913).

[SUHRAWARDY, J.—This question was never raised and we cannot allow you here to raise it for the first time.]

Another point is, that this suit is barred as *res judicata*.

Two *ex parte* decrees for rent were obtained in two previous suits against all these Defendants including these two contesting Defendants and all of them were made jointly and severally liable for the entire rent of the tenure by the two *ex parte* decrees made in those two suits. These contesting Defendants did not raise *kharij* as a ground of defence in those two suits as they now do. This matter might and ought to have been made a defence then in the said two previous suits. The decisions in those two suits, therefore, bar the maintainability of the defence now made by the Defendants in this suit. The fact that the said two decrees were *ex parte* decrees does not help the Defendants (Respondents) in the least. The point is, whether they could have made this defence in the said two former suits, and whether if this defence had there been made, would those joint decrees have been passed against them all and whether that not having been made then, they are now estopped from raising that defence in this suit. Cites *Jamadar Singh v. Serazuddin Ahamad Chowdhury* (4).

Babu Gunada Charan Sen for the Respondents (called upon to argue the *res judicata* point only).—*Ex parte* decrees for rent cannot operate as *res judicata* on any question other than that of the relationship of landlord and tenant. *Hiranmoy Kumar Shaha v. Ramjar Ali Dewan* (5). Causes of action in suits for rent are not the same. They are recurring causes

(4) I. L. R. 35 Cal. 979: s. c. 12 C. W. N. 862 (1908).

(5) 20 C. W. N. 48 (1915).

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of action. The Full Bench case of *Madhusudan Shaha Mundal v. Brae* (1) lays down that the *ex parte* decree for rent is not *res judicata* even as regards the rate of rent, though the plaint contains a statement as to the rate of rent. The mind of the Court was not even directed, in the previous suits, to the question of *kharij* (sub-division of tenancy and distribution of rent).

The question of *kharij* was not heard and decided in the previous suit and therefore it cannot operate as *res judicata* in the present suit.

The *ex parte* decrees obtained in those two previous suits cannot operate as *res judicata* in this suit, because the question of *kharij* was not heard and decided in those two suits. Cites *Kailas Mondol v. Baroda Sundari Dasya* (3) and *Woomesh Chandra Maitra v. Barada Das Maitra* (2).

The case of *Jamadar Singh v. Serazuddin Ahamad Chowdhury* (4) is distinguishable. The Defendants could not have defeated the Plaintiff's claim in the two previous suits by raising the plea of *kharij*. The matter was not directly and substantially in issue in the former suits nor was the same heard and finally decided in those suits. The question of *res judicata* therefore does not arise.

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J.—The Plaintiffs-Appellants brought a suit against the Defendants for arrears of rent for the years 1321 to 1324 on the basis of a *pottah*, dated the 3rd Sraban 1301. The property in respect of which rent was claimed

(1) I. L. R. 16 Cal. 300 (F. B.) (1889).

(2) I. L. R. 28 Cal. 17 (1900).

(3) I. L. R. 24 Cal. 711 : s. c. 1 O. W. N. 565 (1897).

(4) I. L. R. 35 Cal. 979 : s. c. 12 O. W. N. 862 (1908).

consisted of 25 *kittas* of land. Defendants Nos. 3 and 4 only appeared and contended *inter alia* that they held a separate 4 annas *hissya* in the 25 *kittas* and paid rent to the Plaintiffs according to their share. They further denied their liability for the entire rent and claimed that a decree in respect of their 4 annas share should be passed against them. The learned Munsif before whom the suit was brought gave a decree to the Plaintiffs overruling all the objections of the Defendants. The Subordinate Judge of Backergunj on appeal found against the Plaintiffs on some points. He, first, found that the *pottah* created a tenure not of a composite holding but of several *kittas* of which the land was comprised. He next found that there was *kharij* of the 4 annas *hissya* of Defendants Nos. 3 to 9 and that they were not liable for the entire rent. As a result of his findings he passed a decree to the effect that one-fourth of the claim should be decreed against Defendants Nos. 3 to 9 and the remaining three-fourths against Defendants Nos. 1, 2 and 10 to 12.

The Plaintiffs have appealed and it is contended on their behalf that the view of the learned Judge on the construction of the *pottah* and his finding that the *dakhilas* produced by the Defendants prove a division of the tenancy with the consent and knowledge of the landlords are not correct.

With regard to the second point, we are of opinion that it is concluded by the findings of fact arrived at by the Subordinate Judge. He has considered the entire evidence, oral and documentary, and come to the conclusion that it satisfactorily proves that the landlords recognised the separate tenancy of the contending Defendants in respect of the 4 annas *hissya* of the property.

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But the Appellants have raised a point of some nicety in connection with the question of *res judicata*. It appears that the Plaintiffs or their predecessors obtained two *ex parte* rent decrees against the Defendants, one in 1903 and the other in 1914. These decrees were joint decrees against all the Defendants in respect of the entire rent. It is argued as a result of these decrees that the Defendants are estopped from setting up the case of a separate tenancy. I have considered this matter carefully and I am of opinion that this contention ought to prevail. It appears that in the suit of 1914 these Defendants did enter appearance but were absent on the day the case was heard and it was decided *ex parte*. I have looked into the plaint in that suit and it appears that the claim of the Plaintiffs was in respect of the entire rent, and the first prayer in the plaint was that a decree might be passed for the amount claimed against the Defendants. A decree was accordingly passed. We are not aware as to what plea the Defendants raised in that case, but in the present suit they maintain that they are entitled to object to a joint decree on the ground that their tenancies are separate from those of the other Defendants. The question that really arises is as to how far the *ex parte* decrees would operate as *res judicata* as regards the present contention of the Defendants. It is maintained by them that the question of separate tenancy was not a question which might and ought to have been raised in the previous suit within the meaning of Exp. IV of sec. 11, C. P. C. In my judgment it is a question which should have been raised in defence in the previous suit. It is difficult to lay down hard and fast rules as to what questions should be regarded as questions that ought to have been raised in the previous

suit. But there are several tests which have been applied from time to time when such questions have come up for decision. One of the tests is whether by raising the question the decree which was passed in the previous suit could have been defeated, varied or in any way affected. If the question is of such a nature, it must be deemed to be a question which ought to have been raised in the previous suit. Reliance has been placed by the Respondents on the case of *Madhusudan Shaha v. Brae* (1). In that case, which was decided by a Full Court, it was held that a mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex parte* decree has been obtained is not a statement as to which it must be held that it raised an issue between the parties within the meaning of sec. 13 of the old Code of Civil Procedure. The ground of that decision is that if the Plaintiff claims a certain amount as representing the rent which is due to him and in the plaint gives an account of the amount claimed according to certain rate of rent and in the prayer claims a decree for the amount claimed by him, the *ex parte* decree should not operate as *res judicata* with regard to the rate of rent unless there is a direct issue on the point and there is a distinct prayer for a declaration of the rate of rent. One of the reasons assigned for the view taken by the Court is that the Plaintiff may be entitled to the amount claimed on account even though the rate of the rent claimed by him be not correct. I do not think that that case has any bearing on the present question. If it has any, it is in favour of the Appellants. It lays down that if it is prayed in the plaint that a certain right on which the suit is brought is to be declared in favour of the Plain-

(1) I. L. R. 16 Cal. 300 (F. B.) (1889).

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tiff that may create *res judicata*. In the previous rent suit the prayer in the plaints was that a decree for the rent claimed may be passed against the Defendants which means that a joint decree may be passed against all the Defendants and the decree passed gave effect to that prayer.

The case which is next relied upon is the case of *Woomesh Chandra Maitra v. Barada Das Maitra* (2). In that case in the previous suit rent was decreed at a certain rate which included illegal cesses. It was held that in a subsequent case it is open to the Defendant to object to the amount of rent claimed on the ground that it included illegal cesses. That case may be supported on the well-known principle that there can be no estoppel against a statute and what is illegal in law cannot be legalised by operation of the doctrine of *res judicata*. Though some observations in that case are quite general, the ratio of that decision is the finding that all illegal cesses were never made part of the rent. The learned Judges rely upon the decision of Mr. Justice Banerjee in the case of *Kailas Mondol v. Baroda Sundari Dasya* (3) which is said to hold that the subject-matter of two rent suits for different periods being different the law of *res judicata* will not apply. By the expression "the subject-matter of the two suits being different," I understand it was meant that the rent claimed for two different periods must be taken to be two different matters. In the case of *Kailas Mondol v. Baroda Sundari Dasya* (3) the Plaintiff had obtained a decree for rent against the Defendant who had raised various pleas but not the plea which

he raised in the second case, namely, that the Plaintiff was a *benamdar*. The learned Chief Justice (Sir Francis Maclean) on these facts held that the decision in the previous suit would not operate as *res judicata* and one of the grounds he gave was this:—"It is possible that the matter he (the Defendant) now desires to set up may not have been within the knowledge of the Defendant in 1878. Can we say then that he (the Defendant) is debarred from going into those matters now? I think not." The learned Chief Justice further observed that the previous proceedings were not placed before the Court and so the Court could not say whether that point was raised in it or not. Mr. Justice Banerjee no doubt used certain expressions which are capable of supporting the view that in rent suits the subject-matters must *ex necessitate* be different. I am unable to agree in this view of the law if that case really expresses it. If it is adopted, it would mean that the principle of *res judicata* can never apply to rent suits because in all rent suits the period for which rent is claimed must be different—a view in conflict with accepted conceptions of law. This case, however, has been cited with disapproval in *Jamadar Singh v. Serazuddin Ahmad Chowdhury* (4). In my opinion, the view taken in this case seems to be the correct interpretation of sec. 11, C. P. C. On another point Mr. Justice Banerjee's decision in the case of *Kailas Mondol v. Baroda Sundari Dasya* (3) has been dissented from by the Acting Chief Justice in the case of *Jamadar Singh v. Serazuddin Ahmad Chowdhury* (4). Mr. Justice Banerjee had put

(2) I. L. R. 28 Cal. 17 (1900).

(3) I. L. R. 24 Cal. 711: s. c. 1 O. W. N. 565 (1897).

(3) I. L. R. 24 Cal. 711: s. c. 1 O. W. N. 565 (1897).

(4) I. L. R. 35 Cal. 979: s. c. 12 O. W. N. 562 (1908).

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a too narrow construction upon the words of Exp. II to sec. 13 of the old Code, to the effect that a matter may be one which might and ought to have been raised in the former suit; but if it is not decided in that suit it would not operate as *res judicata*. I think that the correct view is that when a matter which ought to have been raised was not raised it must be taken to be a matter which also ought to or must have been heard and finally decided in the previous suit. Reference may also be made in this connection to the case of *Hiranmoy Kumar Shaha v. Ramjan Ali Dewan* (5). It was held in that case that a decree for rent passed *ex parte* is not merely an item of evidence but is conclusive as to the relationship between the parties. According to the dicta in the cases of *Woomesh Chandra Maitra v. Barada Das Maitra* (2) and *Kailas Mondol v. Baroda Sundari Dasya* (3) to which I have referred, the subject-matters of two different rent suits being different, the decision in the former suit will not operate as *res judicata* in the subsequent suit for any purpose with the result that all the points decided in the previous case will be open for discussion in the subsequent case. But according to the decision in the case of *Hiranmoy Kumar Shaha v. Ramjan Ali Dewan* (5), the question as to the relationship of landlord and tenant must be taken to be *res judicata* in the subsequent suit. It, therefore, follows that the decision in a previous suit for rent, whether *ex parte* or *inter partes*, operates as *res judicata* in a subsequent suit for rent, even for a different period,

if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided if objection were taken by a party. In this view I hold that the plea of *res judicata* ought to prevail and the Defendants are estopped from now contending that they hold a separate tenancy under the Plaintiffs.

The result of the foregoing conclusion is that this appeal succeeds, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs.

DUVAL, J.—I agree, but I would simply decide this appeal on the third point, namely, *res judicata*. It appears to me that in the previous suits the Plaintiffs clearly brought the suits on the assumption that all the Defendants were jointly and severally liable for the whole rent. Before that, it is said, according to the Appellants, that the Plaintiffs' predecessors admitted a separate 4 annas share as belonging to these two Appellants. It is not necessary to decide whether this was so or not, if the case is decided on the basis on which I would decide it, namely, on the question of *res judicata*. In the previous suit of 1903 and 1914, as I have said, the Plaintiffs made their claim against all the Defendants jointly and severally. These Defendants did not appear at all in the first suit. In the second suit they appeared but put in no defence and then withdrew and if they wished to set up the point they now urge, they could obviously have done so, and their not having done so under sec. 11, C. P. C., their claim to have that matter reopened is barred by the principle of *res judicata*. I therefore agree with the order which my learned brother proposes to pass.

H. D. C.

(2) I. L. R. 28 Cal. 17 (1900).

(3) I. L. R. 24 Cal. 711: s. c. 1 C. W. N. 585 (1897).

(5) 20 C. W. N. 48 (1915).

[CRIMINAL APPELLATE JURISDICTION.]

A.P. No. 416 OF 1924.

SUHRAWARDY, J. MUKERJI, J. 1924, 7, November.	}	I. G. SINGLETON, • Appellant, v. THE KING-EMPEROR, Respondent.
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Acquittal of a conspirator in a subsequent trial, if a ground of reversal of the conviction of the only other conspirator tried before—Repugnancy in the verdict of jury or contradiction on the face of the record, if by itself a sufficient ground for quashing a conviction—Criminal Procedure Code (Act V of 1898), sec. 449—Appeal, on matters of fact as well as on matters of law, if lies, when an order for trial under sec. 443 was erroneously passed but not challenged or rectified, by the prosecution—Indian Penal Code (Act XLV of 1860), sec. 409, strict proof of elements necessary.

The rule of English law as to the acquittal of a conspirator following from the acquittal of the other when the conspiracy is alleged only amongst the two and in a joint trial held in respect of both, is based upon a rule of practice and procedure, viz., that repugnancy or contradiction on the face of the record is a ground for arresting judgment or annulling a conviction, and is a ground on which the accused can claim an acquittal. But repugnancy in the verdict of jury in this country is not by itself a sufficient ground for quashing a conviction, and there is no provision in the Code justifying interference with a conviction on the ground of repugnancy in the record.

RAMESH CHANDRA BANERJI v. EMPEROR (14), MANINDRA CHANDRA GHOSE v. EMPEROR (15) and UMADASI DAS v. THE KING-EMPEROR (13) referred to.

The acquittal of one conspirator in a subsequent trial has no effect so far as

the other conspirator convicted at the earlier trial is concerned, beyond suggesting that some of the evidence upon which the latter was convicted, was, in a different trial of another accused person, found to be unworthy of acceptance. If on the merits it is established that the evidence against the convicted conspirator was weak or there were inherent improbabilities or infirmities in the case against him then perhaps it may be taken into consideration that the same witnesses were disbelieved—if it is sure that they were actually disbelieved—in a subsequent trial.

GEORGE BAKER v. REX (16) referred to.

To sustain a conviction for criminal breach of trust under sec. 409, I. P. C., all the necessary elements constituting the offence must be strictly proved, and when the charge is that something was substituted in place of another, there must be clear evidence that the thing alleged to have been extracted was actually there when it came under the dominion of the accused.

Where an accused person claimed to be tried as a European British subject, but omitted to claim to be tried under the provisions of Chap. XXXIII of the Criminal Procedure Code, and the Magistrate passed an order that he was to be dealt with under sec. 443, Cr. P. C., which order, however, the prosecution did not take any steps to get set aside or corrected, an appeal against the conviction would lie on matters of fact as well as on matters of law as contemplated by sec. 449 (1), Cr. P. C., even though it would appear that the distinction between a claim to be tried as a European British subject and a claim to be dealt with under the provisions of Chap. XXXIII was not properly appreciated by the enquiring Magistrate, and that there was hardly any foundation for

(13) 28 C. W. N. 1046 (1924).

(14) I. L. R. 41 Cal. 350: s. c. 18 C. W. N. 498 (1918).

(15) I. L. R. 41 Cal. 755: s. c. 18 C. W. N. 580 (1914).

(16) 9 Cr. App. Rep. 136 (1914).

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the claim to be tried under the provisions of Chap. XXXIII.

This was an appeal preferred on the 16th July 1924 against a conviction by the Sessions Judge of 24-Parganas (Mr. G. N. Roy), dated the 19th June 1924.

The facts material to this report are these:—The Appellant I. G. Singleton was placed on his trial under sec. 409, I. P. C., on the charge that being a public servant in the employ of the Customs Department he committed criminal breach of trust in respect of 34 bags of peacock feather over which he had dominion as such public servant, and under sec. 409/120B, I. P. C., on the further charge that he conspired with one Basanta Singh to commit the aforesaid offence of criminal breach of trust. The Appellant on appearing before the Magistrate asserted his right to be tried as a European British subject, and the Magistrate passed an order that he was to be dealt with under sec. 443, Cr. P. C. Both the accused were jointly committed to the Court of Session for trial, but in the Court of Session there were separate trials of the two persons on the ground that their defences were antagonistic. The Appellant I. G. Singleton was tried first and was convicted by the Sessions Judge under secs. 409 and 409/120B, I. P. C., on the 19th June 1924. The trial of Basanta Singh commenced on the 21st July 1924 before the Assistant Sessions Judge on charges under secs. 411, 406/109 and 406/120B, I. P. C., and he was acquitted. The charge of conspiracy in both the trials, averred in effect that the two persons were the only members of the conspiracy. The present appeal was preferred by Singleton against his conviction.

Messrs. J. M. Sen Gupta and Manuel

and Babu Probodh Chandra Chatterjee for the Appellant.

Babu Herambq Chandra Guha for the Crown.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—The Appellant I. G. Singleton has been convicted by the Sessions Judge of 24-Parganas in agreement with the unanimous verdict of the jury on charges under secs. 409 and 409/120B of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 9 months under sec. 409, I. P. C., no separate sentence having been passed under sec. 409/120B, I. P. C.

The facts of the case alleged against him on behalf of the prosecution are set out in sufficient detail in the summing up of the learned Judge and it will serve no useful purpose by recapitulating them here. The charge under sec. 409, I. P. C., alleged that on the 27th February 1924, the Appellant being a public servant in the employ of the Customs Department committed criminal breach of trust in respect of 34 bags of peacock feather over which he had dominion as such public servant. The charge under sec. 409/120B, I. P. C., averred that on the same date he conspired with one Basanta Singh to commit the aforesaid offence of criminal breach of trust.

The Appellant claimed a right of appeal on matters of fact as well as on matters of law under the provisions of sec. 449 (1), Cr. P. C. That claim was opposed on behalf of the Crown. It appears that on appearing before the Magistrate who held the enquiry preliminary to commitment the Appellant, asserted his right to be tried as a European British subject, and upon that the Magistrate evidently being satisfied that he

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was one, passed an order that he was to be dealt with under sec. 443, Cr. P. C. It is not clear whether this claim on the part of the Appellant included a claim to be tried according to the provisions of Chap. XXXIII of the Code, but there is a clear mention of sec. 443, Cr. P. C., in the order which the learned Magistrate passed on the occasion. On behalf of the Appellant it has been contended that the Appellant was entitled to be tried under the procedure laid down in Chap. XXXIII as the information upon which the case against him originated was laid by Sub-Inspector A. T. Halder who presumably is a British Indian subject and that therefore the case came within sec. 443 (1) (a), Cr. P. C. In this connection some reference was also made to the fact that the Appellant was committed to the Court of Session along with one Basanta Singh and it was urged that that would bring the case within sec. 443 (1) (b), Cr. P. C. On behalf of the Crown it was pointed out that the fact that Sub-Inspector A. T. Halder was the informant would not, by reason of the proviso to sec. 444, Cr. P. C., help the Appellant, nor the fact that Basanta Singh was a co-accused with him in the indictment under which the commitment had been made. While I entirely agree with the contention put forward on behalf of the Crown in this respect and while also I am disposed to think that the distinction between a claim to be tried as a European British subject and a claim to be dealt with under the provisions of Chap. XXXIII was not properly appreciated by the enquiring Magistrate, and that there is hardly any foundation for the Appellant's claim to be tried under the provisions of Chap. XXXIII, I find it difficult to hold that that right can at this stage

be disputed by the Crown, in the face of the clear order which the learned Magistrate recorded in the order-sheet and which I have already alluded to. It is true that in the order of commitment itself the learned Magistrate only referred to the fact that the Appellant had claimed to be tried as a European British subject and also to the seriousness of the offence as justifying the course he was adopting, but in my opinion it is not safe to draw from this the conclusion that it was ever intended that the Appellant was not to get the benefit of the order which the Magistrate had already passed in his favour. The Crown did not take any steps to get the order set aside or corrected. I hold therefore that the Appellant's appeal lies and must be dealt with, on matters of facts and matters of law, as contemplated by sec. 449 (1), Cr. P. C.

The contentions put forward on behalf of the Appellant, shortly stated, are as follows:—As regards the conviction under sec. 409/120B, I. P. C., the propriety and legality of it is challenged on the ground that Basanta Singh with whom the Appellant was alleged to have conspired was subsequently tried in a trial separately held, and in that trial there was a unanimous verdict of "not guilty" in favour of Basanta Singh which was accepted by the presiding Judge and on that verdict Basanta Singh was acquitted, that with the acquittal of Basanta Singh recorded as indicated above the fact that the Appellant conspired with Basanta Singh (the indictment in both the trials setting out a conspiracy between the two persons only and not with others) became a legal impossibility and therefore the Appellant is entitled to an acquittal. It has also been contended that Basanta Singh was examined as a prosecution witness in the case and his

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evidence completely demolishes any theory of a conspiracy between him and the Appellant; and that upon the evidence generally the Appellant should be acquitted of that offence. As regards the conviction under sec. 409, I. P. C., it was argued that the elements necessary to constitute the offence and the facts necessary to be proved in order to bring the offence home to the Appellant have not been made out upon the evidence on the record.

In order to deal with the question of law raised in connection with the charge under sec. 409/120B, I. P. C., it is necessary just to state what exactly happened.

The usual inquiry preliminary to commitment was held against the Appellant as well as Basanta Singh jointly and at the conclusion of the enquiry the Magistrate committed both the persons to the Court of Session for trial—Basanta Singh under secs. 406/114 and 411, I. P. C., and the Appellant under sec. 409, I. P. C. In the Court of Sessions there were separate trials of the two persons, presumably on the ground that their defences were antagonistic. So far as the Appellant is concerned he was tried, as already mentioned, on the charge under sec. 409, I. P. C., on which he was committed, and on a fresh charge, *viz.*, one under sec. 409/120B, I. P. C., which was added in the Court of Session. The Appellant's trial came to an end on the 19th June 1924. The trial of Basanta Singh commenced on the 21st July 1924. He was tried on the charge under sec. 411, I. P. C., on which he had been committed and on a charge under sec. 406/109 which was framed on amendment of the charge under sec. 406/114, I. P. C., on which also he had been committed, and on a fresh charge, *viz.*, one under sec.

406/120B, I. P. C., which was added. The trial was held by the Assistant Sessions Judge of 24-Parganas with the aid of a jury and Basanta Singh was acquitted as already stated. The charge of conspiracy in both the trials averred in effect that the two persons were the only members of the conspiracy.

Now, the law in England on this point is summarised in Russel on Crimes and Misdemeanour, 8th Edition, Vol. I, p. 152: "As a matter of procedure it would seem that if A is indicted and tried alone for conspiring with others, he could be lawfully convicted, though the others referred to or included in the indictment had not appeared or pleaded or were dead before or after the indictment was preferred or before they pleaded not guilty or were subsequently and separately tried. But it is not settled whether in cases of separate trials of conspirators the acquittal of those tried later would avoid the conviction of one earlier tried and convicted for the same conspiracy." An examination of the authorities bearing on the question is very interesting.

First of all, there is abundant authority for the proposition that if an accused who is said to be a member of a conspiracy was arraigned and tried alone for the conspiracy and was convicted, his conviction would have been good at the time and judgment could have been given against him although the other persons included in the indictment had not appeared or were dead or the trial of them had been postponed: *Rex v. Kinnersley* (1), *Rex v. Nichols* (2), *Rex v. Scott* (3) and *Rex v. Cooke* (4). In the case of *Reg v. John Ahearne* (5), where three

(1) [1795] 1 Strange 193.

(2) [1742] 13 East. 412n; 12 R. R. 388.

(3) [1761] 3 Burr. 1262.

(4) 5 B. & C. 528 (1826).

(5) 6 Cox C. C. 6 (1882).

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prisoners had been jointly indicted for a conspiracy to murder and severally pleaded guilty, but severed in their challenges and the Crown consequently proceeded to try one of such prisoners; it was held that upon the conviction of such prisoner judgment must follow, although the others have not been tried, and that the possibility of the other prisoners being found not guilty (although such a verdict would be a ground for reversing the judgment) is not a sufficient reason for holding such judgment and all the legal consequences of such conviction of such prisoner, irregular. In the course of the arguments for the prisoner in that case the cases cited above were sought to be distinguished, and it was contended as follows:—"Ahearne may be executed and the others may be acquitted, he will then have been hung for a conspiracy with himself, which is absurd. Again there is a contradiction on the face of the record: he is both innocent and guilty; for the others have not been found guilty and until they are, his guilt is not proved: he is therefore innocent and yet he is found guilty." The Court was unanimously of opinion that there was no ground on which the judgment in the case should be respite or arrested. In the course of his judgment Lefroy, C. J., observed that if the application to respite execution be made to the proper authorities it would be for them to say if such postponement should be granted until the result of the second trial were known as it might fail from the death of a witness, or from other circumstances which would be quite consistent with the prisoner's guilt. There are passages in the judgment which suggest that the subsequent verdict of not guilty against the others may be a ground for reversing the judgment of the one tried before but it is not

expressly stated whether such reversal was to be by the Court or by the proper authorities who are mentioned in one part of the judgment. In the case of *Rex v. Cooke* (4), referred to above, Baley, J., observed: "It is true as stated that an accessory cannot be tried before principal unless by his own consent, but if an accessory be tried at his own request before the principal he is liable to sentence, although if the principal be afterwards acquitted the judgment against the accessory falls to the ground in the same manner, as the reversal of the attainder of a principal *ipso facto* reverses the attainder of the accessory, Hawk P. C. b. 2 c. 29. s. 40 (a). But I think we are not warranted in presuming that the other Defendant in this case will be acquitted." In the same case Littledale, J., observed in the course of his judgment: "If the other Defendant R. S. Cooke shall hereafter be acquitted, perhaps this judgment may be reversed." Judgment against an accessory passed during the attainder of the principal was held good during the attainder, but on reversal of the attainder against the principal was said to be "without any writ of error utterly cancelled;" for by the reversal of the attainder against the principal the attainder of the accessory, which depends on the attainder of the principal, *ipso facto* is utterly defeated and annulled: 1 Hale P. C. 625: *Lord Sancher's case* (6). Wright, J., in his judgment in the case of *Rex v. Plummer* (7) on a reference to this case as well as the other cases cited above observed as follows:—"It is, however, not clearly settled whether in such a case of separate trials a subsequent acquittal of the

(4) 5 B. & C. 538 (1826).

(6) [1612] 9 Co. Rep. 207 at pp. 215, 216.

(7) [1902] 2 K. B. 389.

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other would not avoid the effect of the previous conviction of the Appellant, so, if in the present case, the Appellant had been sentenced, as he might have been, immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed; but it is not certain whether upon the acquittal of the other Defendants the sentence upon him must have been vacated or treated as erroneous just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but as was *ipso facto* avoided when the attainder was removed."

The rule of English law that is now well settled is that where two persons are indicted for conspiring together and they are tried together, both must be acquitted or both convicted. In *Harison v. Errington* (8) where upon an indictment of three for riot two were found not guilty, and upon error brought it was held a "void verdict" and it was said to be "like to the case in 11 Hen. 4 C. 2, "conspiracy against two and only one of them is found guilty, it is void, for one alone cannot conspire." In *Rex v. Sudbury* (9) where only two out of three were found guilty of riot, and there was no allegation of *cum aliis* the judgment was arrested. In *O'Connell v. The Queen* (10) was pointed out the legal impossibility that when several persons are indicted for a conspiracy any verdict should be found which implies that some were guilty of one conspiracy and some of another. In *Reg. v. Thompson* (11), Lord Campbell, C. J., observed: "The acquittal of two involves the acquittal of the third." Though the existence of this

rule was noticed in a series of cases, Lord Coleridge, C. J., in charging the jury in the case of *The Queen v. Manning* (12), tried in the summer assizes at Winchester in 1883, in which an indictment was preferred against the Defendants Manning and Hannar for conspiring to cheat and defraud the prosecution, directed them that on that indictment they might find one prisoner guilty and acquit the other. The jury returned a verdict of guilty against Manning but were unable to agree as to Hannar and were discharged. Upon a rule moved for a new trial it was held by Lord Coleridge, C. J., himself and Mathew and Stephen, JJ. [*The Queen v. Manning* (12)] that there had been a misdirection. In *Rex v. Plummer* (7) the facts were these: Plummer, Fenton and Wheeler were charged jointly on an indictment containing six counts, of which five related to obtaining money by false pretence and are not material, and the sixth charged them with conspiring amongst themselves. Upon the five counts relating to obtaining money by false pretence Plummer pleaded not guilty and a verdict of not guilty was returned in his favour. Plummer was subsequently called as a witness for the prosecution against Fenton and Wheeler, who pleaded not guilty to the whole indictment and were found not guilty upon the whole indictment. When verdict of not guilty was recorded in favour of Fenton and Wheeler, Plummer's Counsel claimed that Plummer could not be convicted and punished, but that he should be acquitted. The Chairman sentenced Plummer but respited the sentence and admitted Plummer to bail pending the hearing of the case by the Court for the Consideration of Crown

(8) 1 Popham 202 (1365).

(9) 12 Mod. 262 (1698).

(10) 11 Cl. & F. 155 (1844).

(11) 16 Q. B. 332 (1851).

(7) [1902] 2 K. B. 339.

(12) 12 Q. B. D. 241 (1883).

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Cases Reserved. Wright, J., observed that there was much authority to the effect if Plummer had pleaded not guilty to the charge of conspiracy, and the trial of all three Defendants together had proceeded on that charge and had resulted in the conviction of Plummer and the acquittal of the only alleged conspirators, namely, Fenton and Wheeler, no judgment could have been passed against Plummer because the verdict must have been repugnant in finding that there was a criminal agreement between Plummer and the others and none between them and him. All the learned Judges who heard this case were pressed by the rule which had been followed in a long course of decisions that because the record of conviction can only be made in the terms of the indictment the acquittal and conviction on the same record would be directly repugnant and contradictory to each other, and that the record would be inconsistent and contradictory and so bad on its face. As pointed out by this Court in the case of *Umadas Dasi v. The King-Emperor* (13), Lord Alverstone, C. J., and Jelf, J., in *Rex v. Plummer* (7) considered the objection to be to a certain extent technical, but they concurred in the judgments of the other three learned Judges because they were, as they said, unable to give satisfactory reasons for adopting a contrary view, and Mathew and Stephen, JJ., in the case of *R. v. Manning* (12), expressly stated that they affirmed the principle with great reluctance. In fact Lord Alverstone, C. J., speaking for himself and Jelf, J., said in *Rex v. Plummer* (7) that in so concurring they placed great reliance on the fact that there was a joint trial on one indictment charging the

three Defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons. In *R. v. Manning* (12), Lord Coleridge, C. J., was rather doubtful as to the propriety of the rule. He observed as follows:—"I am by no means prepared to say that if the matter were *res integra*, and even in this case if there could have been an appeal from this decision to some other tribunal, I might not have adhered to my view and left the point to be settled by higher authority. But I feel bound by what I now understand to be the established rule of practice. The earlier cases, it is true, are stated shortly and without much particularity of detail. It may be, if we had all the facts of those cases, they might turn out to be less in point than they appear to be at present, but still from the time of the 14 Hen. 4 (1) it has been taken for granted by the Judges of these Courts that in cases of an indictment for conspiracy when two people are indicted and are tried together (because different considerations arise when people are not tried together) either both must be convicted or both must be acquitted. That seems to have been determined or, if not determined, taken for granted from very early times."

So far then as the acquittal of a conspirator in a subsequent trial is concerned, it is now settled that it forms the ground of reversal of a conviction of one tried before; on the other hand, the conviction of the latter is a perfectly good one at the time that the judgment is pronounced against him, and all the legal consequences of a valid conviction follow from it. As for the principle relating to the acquittal of a conspirator following from the acquittal of the other when the conspiracy is alleged only amongst the two and in a

(7) [1902] 2 K. B. 339.

(12) 12 Q. B. D. 241 (1885).

(13) 28 C. W. N. 1546 (1924).

(12) 12 Q. B. D. 241 (1885).

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joint trial held in respect of both, it is based upon rule of practice and procedure, which under the English law appears to be well settled, that repugnancy or contradiction on the face of the record is a ground for arresting judgment or annulling a conviction, and is a ground on which the accused can claim an acquittal.

The powers exercised by the Court for the Consideration of Crown Cases Reserved and by the Court of Criminal Appeal are, under the statutes under which the said Courts act, much larger than the powers conferred on Courts in this country under sec. 423 of the Code of Criminal Procedure. In an ordinary appeal from an order based on the verdict of a jury this Court as a Court of Appeal is bound by the provisions contained in sub-sec. (2) to that section which enacts that "nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down here," but in the present case we are not fettered by that proviso in consequence of the exception expressly made in sec. 449, Cr. P. C. It has been held by this Court in a number of cases that repugnancy in the verdict of jury in this country is not by itself a sufficient ground for quashing a conviction, and there is no provision in the Code justifying interference with a conviction on the ground of repugnancy in the record: Per Beachcroft, J., in *Ramesh Chandra Banerji v. Emperor* (14), *Manindra Chandra Ghose v. Emperor* (15); and in the case of *Umadasi*

Dasi v. The King-Emperor (13), it was held that in the absence of any provision in the Indian Statute Law the Court is not bound to follow the rule of English law that repugnancy or contradiction on the face of the record is a ground for quashing a conviction. That no doubt is so; but if we were satisfied that if a rule was recognized under the English law which was not a mere rule of practice and procedure but as embodying a principle of natural or substantial justice, and there was nothing in the Code in force in this country militating against its application here, the powers conferred by sec. 423, Cr. P. C., would be large enough to invoke its application in this country as well, and I would have not hesitated to invoke the aid of that principle. In my opinion, however, no such thing has been established in the present case. The net result of the acquittal of Basanta Singh was to hold him not guilty for all purposes, and so far as he is concerned that verdict can no longer be challenged nor the effect of it in any way minimised, no matter whatever the reason was that formed the basis of that verdict or that actuated the Judge in accepting it. It has no effect so far as the present Appellant is concerned, beyond suggesting that some of the evidence upon which the Appellant was convicted was, in a different trial of another accused person, found to be unworthy of acceptance. That, in my opinion, is the highest at which the matter can be put in favour of the Appellant. If on the merits it is established that the evidence against the Appellant was weak or there were inherent improbabilities or infirmities in the case against him then perhaps we may take into consideration the

(14) I. L. R. 41 Cal. 350; a. c. 18 C. W. N. 493 (1913).

(15) I. L. R. 41 Cal. 755; a. c. 18 C. W. N. 590 19

(13) 28 C. W. N. 1046 (1924).

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fact that the same witnesses were disbelieved—if we are sure that they were actually disbelieved—in a subsequent trial. At least, that was what was done by the Court of Criminal Appeal in England in the case of *George Baker v. Rex* (16) who set aside a conviction of the prisoner on a certificate granted under the Act for the reason that the prosecution had been disbelieved in a subsequent trial of another person for a similar offence. In that case Ridley, J., thought fit to quash the conviction as on the whole the conviction was unsatisfactory. Speaking of the logic of the course he observed, "It is not possible to say that logically that is a reason why the verdict should be interfered with, but the conviction is somewhat unsatisfactory."

Turning now to the merits, so far as the charge of conspiracy is concerned, Basanta Singh, the alleged co-conspirator, was examined as P. W. 18 in the case. Basanta Singh was, at the time when he was so examined, awaiting his trial, having, as already stated, been committed for trial jointly with the Appellant. It is difficult to appreciate the object of examining Basanta Singh as a witness in the case and I am unable to conceive what evidence the prosecution could reasonably expect to get from him. Basanta Singh himself objected to be so examined and his examination was also objected to by learned Counsel for the Appellant. The prosecution insisted on the examination of the witness and the Court explained to him the provisions of sec. 132 of the Indian Evidence Act and he was examined. The witness gave the whole case of conspiracy away; nothing less could, I think, be reasonably expected of him, be the prosecution case true or

(16) 9 Cr. App. Rep. 155 (1914).

false. In my opinion, it was an injudicious step for the prosecution to take; but in view of the other evidence in the case which had already been adduced and the fact that even after the examination of Basanta Singh the prosecution went on examining other witnesses in support of the charge of conspiracy, I am of opinion that the prosecution never meant to abandon that charge. It cannot be gainsaid that this procedure was likely to embarrass the Appellant to a certain extent, for the prosecution could examine Basanta Singh as a witness on their behalf only by putting him forward as a witness of truth; but judging from the course of the trial and the statement filed by the Appellant at the close of the trial on the 18th June 1924 it does not appear that he was in any way misled.

As to the evidence in support of the charge relating to the conspiracy, we start with the fact admitted by the Appellant that he took delivery of the bags at the Baliaghata Railway station, and had them put into hand-carts for the purpose of taking them to the Customs Office. What happened then, according to him, was that he found an empty lorry and asked the driver whether he would take them to the Customs House and the man agreed, upon which the Appellant paid him Rs. 10, that the Appellant went for a taxi for himself and when he came back he found that the lorry had left, that he then searched for the lorry and even went to Howrah and Kidderpore but could find no trace of it. The driver of the lorry Banamali Das has been examined as P. W. 10 in the case. He was not able to identify the Appellant as the Sahib in whose presence the bags were loaded on his lorry; but that he was the driver and the Appellant was the Sahib in question admits of no doubt, for

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on behalf of the Appellant the following question was put to the witness and the following answer obtained: "Q.—I put it to you that the Sahib said go and take the goods to the Customs House, I am coming in a taxi. A.—No." So the fact that the witness is not able to identify the Appellant does not at all matter. The evidence which this witness has given and which in my opinion there is absolutely no reason to disbelieve clearly and conclusively establishes the charge of conspiracy as against the Appellant. He says that Basanta Singh had booked an order for the lorry (which upon the evidence of Mr. Sherman, P. W. 13, appears to have been booked at about 5-30 P.M., about which time the witness said he was inclined to be confident), that the Superintendent of the garage told him that the lorry was to take some jute from Sealdah Railway station to Bhowanipur, that he started with Basanta Singh from the garage at about 8 P.M., that under the directions of Basanta Singh he waited near the Baliaghata Railway station, that at about 10 P.M., the bags were put into the lorry, and during the loading the Sahib remained standing 12 or 14 cubits away. What happened then may better be described in the words of the witness himself:—"Later on Basanta Singh turned up. The Sahib left. Basanta Singh said that the goods belonged to the Sahib and he would direct me as to where the goods were to be taken to. When the coolies were tying up the goods the Sahib turned up. He said, 'thick hai,' I said 'yes.' He walked away. I asked the Sahib in Hindusthani when are the goods to be taken. The Sahib said at 10 or 11. I asked him, 'to-night' or 'to-morrow.' He said, 'to-morrow.' " I can see nothing on which

I may say that the witness did not depose truthfully as to what occurred. Then there are certain circumstances which cannot be overlooked. The Appellant upon his own statement knew that the goods had not arrived at their proper destination that night, and he made a fruitless search for the same at different places; but he did not inform the police or the Customs Authorities. The next morning he arrived at the thana after the bags had been seized and claimed the bags as his, but did not tell the police the story as to how the bags had been diverted or make any complaint on that score. He moved the Assistant Commissioner and having succeeded in getting them back quietly deposited them in the Customs House godown without making any mention of what had happened to any body. The explanation which he has offered as to how he came to spot out the Bhowanipur thana as the place where the goods would be found does not bear scrutiny, and the explanation which he offers for not mentioning the matter to his superiors or to the police seems to be absurd and points inevitably to a guilty conscience. These are but a few of the many circumstances which, in my opinion, point unmistakably to a conspiracy between him and Basanta Singh, the object of which was to wilfully suffer the latter to commit the offence of criminal breach of trust in respect of the goods. The conviction of the Appellant under sec. 409/120B, I. P. C., is, in my opinion, amply supported on the evidence and is unassailable.

As for the substantive offence under sec. 409, I. P. C., for which also the Appellant has been convicted, I am of opinion that the prosecution has not succeeded in proving the elements requisite

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to constitute that offence. One of essential facts that they have got to establish is that the bags did actually contain peacock feather at the time when the Appellant came to have dominion over them. It is true that in his report the Appellant stated he had seized 34 bags of peacock feather, but the evidence of the witnesses, which has all been fully discussed before us, shows that only one bag was opened and found to contain peacock feather and there is no positive evidence as to the contents of the other bags at the time when Appellant took charge of them. There is no clear evidence that the condition of the bags when they were found by the police was not the same as it was when they were in the charge of the Appellant. It is no doubt not very likely that the one solitary bag which the Appellant chanced to open would contain peacock feather and all the others would contain chaff; but to sustain a conviction for criminal offence all the necessary facts must be strictly proved. In my opinion, the offence under sec. 409, I. P. C., has not been proved beyond doubt.

I would accordingly set aside the conviction of the Appellant under sec. 409, I. P. C., and affirm the conviction under sec. 409/120B, I. P. C.

As to sentence the learned Judge considered the recommendation of the jury for a light sentence, and taking into consideration all the facts and circumstances sentenced the Appellant to undergo rigorous imprisonment for nine months. I am not prepared to say that the sentence is severe.

I would accordingly dismiss the appeal subject to the modification that the conviction of the Appellant under sec. 409, I. P. C., is to be set aside, and the sentence passed upon the Appellant

should be allotted to the conviction under sec. 409/120B, I. P. C.

The Appellant will surrender to his bail and serve out the sentence.

SUHRAWARDY, J.—I agree in the able and learned judgment of my learned brother.

J. N. R.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.	THE MIDNAPUR
LORD SHAW.	ZEMINDARY Co., LD.,
LORD BLANESBURGH.	Appellant,
SIR JOHN EDGE.	v.
MR. AMEER ALI.	NARESH NARAYAN
1924,	ROY and ors.,
29, October.	Respondents.

Limitation Act (IX of 1908), Sch. I, Arts 120, 142—Co-sharer's decree for joint possession—Delivery of symbolical possession in execution—Failure to obtain actual possession—Suit for partition and separate possession with mesne profits—Limitation.

Where a co-sharer in execution of a decree for recovery of joint possession was given symbolical possession under sec. 264 of the Code of Civil Procedure of 1882, on 20th June 1903, but having failed to obtain actual possession sued for partition and separate possession and for mesne profits on the 8th August 1912:

Held—That the claim for recovery of possession was governed by Art. 142 of the Limitation Act and was within time.

That the claim for mesne profits was governed by Art. 120, and Plaintiff was entitled to recover mesne profits from the 8th August 1906 until partition was effected and possession of lands falling to Plaintiff's share was delivered to him.

In the above appeal, judgment wherein was delivered by the Board on 7th April 1924 (*vide* report at 29 C. W. N. 34), an application was made to the same Board for the rectification of the order in Council of the aforesaid date. Judgment had

THE MIDNAPUR ZEMINDARY CO., LD. v. NARESH NARAYAN ROY.

been given in favour of the Respondents and compensation awarded them from the 20th June 1903, that is to say, for a period exceeding nine years before the commencement of the suit—the full period in fact, during which they had been excluded from possession of the property in dispute.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellants contended that the date, 20th June 1903, from which compensation had been allowed had been inserted by inadvertence, that the Respondents were claiming mesne profits and that in law they were not entitled to the same. In any event the longest possible time during which compensation could be claimed was 6 years. Referred to Art. 120, Limitation Act and to *Watson & Co. v. Ram Chand Dutt* (1), *Batul Begum v. Mansur Ali Khan* (2) and *Watson & Co. v. Ram Chand Dutt* (3).

Messrs. Dunne, K. C. and Wallach for the Respondents contended that no limitation applied.

The Board decided that 6 years was the period of limitation under Art. 120 and ordered the date 8th August 1906 to be substituted for 20th June 1903 in the Order in Council.

Judgment was amended accordingly and copies thereof with the date amended as above have been re-issued from the Privy Council Office.

G. D. M.

(1) L. R. 17 I. A. 110, 118, 122: s. c. I. L. R. 18 Cal. 10 (1890).

(2) L. R. 28 I. A. 248, 254: s. c. 5 C. W. N. 888 (1901).

(3) I. L. R. 23 Cal. 799 (1896).

[EDITOR'S NOTE.—In consequence of the rectification of the Board's judgment made as reported above, the report of the judgment should be corrected as follows.—

29 C. W. N., at p. 45, col. 1, l. 5,

for "20th June 1903," read "8th August 1906."]

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

1924,

Heard, 12, May.

Judgment,

19, June.

KENCHAVA KOM

SANYELLAPPA

HOSMANI and anr.,

•Appellants,

v.

GIRIMALLAPPA CHAN-

NAPPA SOMASAGAR,

Respondent.

Hindu law—Murderer, if may succeed to estate of murdered—Disqualification, if in respect of beneficial ownership only or of both legal or beneficial estate—Disqualification, if personal or bars disqualified heir's heirs—Bandhus, succession of—Males, if preferred to females, when all pitri-bandhus and when former matri-bandhus and latter pitri-bandhus—Law in Bombay Presidency—Principles of justice, equity and good conscience—Statutes of succession, if to be read as superseding such principles.

Amongst Hindus, a murderer is excluded from succession to the estate of the murdered by the principles of equity, justice and good conscience, if not by the principles of Hindu law.

He is disqualified from succeeding wholly and not merely to the beneficial interest, the theory of legal and equitable estates being no part of Hindu law.

The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent.

VEDANAYAGA MUDALIAR v. VEDAMMAL (2) and GANGU v. CHANDRABHAGABAI (3) referred to.

As between bandhus of an equal degree, and both related on the father's side:

Held, in a case from Bombay—That the male is to be preferred to the female.

Quære:—Whether, in the Bombay Presidency, the male bandhu is to be preferred to the female bandhu even when the latter is related through the father and the former through the mother.

(2) I. L. R. 27 Mad. 591 (1904).

(3) I. L. R. 32 Bom. 275 (1907).

KENCHAVA KOM SANYELLAPPA HOSMANI v. GIRIMALLAPPA CHANNAPPA SOMASAGAR.

NARASIMMA v. MANGAMMAL (4), VEDACHELA MUDALIAR v. SUBRAMANIA MUDALIAR (5), SAGUNA v. SADASHIV (6), RAJAH VENKATA NARASHIMA v. RAJAH SURENANI (7) and BALKRISHNA v. RAMKRISHNA (8) referred to.

Semble:—Statutes regulating heirship or descent, or giving force to Wills and to devises contained in Wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence.

IN RE: HOUGHTON (1) referred to.

This was an appeal (No. 100 of 1922) from a decree of the High Court at Bombay, dated the 1st September 1920, which varied a decree of the Subordinate Judge at Dharwar, dated the 15th March 1919.

The suit was brought by the Respondent to recover possession of property which originally belonged to Ramanna. Ramanna adopted Parappa, a Sudra, and died in 1912. Parappa only survived his adopted father by a month and his mother Chanbasava succeeded to the property for a Hindu woman's estate.

Ramanna's brother's son, Hanmappa, claimed the estate and on an adverse decision of the Court he murdered Chanbasava and was sentenced to transportation for life.

The Defendants to the present suit, Appellants in this appeal, are the brother's daughters of Ramanna.

The relationship of the parties is set out more clearly in the judgment of the Judicial Committee.

(1) [1915] 2 Ch. 173.

(4) I. L. R. 13 Mad. 10 (1889).

(5) I. L. R. 48 I. A. 349: A. C. 26 C. W. N. 159 (1921).

(6) I. L. R. 26 Bom. 710 (1902).

(7) I. L. R. 31 Mad. 321 (1908).

(8) I. L. R. 45 Bom. 353 (1920).

The Subordinate Judge passed a decree for the Respondent for a one-third share of the property and based his decree on a ruling of the Madras High Court, *Vedamayaga Mudaliar v. Vedammal* (2), which decided that the estate of a son vested in his mother who had murdered him but that she took no beneficial interest therein and did not also constitute a fresh stock of descent, but held in trust for the then presumptive reversioner. In this case he held that the Defendants as the next heirs of Hanmappa did not succeed to the exclusion of Plaintiff, and that as the Plaintiff and the Defendants were together the presumptive reversioners, being equal in degree from Parappa, each succeeded to a third share.

He held accordingly that the Plaintiff and Defendants were entitled to share equally as the heirs of Parappa. An appeal to the High Court was allowed by MacLeod, C. J. and Fawcett, J., who decided that the Respondent was entitled to the whole estate. They were of opinion that although there was no direct provision of Hindu law bearing on the subject, yet on the principles of justice, equity and good conscience a murderer was absolutely disqualified from succeeding. They further held that a male succeeded in preference to a female standing in the same degree of relationship and they varied the decree of the Subordinate Judge accordingly. The decision of the High Court is reported [*Girimallappa v. Kenchava* (9)].

Mr. E. B. Raikes for the Appellants.—The law to be applied is laid down by Bombay Regulation IV of 1827, sec. 26. In the present case the law applicable is Hindu law and the High Court was in error in applying the general principles

(2) I. L. R. 27 Mad. 591 (1904).

(9) I. L. R. 45 Bom. 766 (1920).

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of justice, equity and good conscience. *Rama Chandra v. Vinayak Kothekar* (10).

There is no occasion for referring to the principles of public policy for there is express provision in the Indian Penal Code for forfeiture of the property of a murderer; *vide* secs. 61 and 62, I. P. C.

Hindu law being applicable that law does not include murder or at any rate the murder of a *Sudra* among the disabilities of inheritance.

Even if there is any law excluding a murderer from inheriting the estate of the person he murders, the estate inherited in this case was not the estate of the murdered person.

Assuming, however, that Hanmappa was excluded from beneficial inheritance that exclusion did not prevent him from being a stock of descent.

Gangu v. Chandrabhagabai (3).

In Hindu law there is no doctrine of "corruption of the blood" as in treason. The question of "stock of descent" would not arise in the case of *Vedanayaga Mudaliar v. Vedammal* (2) because in that case the question was whether the widow was a party to the murder and therefore excluded, and a widow cannot in any event be a "stock of descent."

Assuming that Hanmappa was excluded from the inheritance, the Appellants would have a prior claim to succeed to Parappa's estate, for in Bombay a father's brother's daughters have a prior right to a father's sister's son.

It is admitted that in any other presidency than Bombay the male would have the preference over the female but under Bombay law a woman is a *gotraja sapinda* if born in the family and remains so even

though married out. In *Saguna v. Sadasiv* (6) the law as laid down in Madras in *Narasimma v. Mangammal* (4) was referred to but was not followed.

In Bombay it has always been held that propinquity is the only test.

By Bombay law a woman born in the *gotra* takes absolutely so as to form a fresh stock of descent.

Mayne's Hindu Law, paras. 38, 532, 58.

The Appellants in this case were born in the *gotra* and are therefore to be preferred to the Respondent who was born outside the *gotra*.

Mayne's Hindu Law, para. 585.

He also referred to *Balkrishna v. Ramkrishna* (8), *Vijjarangum v. Lakshuman* (11), *Bai Kesserbai v. Hunsraj Morariji* (12) and *Parot Bapalal Sevakram v. Mehta Harilal Surajram* (13).

The Respondent was not represented.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This case involves some questions of importance. The parties are all relations; descendants of one Hanmanna. He had three children—a daughter, Basava, whose son Girimallappa Channappa Somasagar is the Plaintiff and present Respondent; a son Vadakappa who had two daughters, Kenchava and Gangava—who are the Defendants and present Appellants—and a son Hanmappa—of whom more hereafter. The third child of Hanmanna was another son, Ramanna since deceased. Ramanna married Chanbasava; they had no children, but they adopted as a son,

(4) I. L. R. 13 Mad. 10 (1889).

(6) I. L. R. 26 Bom. 710, 714 (1902).

(8) I. L. R. 45 Bom. 353 (1920).

(11) 8 Bom. H. C. R. 244, 261 (1871).

(12) L. R. 33 I. A. 176; s. c. 10 O. W. N. 802 (1906).

(13) I. L. R. 19 Bom. 631 (1894).

(2) I. L. R. 27 Mad. 591 (1904).

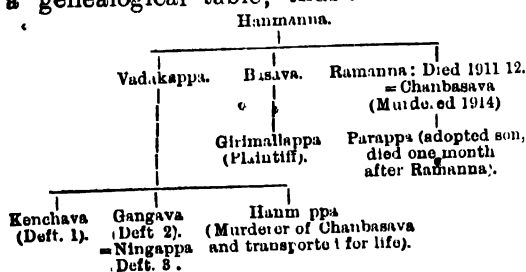
(3) I. L. R. 32 Bom. 275, 280 (1907).

(10) L. R. 41 I. A. 290, 299; s. c. 18 O. W. N. 1154 (1914).

KENCHAVA KOM SANYELLAPPA HOSMANI v. GIRIMALLAPPA CHANNAPPA SOMASAGAR.

Parappa. He died a month after Ramanna. Thereupon, his adoptive mother Chanbasava succeeded to the property for the ordinary Hindu woman's estate, and upon her death, descent would have to be traced to Parappa as the propositus; and Hanmappa if he survived Chanbasava would be the natural heir to Parappa.

The relationships can be illustrated on a genealogical table, thus:—



In 1914, Hanmappa had a quarrel with his aunt Chanbasava and murdered her. He was tried and sentenced to transportation for life. The matter to be determined in this case is who, in these circumstances—the Hindu woman's estate of Chanbasava having been brought to an end—is to succeed as heir to Parappa's property.

The Defendants, Kenchava and Gangava, the daughters of Parappa's uncle, obtained possession. Thereupon, the Plaintiff, as son of Parappa's aunt, sued claiming to have a better title. The Defendants being in possession—while averring their better title—also rely as they are entitled to do, upon the contention that the real title is in or through the murderer Hanmappa.

The case therefore raises three questions—

Can the murderer succeed?

If not, can title be claimed through him?

If not—and he is to be wiped out altogether—who are the heirs of Parappa?

And to this last question there are three possible answers: The three cousins may be entitled equally; or the daughters of the uncle may succeed alone; or the son of the aunt may succeed alone.

As to the first two questions the Subordinate Judge held that the matter was provided for by Hindu law, and that this law disqualified a murderer from succeeding to an estate, the succession to which he had accelerated by killing the woman who had a previous interest during her life. But in compliance, as he considered, with a decision of the High Court of Madras, he held that nevertheless the murderer did take the legal estate, though he was disqualified from having any beneficial interest. He further held that this disqualification was not confined to a personal disqualification of the murderer, but wiped him out from the line of descent, so that the heirship to the propositus Parappa is to be traced directly and not through him.

The High Court came to the same conclusions, that is to say, that the murderer had no title, and that the heirship was not to be traced through him, but on a somewhat different line of reasoning. The learned Judges thought that there was no Hindu law which governed the matter, so that they had to have recourse in obedience to the Bombay Regulation of 1827, No. 4, sec. 26, to the principles of equity, justice and good conscience. And while thinking it immaterial whether the murderer had the legal estate vested in him or not because "in either case he must for the purpose of the inheritance be treated as if he were dead when the inheritance opened and as not being a fresh stock of descent," they thought it "simpler to say that the exclusion extends to the legal as well as beneficial estate."

Before this Board, it has been con-

KENCHAVA KOM SANYELLAPPA HOSMANI v. GIRIMALLAPPA CHANNAPPA SOMASAGAR.

tended that the matter is governed by Hindu law, and that the Hindu law makes no provision disqualifying a murderer from succeeding to the estate of his victim and therefore it must be taken that according to this law he can succeed, and he being alive, the Plaintiff has no title.

Their Lordships do not take this view. There is much to be said for the argument of the Subordinate Judge that the principles of jurisprudence which can be traced in Hindu law, would warrant an inference that according to that law a man cannot take advantage of his own wrong, and that if this case had come under consideration by the Hindu sages they would have determined it against the murderer. But it is unnecessary so to decide, because the alternative is between the Hindu law being as above stated or being for this purpose non-existent, and in this latter case the High Court have rightly decided that the principles of equity, justice and good conscience exclude the murderer.

The English law on this subject is based upon principle and is well-settled. It is true that the reported decisions have been in cases where the murderer was a devisee or legatee under the Will of the murdered person, and that Joyce, J., in *In re: Houghton* (1) thought it a matter for consideration whether the same rule would apply in the case of an intestacy, and cited a decision of a Court in the U. S. A. by which it was held that the provisions of the Statute of Distributions were paramount and forbade the consideration of any disqualification. But the actual decision of Joyce, J., was rested upon another ground and a quite satisfactory one; and their Lordships are unable to follow the reasoning of the learn-

ed American Judge. Statutes regulating heirship or descent, or giving force to Wills and to the devises contained in Wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence.

In their Lordships' view it was rightly held by the two Courts below that the murderer was disqualified; and with regard to the question whether he is disqualified wholly or only as to the beneficial interest which the Subordinate Judge discussed, founding upon the distinction between the beneficial and legal estate which was made by the Subordinate Judge and by the High Court of Madras in the case of *Vedanayaga Mudaliar v. Vedammal* (2), their Lordships reject, as did the High Court here, any such distinction. The theory of legal and equitable estates is no part of Hindu law and should not be introduced into discussion.

The second question to be decided is whether title can be claimed through the murderer. If this were so, the Defendants as the murderer's sisters, would take precedence of the Plaintiff, his cousin. In this matter also, their Lordships are of opinion that the Courts below were right. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. It may be pointed out that this view was also taken in the Madras case just cited.

It was contended that a different ruling was to be extracted from the decision of the Bombay High Court in *Gangu v. Chandrabhagabai* (3). This is not so. In that case, the wife of a murderer was held entitled to succeed to the

(1) [1915] 2 Ch. 173.

(2) I. L. R. 27 Mad. 591 (1904).

(3) I. L. R. 32 Bom. 275 (1907).

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estate of the murdered man; but that was not because the wife deduced title through her husband, but because of the principle of Hindu family law that a wife becomes a member of her husband's *gotra*, an actual relation of her husband's relations in her own right, as it is called in Hindu law a *gotraja sapinda*. The decision therefore has no bearing on the present case.

It remains to be determined whether as between the Appellants and the Respondent—all three being first cousins of the propositus—any distinction is to be made by reason of their sex or the sex of their parents. The Subordinate Judge thought that there was no distinction to be made between *bandhus* of equal nearness, and that all took equally, and so he gave to the Plaintiff a third of the property.

Both parties appealed to the High Court, which held that as between *bandhus* of equal nearness to the propositus, male members of the family were preferred to female, and gave judgment that the Plaintiff should take the whole.

The case against this decision has been very fully argued before their Lordships by counsel for the Defendants-Appellants. He brought a number of authorities before their Lordships for review, all of which have been considered.

In the result, however, for the purposes of this case, the matter can be brought into a short compass. Both the Subordinate Judge and the High Court agreed—indeed the Subordinate Judge said it was conceded in argument on both sides—that the Plaintiff and the Defendants are *bandhus* (*bhinna gotra sapindas*) of an equal degree being *sapindas* within four degrees of the common ancestor. This being so, no reason is shown in their Lordships' opinion why the Defendants

as daughters of the deceased father's brother should take in preference to the Plaintiff who is the son of the deceased father's sister. So far again, both Courts are in agreement, and their Lordships are in agreement with both Courts. That leaves to be determined the point on which the two Courts differ, the Subordinate Judge having held that all three should share alike, and the High Court having given preference to the Plaintiff as being a male.

Now, it was decided by the High Court of Madras in 1889, in the case of *Narasimma v. Mangammal* (4) that a father's sister was postponed to a mother's brother by reason of the general preference given among *bandhus* to male over female heirs. This decision was quoted without disapproval by their Lordships on this Board in the case of *Vedachela Mudaliar v. Subramania Mudaliar* (5).

But the High Court of Bombay in 1902 in the case of *Saguna v. Sadashiv* (6) came to the conclusion that however this might be in Madras it was different in Bombay. The Judges gave preference to the father's half-sister over the mother's brother, and did not follow the case of *Narasimma v. Mangammal* (4) which was quoted to them. And it was upon this decision of the High Court of Bombay that the main argument of counsel for the Appellants was founded.

When analysed, however, the decision of the Bombay Court comes to this only. There may or may not be a preference among *bandhus* of males over females, if they are otherwise in the same position, but there is a prior and paramount enquiry whether they are *bandhus* on the

(4) I. L. R. 13 Mad. 10 (1889).

(5) L. R. 48 I. A. 349 at p. 360: s. c. 26 C. W. N. 159 (1921).

(6) I. L. R. 26 Bom. 710 (1902).

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father's side or on the mother's side—those on the father's side having the precedence.

The question of priority as between *atma bandhus ex parte paterna* and those *ex parte materna* has been the subject of much discussion—the latest word on the subject being found in *Vedachela Mudaliar v. Subramania Mudaliar* (5) which decided in 1921, that as between *pitru bandhus* and *matru bandhus*, the preference given to the former is settled.

The case now before their Lordships is not affected, however, by these considerations, as both sets of claimants are related on the father's side.

In 1908, the High Court of Madras in *Rajah Venkata Narashima v. Rajah Surenani* (7) again decided that in that Presidency a male *bandhu* is entitled to preference over a female *bandhu*, even though the latter is nearer in degree. *Saguna v. Sadashiv* (6) was not referred to in the judgment, but it was unnecessary because there was no contest between maternal and paternal *bandhus*.

Then in *Balkrishna v. Ramkrishna* (8) (decided in 1920 by the High Court of Bombay—consisting of the same Judges who decided the case now under appeal) the authority of *Rajah Venkata Narashima v. Raja Surenani* (7) was followed. The principle that among *bandhus* the male is entitled to preference over the female—even though the latter is nearer in degree—was accepted as being law for the Bombay Presidency as much as for the Madras Presidency; and preference was given to a mother's sister's son over a brother's daughter. In that particular

case the actual decision would appear to conflict with *Saguna v. Sadashiv* (6), because it apparently ignored the supposed prior and paramount claim of paternal over maternal *bandhus*; and it would seem that for some unaccountable reason, *Saguna v. Sadashiv* (6) was not cited to the Court. Whenever therefore the two conflicting principles of preference of the paternal over the maternal line and preference of the male over the female sex, in the Presidency of Bombay, have to be weighed, the Court which weighs them will have to choose between these two decisions of the High Court.

But it will be seen from this summary that there is no case in the Bombay Presidency which decides that some preference is not to be given to male *bandhus* over female. And there is no doubt, indeed the learned counsel for the Appellants did not contend that there was any doubt, that throughout the rest of India preference for the male would be certain.

This being so, their Lordships are of opinion that the case was rightly decided by the High Court of Bombay, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

G. D. M.

(ORDINARY ORIGINAL CIVIL JURISDICTION.)

SUIT NO. 2445 OF 1922.

PAGE, J.

1924,

17, November.

CHIRANJILAL RAHLAL

v.

B. N. RY. CO., LD.

Limitation Act (IX of 1908), Art. 31 or Art. 115, whether applicable to suit by consignor against carrier for compensation for non-delivery or delay in delivery of goods

Art. 31 of the Limitation Act (Act IX of

(6) I. L. R. 26 Bom. 710 (1908).

(5) L. R. 48 I. A. 349: s. c. 26 C. W. N. 159 (1921).

(6) I. L. R. 26 Bom. 710 (1908).

(7) I. L. R. 31 Mad. 321 (1908).

(8) I. L. R. 45 Bom. 333 (1920).

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1908) *applies whether the claims in such suits arise ex contractu or ex delictu and is not limited to suits by the consignee.*

RADHA SHYAM BASAK v. THE SECRETARY OF STATE FOR INDIA (1) *dissented from.*

THE BRITISH INDIA STEAM NAVIGATION CO. v. HAJI MAHOMMED ESSACK & Co. (4), **DANMULL v. BRITISH INDIA STEAM NAVIGATION CO.** (3), **GREAT INDIAN PENINSULA RAILWAY v. RAJSETT CHANDMULL** (5) and **VENKATA SUBBA RAO v. THE ASIATIC STEAM NAVIGATION CO.** (6) *dissented from.*

HAJI AJAM GOOLAM HOOSSEIN v. BOMBAY AND PERSIA S. N. Co. (7), **INDIA GENERAL NAVIGATION AND RAILWAY Co. v. NANDALAL BANIK** (8), **GREAT INDIAN PENINSULA Ry. Co. v. GUNPAT RAI** (9) and **MUTSADDI LAL v. B. B. & C. I. Ry. Co.** (10) *referred to.*

The facts of the case will appear from the judgment.

Mr. B. C. Ghose for the Plaintiff.

Mr. Surita for the B. N. Ry. Co., Ltd.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—The decision of this suit involves the construction of Art. 31 of the First Schedule of the Limitation Act (Act IX of 1908). The material facts are simple and undisputed. On the 9th October 1919 the Bengal Nagpur Railway Company agreed to carry for the Plaintiff certain scantlings from Lapanga to Charkhidhari on the terms of Risk Note Form B. The Plaintiff duly delivered the

scantlings to the first Defendant, the B. N. Ry. Co., at Lapanga Station and the goods were despatched therefrom as to 558 scantlings in wagon No. 2820 on the 12th October 1919 and as to 328 scantlings in wagon No. 9656 on October the 12th. Wagon No. 2820 arrived at Charkhidhari sometime in December 1919 and the goods therein were delivered to and accepted by the consignee Kooliram Dwarkadas. Notwithstanding repeated protests and demands by the Plaintiff, however, the Defendants were not ready or willing to deliver the scantlings loaded in wagon No. 9656 until the 3rd March 1921, when notice that the goods had been sent to Charkhidhari was received by the Plaintiff. The Plaintiff thereupon informed the Defendants that he refused to take delivery of the scantlings as they had not been delivered within a reasonable time, and had become useless to him. Thereafter the goods were sold by the Defendants, and the proceeds, after deducting the expenses in connection with the carriage, are being held to the use of the Plaintiff. At the trial it was agreed between the parties that delivery of all these scantlings ought to have been made not later than the month of December 1919. On the 29th July 1922 the Plaintiff commenced the present proceedings in which he claimed damages for non-delivery of the scantlings in wagon No. 9656. At the trial he abandoned the claim against the Bombay Baroda and Central India Ry. Co., but continued the suit against the B. N. Ry. Co., with whom the contract of carriage had been made. The B. N. Ry. Co. contended that Art. 31 was applicable to the Plaintiff's claim, and that the suit which had not been commenced within a year after December 1919 was barred by limitation. On the other hand, the Plaintiff urged that Art. 115 was applicable

(1) I. L. R. 44 Cal. 161; s. c. 20 O. W. N. 790 (1916).

(3) I. L. R. 12 Cal. 477 (1886).

(4)* I. L. R. 3 Mad. 107, 110 (1881).

(5) I. L. R. 19 Bom. 165, 188 (1895).

(6) I. L. R. 39 Mad. 1, 5 (F. B.) 1915.

(7) I. L. R. 26 Bom. 562 (1902).

(8) 13 O. W. N. 851 (1909).

(9) I. L. R. 33 All. 544 (1911).

(10) I. L. R. 42 All. 390 (1920).

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and that the suit was launched in time. In support of his contention Mr. B. C. Ghose on behalf of the Plaintiff relied upon the following observations passed by Digambar Chatterjee, J., in the course of his judgment in *Radha Shyam Basak v. The Secretary of State for India* (1). His Lordship said:—"Art. 31 applied to suits against the carrier for compensation for non-delivery of or delay in delivering the goods and the time for suit is one year from the time when the goods ought to have been delivered. I think this article has no application. In the first place this article seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee. . . . Apart from this consideration, however, I think this is a case of breach of a written contract and Art. 115 of the Schedule governs the case. It was so held in a similar case of *Mahansing Chawan v. Henry Conder* (2) which was followed by Chief Justice Garth and Wilson, J., in the case of *Danmull v. The British India Steam Navigation Co.* (3)." If the propositions of law thus enunciated are correct it is admitted that the defence of limitation fails. The question which I have to determine is whether or not this statement of the law is well-founded. Art. 31 provides "against the carrier compensation for one year for non-delivery of or delay in delivering goods when the goods ought to have been delivered."

In considering what is the meaning which is to be attributed to the terms used in Art. 31 it is necessary to bear in mind that there is considerable judicial authority in support of the view that Arts. 30 and 31 relate only to claims which are

not founded on contract and arise *ex delictu*, and are not applicable to claims *ex contractu* [see *The British India Steam Navigation Co. v. Haji Mahommed Essac & Co.* (4) *per* Chief Justice and Innes, J., *Danmull v. British India Steam Navigation Co.* (3) *per* Garth, C. J., *Great Indian Peninsula Railway v. Risset Chandmull* (5) and *Venkata Subba Rao v. The Asiatic Steam Navigation Co.* (6) *per* Seshagiri Ayyar, J.]. The foundation of the doctrine appears to be that "although it is not easy to give a logical explanation for the arrangement of the articles in the Limitation Act it seems clear from their grouping and from the position of the residuary articles that compensation for torts is provided separately from compensation for breaches of contract. I feel no hesitation, therefore, in holding that Art. 31 does not relate to claims arising from contract" [*per* Seshagiri Ayyar, J., *Venkata Subba Rao v. The Asiatic Steam Navigation Co.* (6)]. With great respect I can find no warrant for such a doctrine in the language in which the article is couched, and I agree with Farran, J., that "the position of the article in the Schedule is to my mind a most fallacious guide. In part IV of the Schedule claims arising out of contract and claims arising out of tort are mixed together and certainly a claim under Art. 31 is much more naturally based upon contract than upon tort:" *Great Indian Peninsula Railway v. Risset Chandmull* (5). In my opinion, the legislature by enacting Arts. 30 and 31 intended to limit the period within which suits of the nature indicated in the articles must be commenced against carriers, having regard to the special disadvantages

(1) I. L. R. 45 Cal. 16, 35: s. c. 20 C. W. N. 780 (1916).

(2) I. L. R. 7 Bom. 473 (1888).

(3) I. L. R. 12 Cal. 477 (1893).

(4) I. L. R. 12 Cal. 477 at p. 480 (1886).

(5) I. L. R. 8 Mad. 107, 110 (1881).

(6) I. L. R. 19 Bom. 165, 188 (1895).

(7) I. L. R. 12 Cal. 477 at p. 480 (1893).

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under which carriers labour in resisting stale claims. I can see no ground for placing a limited construction upon the language used in these articles, and, in my opinion, Art. 31 applies whether the claims in such suits arise *ex contractu* or *ex delictu*. In my opinion, the weight of authority has always been in favour of the interpretation which I am disposed to give to the provisions of these articles [*The Great Indian Peninsula Railway v. Rasett Chandmull* (5) and *Haji Ajam Goolam Hoosein v. The Bombay and Persia Steam Navigation Co.* (7)], but the intention of the Legislature became manifest after the enactment of Act X of 1899. By sec. 3 of that Act the words "non-delivery of or" were added to Art. 31 which before this amendment had been referable only to claims in respect of delay in delivering goods. Digambar Chatterjee, J., in support of the construction which he put upon Art. 31 refers to the cases of *Mahansing Chawan v. Henry Conder* (2) and *Danmull v. The British India Steam Navigation Co.* (3) but these cases were decided before Act X of 1899 became law, and, while no doubt they were correctly decided having regard to the provisions of Art. 31 as it then stood, in my opinion, after the enactment of Act X of 1899 these cases can no longer be regarded as authorities for the proposition that Art. 115, and not Art. 31, is applicable to claims against a carrier for compensation for the non-delivery of goods which he has undertaken to carry. With great respect to Digambar Chatterjee, J., to so hold would be not only to turn counter to the current of recent judicial decisions but to fail to give effect to the express

language used in Art. 31 [see *Haji Ajam Goolam Hoosein v. Bombay and Persia S. N. Co.* (7), *India General Navigation & Ry. Co. v. Nandalal Banik* (8), *Great Indian Peninsula Ry. Co. v. Gunpat Rai* (9) and *Mutsaddi Lal v. B. B. & C. I. Ry. Co.* (10)]. The Plaintiff further contended, upon the authority of the above case, that Art. 31 "seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee." It is to be observed that the learned Judge cites no authority and adduces no reasons in support of this proposition. Counsel for the Plaintiff, however, urged that Art. 31 should be deemed to refer to the person who alone is entitled to take delivery, that is, the consignee, but in my opinion, there is no substance in this contention. No such limitation is to be found in the language used, and, in my opinion, the Legislature in enacting Art. 31 was not minded to discriminate between a suit brought by a consignor and a similar suit brought by a consignee—either of whom may suffer damage by reason of the failure of the carrier to deliver—but thereby intended to lessen the special difficulties to which carriers are exposed in investigating long deferred claims made against them in respect of the non-delivery of goods which they have undertaken to carry. The decision of the Court in *Radha Shyam Basak's* case (1), to which Beachcroft, J., and Chatterjee, J., were parties may, I think, be supported on the ground that in that case no evidence was adduced to prove when the goods ought to have been delivered: but, in my opinion, the propositions of law laid down

(1) I. L. R. 44 Cal. 16, 26: s. c. 20 C. W. N. 790 (1916).

(7) I. L. R. 26 Bom. 562, 570 (1902).

(8) 18 C. W. N. 851 (1909).

(9) I. L. R. 38 All. 544, 552 (1911).

(10) I. L. R. 43 All. 260 (1920).

(2) I. L. R. 7 Bom. 478 (1883).

(3) I. L. R. 12 Cal. 477 (1886).

(5) I. L. R. 19 Bom. 165, 188 (1885).

(7) I. L. R. 26 Bom. 562, 570 (1902).

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by Chatterjee, J., upon which the Plaintiff relies, are not well founded. For the above reasons with all due deference I am unable to hold that Art. 115 is referable to the claim in the present case. It is unnecessary for me in this case to consider under what circumstances, if any, Art. 49 of the Limitation Act may be relied upon in cases to which Art. 30 or 31 is inapplicable [*Essoo Bhayaji v. The Steamship "Shavitri"* (11) and *Venkata Subba Rao's case* (6)]. In my opinion the period within which it was incumbent upon the Plaintiff to commence proceedings to enforce his claim was determined by Art. 31. The suit, therefore, is barred by limitation and must be dismissed with costs on Scale No. 2 including reserved costs.

S. N. B.

(CIVIL REVISIONAL JURISDICTION.)

RULES NOS. 611, 1025 AND 1033 OF 1924.

GREAVES, J.

CHAKRAVARTI, J.
1924,

Heard,

21, November.

Judgment,

16, December.

KUNDAMUL DALIMIA
and ors., Petitioners,
v.

W. DYER and ors.,
Opposite Party.

Calcutta Rent Act (III of 1920, B. C., as amended by Act II of 1923, B. C., and Act I of 1924, B. C.), sec 1, sub-sec. (4), first proviso—Proceeding pending on 31st March 1924, for standardisation of rent in respect of premises, rent of which exceeded Rs 250 a month on 1st November 1918, effect of proviso on—Statute, interpretation of—Temporary Act, extension of, in part, if saves pending proceedings under part not extended—Application to part of premises leased as a whole, when rent apportionable to part exceeds Rs. 250 a month.

The Calcutta Rent Act III of 1920, B. C., a temporary Act, having been extended by the Amending Act II of 1923.

(9) I. L. R. 39 Mad. 1 at p. 12 (F. B.) (1916).

(14) I. L. R. 11 Bom. 129 (1880).

B. C., to 31st March 1924 ceased to operate after that date, and the Amending Act I of 1924, B. C., extended it for a further period of three years only as regards premises the rent of which did not exceed two hundred and fifty rupees a month or three thousand rupees a year on the 1st of November 1918. It ceased to operate as regards premises carrying a higher rent on that date, and proceedings for standardisation of rent, even though commenced before the 31st March 1924 and pending on that date, were not saved, there being no provision to that effect in the Amending Act.

Proceedings pending on the 31st March 1924 in respect of a part of premises let out as a whole on the 1st November 1918 ceased to be maintainable after that date, if the share of the rent allocated to the part upon apportionment was found to exceed Rs. 250 a month.

The Petitioners were tenants under the Opposite Party in respect of premises in Calcutta and had applied to the Controller of Rent for fixation of standard rents under sec. 15 of the Calcutta Rent Act. When the said applications were pending before the Controller, Act III. B. C., of 1920 which was originally enacted for a period of three years; had been extended for another year by the Calcutta Rent (Amendment) Act (II. B. C., of 1923), i.e., up to end of March 1924. By the Calcutta Rent (Amendment) Act, 1924 (I. B. C., of 1924) the duration of the Act was extended until the end of March 1927, but it was provided by this last Amending Act that, after the 31st March 1924, the provisions of the Act should cease to apply to any premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year, on the 1st of November 1918. This Act came into

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force by a notification in the Calcutta Gazette on the 26th of March 1924.

The Petitioners' applications were disposed of by the Controller some time in 1922 and they had applied before the President of the Calcutta Improvement Tribunal for revision of the orders of the Controller under sec. 18 of the Rent Act. The proceedings before the President continued up to and beyond the 31st of March 1924. On various dates subsequent to the 31st March 1924, the President held that the proceedings of the aforesaid cases before him had terminated *ipso facto* on the 31st of March 1924, when the old Act expired.

In one of his orders the President dealt with the question of law which arose in the cases in the following terms:—

"The state of things previous to the coming into force of Bengal Act I of 1924 was that, if matters had stood where they were, the Calcutta Rent Act, 1920, would have expired with the 31st of March 1924. The effect of the expiration of a temporary Act is that, as a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect and that, consequently as soon as the Act expired, proceedings which are being taken *ipso facto* terminate; (see Craies's Statute Law, 3rd Edition, p. 341). The law is stated in the same way in Halsbury's Laws of England, Vol. 27, p. 301, where it is said that, after the expiration of a statute in the absence of provision to the contrary, proceedings already commenced *ipso facto* determine. The decision in *Steavenson v. Oliver* (3) that the right conferred by sec. 4 of 6 Geo. IV, c. 133, on commissioned army surgeons to practise as apothecaries

(3) 5 M. & W. 234 (1841).

without having passed the usual examination continued notwithstanding the expiration of that statute was passed upon a construction of that statute.

In the Calcutta Rent Act, 1920, however, there is nothing to take the case out of the general rule laid down in the books about the effect of the expiration of a temporary Act. The proviso to sec. 1 (4) in the Act of 1920, which has been referred to by the learned vakil for the landlord in this case, has no bearing on the question; it says that the expiration of the Act shall not render recoverable any sum which during the continuance thereof was irrecoverable, or affect the right of a tenant to recover any sum which during the continuance thereof was under the Act recoverable by him. That proviso does not relate to any proceedings under the Act; the question whether any money was irrecoverable or recoverable within the meaning of that proviso would have to be decided not in any proceedings under the Act but under the ordinary laws of the land.

There is, I think, nothing in that proviso which can be construed as a saving for any proceedings under the Act. The provisions in the General Clauses Act (Bengal Act I of 1899) to the effect that, upon the repeal of an Act, legal proceedings in respect of rights and privileges acquired or accrued under the repealed Act may be instituted or continued as if the repealing Act had not been passed, apply only where the operation of an Act is terminated by a repeal, and they cannot be applied in cases of expiration of a temporary Act.

For these reasons, I am of opinion that, if matters had stood as they were when Bengal Act II of 1923 was passed, the proceedings in these cases would have *ipso facto* determined on 31st March 1924.

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Upon that state of things there has supervened the Bengal Act I of 1924. The first observation which I would make on this Act is that it does not take away or curtail in any manner any right which was in existence at the time when it came into force. The case of *Colonial Sugar Refining Co. v. Irving* (2), in support of the contention that these proceedings may be continued, has therefore no bearing on the present question.

It has been contended in the next place that the effect of the enactment of the proviso by the Act of 1924 amounts to a partial repeal of the law brought into existence by the first amendment (namely, the substitution of '1927' for '1924') made by the same Act, that the effect of the first amendment is to extend the principal Act in its entirety to the end of March 1927, and that the effect of the second amendment which inserted the proviso is that the Act as so extended or continued is repealed, with effect from 1st April 1924, in its application to certain premises and that, so far as such repeal was concerned, the provisions of the General Clauses Act regarding the institution and continuance of proceedings would apply. I do not think that this contention is sound. The insertion of the proviso excluding premises which had a rent exceeding Rs. 250 on 1st November 1918, is part and parcel of the amendment extending the principal Act to 31st March 1927. The proviso and the extending amendment came into operation at the same moment of time, so that the extension of the principal Act till the end of March 1927, was from the inception subject to the proviso that it was not to apply to the case of premises, the rent of which in November 1918 was more than Rs. 250 a month.⁴

(3) [1905] A. C. 369.

In No. 611 of 1924.

Mr. Bipin Ch. Mullick and Babu Kashi Prasun Chatterjee for the Petitioners.

Babu Amulya Chandra Chatterjee for the Opposite Party.

In No. 1025 of 1924. .

The Advocate-General and Babus Hiralal Ganguly and Prafulla Ch. Chakravarti for the Petitioners.

Dr. D. N. Mitter and Babu Narain Chandra Kar for the Opposite Party. .

In No. 1033 of 1924.

Babu Asita Ranjan Ghose for the Petitioners.

Mr. Bipin Ch. Mullick and Babu Probodh Krishna Shome for the Opposite Party.

The Advocate-General Mr. S. R. Das (with him *Messrs. Hiralal Ganguli and Prafulla Chandra Chakravarti*) for the Petitioners in Civil Revision No. 1025 of 1924 argued that the whole of the Act of 1920 was extended with a proviso that it shall cease to apply to particular premises, i.e., it extended the Act at the same time amending it. To certain premises the old Act ceased to apply because of the amendment. The old Act continued and with it the whole of the machinery created by that Act continued to enforce its operation. The Act was still in existence and there would not be any question of its expiry. Therefore sec. 6 (e) of the General Clauses Act would apply.

It was always a matter of construction about the effect of the expiry of a temporary Act. In the present case the Controller had fixed standard rent, and application for revision against that order had been filed and the case proceeded with for some time when the old Act was in force, and it was a matter of accident that it came on for final hearing in

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August 1924, when the new Act was in force, and the liability of parties during the period the Act was in force should be determined.

The following authorities were referred to :—

Maxwell on Statutes, VI Edition, pp. 728-731; Craies on Statutes, p. 342; *Stevenson v. Oliver* (3) and *Doolub Doss v. Ramlall* (4). • •

Dr. Dwarkanath Mitter (with him *Mr. Narain Chandra Kar*) contended for the landlord, Opposite Party—That the special Courts of the President and the Controller were constituted to deal with cases governed by the Rent Act, and these special Courts ceased to exist after 31st March 1924, in respect of premises fetching a rental of over Rs. 250 a month. Thereafter, there was no Court or machinery to put into operation the provisions of the Rent Act. The new Act merely created another Court of limited jurisdiction, much narrower in scope than the old one, and the Improvement Trust Tribunal no longer retained jurisdiction to deal with cases excluded by the proviso to sec. 1 (4).

Sec. 6 of the General Clauses Act applied only to repeal of a permanent statute. Here there was no case for a repeal, because duration of the Statute was fixed by the Statute itself. The legislature, if it intended to protect accruing rights, could have enacted a saving clause.

The following authorities were referred to :—*Morgan v. Thorne* (5), *Bowles v. Attorney-General* (6) and *Macmillan v. Dent* (7).

(3) 8 M. & W. 284 (1841).

(4) 5 M. I. A. 109, 126 (1850).

(5) 7 M. & W. 400 (1841).

(6) [1912] 1 Ch. 126 (1911).

(7) [1907] 1 Ch. 107 (1906).

The JUDGMENT OF THE COURT was as follows.—

The main question which arises in these three rules is the same and it will be convenient to deal with them in one judgment considering first the main question which is common to all three rules, and dealing later with any special matter which arises in one or other of the rules.

By sec. 1 (1) (4) of the Calcutta Rent Act, 1920 (Béngal Act No. III of 1920) it was provided that the Act should come into force on such date as the Local Government might by notification direct and it should be in force for a period of three years from the date of the commencement of the Act.

The Act came into force under a notification in the Calcutta Gazette on the 5th May 1920.

By the Calcutta Rent (Amendment) Act, 1923 (Bengal Act No. II of 1923) the period of the duration of the Act of 1920 was extended to the end of March 1924.

By the Calcutta Rent (Amendment) Act, 1924 (Bengal Act No. I of 1924) the duration of the Act was extended until the end of March 1927, but it was provided by this last amending Act that after the 31st March 1924 the principal Act should cease to apply to any premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918.

The President of the Calcutta Improvement Tribunal has held that by virtue of this proviso he cannot entertain appeals to him from decisions of the Rent Controller in cases in which the proceedings before him had not terminated on the 31st March 1924 if such proceedings related to premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918.

The President considers that the Cal-

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cutta Rent Act was a temporary Act and that after the 31st March 1924 it ceased to have effect so far as regards premises the rent of which on the 1st November 1918 was over Rs. 250 a month or Rs. 3,000 a year and that as regards such premises he was *functus officio* after the 31st March 1924.

The Petitioners who obtained these rules contended that this is not so and that the amending Act of 1924 in effect repealed the principal Act as regards premises of a rental over Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918 and that by virtue of sec. 6 of the General Clauses Act (Act X of 1897) appeals pending before the Rent Controller and undisposed of on the 31st March 1924 are saved. It is said that by the amending Act of 1924 the Calcutta Rent Act is extended to the 31st March 1927 with a proviso that the Act ceases after the 31st March 1924 to apply to premises of a rental of over Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918 or to put it in another way that the Act of 1924 is an extending Act which, however, also repeals certain matters in the principal Act. The question has to be determined upon the construction of the amending Act of 1924 which was published in the Calcutta Gazette of the 26th March 1924 and came into force on that day. It seems to me that reading sub-secs. (1) and (2) of sec. 2 together the effect of the amending Act was to extend the principal Act to the 31st March 1927 as regards premises of a less rental than Rs. 250 a month or Rs. 3,000 a year on the 1st November 1918 leaving the principal Act as amended by the Act of 1924 to expire on the 31st March 1924 as regards premises of a rental above these amounts. In this view the Act of 1924 cannot be regarded as a repealing Act to

which the principles of sec. 6 of the General Clauses Act would apply, with the result that the decision of the President of the Tribunal is in my opinion correct for it is I think well settled that if an Act is a temporary Act it comes to an end for all purposes at the end of the period for which it is enacted (see Craies on Statute Law, 3rd Ed., p. 342) where the law is stated in the following passage.

"As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further force." And the learned editors refer to a case of *Spencer and Hooton* (1) to which I have not been able to refer, where Roche, J., held that he had no jurisdiction to hear appeals from Munitions Tribunals in proceedings taken under the Wages (Temporary Regulation) Acts by reason of the Act giving him jurisdiction, which was a temporary Act, having expired before the appeals came on for hearing.

It cannot be disputed that the Calcutta Rent Act was a temporary Act, enacted originally for three years which period was extended for a further year by amending Act of 1923, and I think upon the true construction of the amending Act of 1924 that there was no repeal of the original Act but that the Act was only extended for a further period of three years as regards premises of a less value than Rs. 250 a month and Rs. 3,000 a year on the 1st November 1918 and that the original Act ceased to operate on the 31st March 1924 as regards premises above this value there being no provision to the contrary which would save pending proceedings.

We must take the position as we find it according to the true construction of the legislative enactments and we are not con-

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cerned with any case of hardship or suggested hardship which may arise from our decision if, as we do, we think the position is clear.

This disposes of the point which is common to the three appeals and we accordingly discharge Rules 1025 of 1924 and 1033 of 1924 with costs, three gold mohurs in each Rule.

But in Rule 611 of 1924 a further contention is put forward to understand which it is necessary to state a few facts. The premises to which the Rule relates is 9, Theatre Road, which on the 1st November 1918 was let out as a whole at a rental of Rs. 650. In 1922 the lower flat of these premises was let out separately for Rs. 500 excluding certain godowns. In February 1923 the tenant of this lower flat applied for standardisation of rent which the Rent Controller fixed on the 1st August 1923 at Rs. 321 including fans and light. On the 31st August 1923 an application for revision of the order of the Rent Controller was made under the provisions of sec. 18 of the Rent Act to the President of the Tribunal under the Calcutta Improvement Act. The case went on before the President until the 31st March 1924 when the President said that the rent could not include the hire of fans and that if he had to fix the standard rent he would do so without including fans excluding which the rent would be Rs. 261. The case was not concluded on the 31st March and on the 11th April when the matter was again before him the President held that he had no jurisdiction to further deal with the matter as the Calcutta Rent Act had expired as regards premises of a rental above Rs. 250 a month and Rs. 3,000 a year on the 1st November 1918.

The contention of the Petitioner is that the President was wrong in so deciding

on the ground that the premises was not let out separately on the 1st November 1918 and that there was no rent of these premises on that date, the house being then let out as a whole.

We do not think that this contention is well-founded and we agree with the President that the premises having been let as a whole on the 1st November 1918 it was a fact capable of ascertainment what share of the total rent should be allocated to the lower flat on this date and that this being so, the lower flat was notionally let out at a rent on that date and that as the rent exceeded Rs. 250 he has rightly held for the reasons stated in the earlier part of this judgment that he had no jurisdiction after the 31st March 1924. But a further contention is put forward by the Respondent that the President had jurisdiction as the real rent of the lower flat was less than Rs. 250 the apportionment made by him being incorrect and that difference between the lower and upper flat is more than the 10 per cent. which he has found as the upper flat contains an additional room. Both the Rent Controller and the President have found the rent of the lower flat to be more than Rs. 250 and we must accept this for the purposes of revision. We think that there is no substance in the contentions raised and that the Rule should also be discharged but we make no order as to costs in this Rule.

N. G.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
No. 423 OF 1922.

SUHRAWARDY, J. GRAHAM, J. 1924, 20, March.	}	<p>RAMESH CHANDRA DAS, Appellant, v. MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR, Respondent.</p>
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Civil Procedure Code (Act V of 1908), Or 32, rr. 3, 16, sec. 85—Ruling Chief, Respondent in appeal arising in connection with his zemindary in British India, death of, pending appeal—Succession to State of heir who is over 15 but under 16 years of age—Application for substitution—Heir, if minor—Indian Majority Act (IX of 1875)—Hindu law, Dayabhaga School, age of majority under—Guardian ad litem, if should be appointed—Notice of appeal, whom to be served on

A Ruling Chief of a Feudatory State who was Respondent in an appeal pending in the High Court in a case which had arisen in connection with his zemindary within British India died leaving as his heir the present Ruling Chief who succeeded to the State of his father with the approval of the British Government. The latter had completed his 15th but not his 16th year. On an application for his substitution in the place of the deceased Chief on the record of the appeal:

Held—That the Ruling Chief not being domiciled in British India, the Indian Majority Act did not apply to him and he was not a minor within the meaning of Or. 32 of the Civil Procedure Code.

That he had attained majority under the Dayabhaga law by which he was governed.

That it was therefore not necessary to appoint a guardian ad litem to represent him in the appeal.

Ordered—That notice of the appeal be served on the Ruling Chief through the Vice-President of the Council of Administration constituted for the administration of the State, who had been appointed

Manager of the Chief's zemindaries in British India and agent of the Chief under sec. 85 of the Civil Procedure Code.

This matter arose out of an application for substitution of the heir of the deceased Respondent and appointment of a guardian ad litem to represent him in Appeal from Appellate Decree No. 423 of 1922, filed on the 28th February 1924.

The facts of the case will appear from the judgment.

Babus Mahendra Nath Roy, Romesh Chandra Sen and Santinay Majumdar for the Petitioner.

Babus Gobinda Chandra Dey Roy and Birendra Chandra Das for the Manager.

Babu Sasadhar Roy (Sr.) for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SUHRAWARDY, J.—This is an application by Maharani Srimati Arundhati Mahadevi of Tipperah asking for a decision of this Court as to whether Maharaja Bir Bikram Kishore Manikya Bahadur, the present Maharaja of Tipperah, is a minor for the purposes of the present appeal which is one of many cases pending in British Indian Courts in connection with his extensive zemindary within British territories and for such order as to this Court may seem fit and proper. During the pendency of this appeal the Respondent Maharaja Birendra Kishore Manikya Bahadur of Tipperah died on the 13th August 1923, leaving as his son and heir the said Maharaja Bir Bikram Kishore Manikya Bahadur who has succeeded to the Tipperah State, a Feudatory State in alliance with the British Government, as its Ruling Chief with the approval of the British Government. The Appellant thereupon applied for the substitution of the name of Maharaja Bir Bikram Kishore Manikya Bahadur as

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Respondent and, alleging that he was a minor, proposed the applicant Srimati Arundhati Mahadevi, his mother, as his guardian *ad litem*. Notices were served upon the applicant, the Government pleader, as also upon Rai Jyotish Chandra Sen Bahadur who is the Vice-President of the Council of Administration of the Tipperah Estate. The Petitioner Maharani Srimati Arundhati Mahadevi states that Maharaja Bir Bikram Kishore Manikya Bahadur has not yet completed his 16th year and is governed by the Dayabhaga School of Hindu law. She therefore submits that according to the personal law of the Maharaja he has attained the age of majority. Sometime in November 1893 with the approval of the Government of India in the Political Department, a Council of Administration was constituted for the administration of the Tripura State and by a proclamation, dated the 9th December 1923, the Council of Administration assumed charge of the administration and Rai Jyotish Chandra Sen Bahadur, the Vice-President of the Council, was appointed the Manager of the Chakla Roshnabad Estates which are estates appertaining to the Tipperah Raj in British territory. It further appears that by a notification published in the Calcutta Gazette, dated the 5th December 1923, Part I, p. 1826, the Governor in Council appointed the said Rai Jyotish Chandra Sen Bahadur Manager of His Highness's Roshnabad Estates to be the agent of the Maharaja under sec. 85 of the Code of Civil Procedure. The question as to what course should be adopted in the matter of substituting the Maharaja's name in the pending suits, appeals and proceedings was referred to the Government by the Vice-President by a letter, dated the 27th January 1924, and the answer given by the Government by its

letter, dated the 25th February 1924. from the Political Agent of the Tipperah Estate to the Vice-President of the Council of Administration of the Tipperah Estate is to the following effect: "The name of His Highness the Maharaja should be substituted in suits in British Courts acting through his Manager holding his power." It is further suggested in that letter that "the Maharaja should himself execute a power-of-attorney in favour of the Manager for the purpose of British Indian Courts only for the administration of properties of His Highness in British territory."

We are now invited to decide whether the Maharaja is a minor and should be represented by a guardian in this appeal or whether he is competent to act without the intervention of a guardian *ad litem*. Or. 32, r. 3 of the Code of 1908 provides that where the Defendant (Respondent in appeal) is a minor the Court on being satisfied of the fact of his minority shall appoint a proper person to be the guardian for the suit (or appeal) for such minor. We have therefore to satisfy ourselves of the fact of the minority of the Maharaja. Reference may also be made in this connection to r. 16 of that order which applies to Ruling Princes, as the present Maharaja is, and which makes this order inapplicable to a Ruling Chief where he is sued in the name of his State or any other name. With reference to the provisions of Or. 32, C. P. C., a minor is a person who under the Indian Majority Act (IX of 1875) has not completed the age of 18 years or a person of whose person and property a guardian has been appointed by a Court of Justice or whose property is in the hands of the Court of Wards and he has not completed the age of 21 years.

The Indian Majority Act, as the pre-

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amable shows, applies only to persons domiciled in British India. Admittedly the Maharaja is not domiciled in British territory. The Indian Majority Act has therefore no application.

The next question that we have to consider is whether the Maharaja is a minor according to the law by which he is governed. It is maintained and there is no contradiction on this point, that the Maharaja is governed by the Dayabhaga School of Hindu law. According to the tenets of that school majority is attained after the completion of the 15th year. There is a slight difference in regard to the age of majority between the two important schools of Hindu law. Under the Dayabhaga School a person who has completed his 15th year is to be considered a major, whereas under the Benares School he must have completed his 16th year. (See Mayne's Hindu Law, 9th Edition, p. 282, and Trevelyan on Law relating to Minors, 5th Edition, p. 200.) The Act in force before the Indian Majority Act was Act XL of 1858 which laid down the age of majority as 18 years; but that Act was in force only in the mofussil. It was not applicable to the town of Calcutta within the jurisdiction of the Supreme Court of Judicature and the question arose in several cases as to the age of majority on this point; but it will suffice if we refer to the Full Bench decision in the case of *Mothoor Mohan v. Soorendra Narain* (1). In that case the age of the Defendant when he executed the bond was sixteen years and a few months. His plea of minority at the time of the contract was overruled on the ground that he was bound by his personal law according to which he was a major. In this state of the authorities we are of opinion that Maharaja Bir

(1) I. L. R. 1 Cal. 108 (F. B.) (1875).

Bikram Kishore Manikya Bahadur is not a minor within the meaning of Or. 32, C. P. C., and that it is not necessary therefore to appoint a guardian *ad litem*. He is, however, entitled to act through his Manager, the Vice-President of the Council of Administration appointed by order of Government under sec. 85, C. P. C.

The result is that the application made by the Appellant on the 12th November 1923 asking for the appointment of Maharani Srimati Arundhati Mahadevi, as guardian *ad litem* of the Respondent Maharaja Bir Bikram Kishore Manikya Bahadur is dismissed. The Appellant will serve notice of this appeal on the Maharaja through the Vice-President who has appeared in these proceedings through Babu Gobina Chandra Dey Roy who is willing to receive service on his behalf.

GRAHAM, J.—I entirely agree with the order which my learned brother proposes to make. Having regard to the authorities which have been placed before us by the learned vakil for the Petitioner, *viz.*, Mayne's Hindu Law, 9th Edition, p. 282, Trevelyan on Law relating to Minors, 5th Edition, p. 200, *Cally Churn v. Bhagobutty Churn* (2) and *Mothoor Mohan v. Soorendra Narain* (1), we must, I think, hold that the present Maharaja Bir Bikram Kishore Manikya Bahadur has attained his majority. This view also finds support in the action which has already been taken by Government in this connection. The proper course in the circumstances of the case will, I think, be to treat the Maharaja as a major and for action to be taken on the lines indicated in sec. 85, Civil Procedure Code.

N. G.

(1) I. L. R. 1 Cal. 108 (F. B.) (1875).

(2) 19 W. R. 110 (1873).

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE**

No. 224 of 1924.

WALMSLEY, J.**MUKERJI, J.**

1921,

Heard, 15 and

16, April.

Judgment,

2, May.

Bengal Tenancy Act (VIII of 1885), sec 180—Chur, meaning of—Reformations in situ, if “chur.”

The word “chur” as used in sec. 180 of the Bengal Tenancy Act must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil, and not to the site of the deposit. Lands which are reformations in situ would be chur lands within the section.

This was an appeal preferred on the 29th of November 1921 against the decree of the District Judge of Chittagong (H. A. Street, Esq.), dated the 8th of August 1921, modifying the decree of the Munsif, 1st Court at that place (Babu Jnan Chandra Banerjee), dated the 31st of May 1920.

The facts of the case will appear from the judgment.

Babu Narendra Coomar Das for the Appellants.

Dr. Sarat Chunder Basak and Babus Chandra Sekhar Sen and Manindra Coomar Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by some of the Defendants against a judgment of the District Judge of Chittagong, which affirmed with slight modifications the decree of the first Court.

The Plaintiff bought Noabad Taluq Mahammad Daim Najir at a sale held under the provisions of Act XI (B. C.)

of 1859 on 7th August 1913, and he then brought two suits for recovery of *khas* possession and for mesne profits. One suit No. 297 related to 52.3 Kanis of land in Cadastral Survey Plot No. 17/13564, and the other to the whole of that plot with certain other plots. It is not necessary to mention the reasons which led the Plaintiff to bring two suits, instead of one. The two suits were heard together. The first Court gave him a decree for *khas* possession and for mesne profits. Then the Defendants, or some of them, filed two appeals; these again were dealt with in one judgment. The learned Judge upheld the decision of the first Court with this modification, viz., that he directed that the area of the lands covered by the decree was not to be stated, and that the decree should not make any reference to the Cadastral Survey Map. The Defendants have appealed, and there is a cross-objection by the Plaintiff.

The case is an obscure one, and the arguments advanced on behalf of the Appellants did not help to remove the obscurity. Their main contention, however, is that the Defendants have a protected interest, although the land is admittedly alluvial in character. It is said that the provisions of sec. 180 of the Bengal Tenancy Act do not apply, and the reason alleged for this argument is that the principle laid down in the case of *Felix Lopez v. Muddun Mohan Thakoor* (1) is applicable here, and that in consequence the land is not *chur* but the old land reformed on its original site. This argument is unsound. The decision just mentioned laid down the principle to be applied in dealing with questions of title to land reformed *in situ*: it directed that when land reformed on the site of a diluviated estate, the owner of that

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estate, if he had continued to pay revenue while the site was under water, was entitled to claim the land as belonging to his estate, and that such land was not to be dealt with under the provisions of Reg. XI of 1825. It is true that in the preamble to that Regulation the words "churs or small islands" appear, but that is not a definition of the word "chur" and it cannot be held that land which is reformation *in situ* may not also be *chur* land. The word "chur" as used in sec. 180 of the Bengal Tenancy Act must be understood in its ordinary sense of land formed by fluvial action, that is to say, it is a word referring to the character of the soil, and not to the site of the deposit. I have no doubt therefore that the Courts below are right in saying that the provisions of sec. 180 of the Bengal Tenancy Act are applicable to the land in suit. It follows that the tenant Defendants to escape eviction must prove continuous possession for 12 years of the identical plots in their possession at the date of the institution of the suit. On this question there is a definite finding of fact that they have failed to do so.

The other objection put forward on behalf of the Defendants relates to the form of the decree, which is said to be bad because it does not specify the area to which the Plaintiff's title is declared. It seems singular that this objection should come from the Defendants, for it is they and not the Plaintiff who benefit by the remarks made by the learned Judge in the closing paragraphs of his judgment. In fact, these remarks are the subject-matter of the Plaintiff's cross-objection. Consequently, I think that this second argument for the Defendants fails.

With regard to the cross-objection, the position is this. After the creation of

the Noabad Taluq in 1898, some of the land comprised within it was settled with Nabin Chandra Mahajan and afterwards with Gagan Chandra Aich by the Collector. That may have been wrong, but the learned Judge has held that in the absence of the Secretary of State as a party he cannot give the Plaintiff a decree which would have the effect of disturbing the possession of those who have entered on the lands by virtue of that settlement. I think that is a right view and consequently that the cross-objection cannot be sustained.

The result is that the appeal and the cross-objection are both dismissed. No order is made as to costs.

MUKERJI, J.—This appeal arises out of two suits instituted by the Plaintiff as purchaser at a revenue sale for establishing his title and for recovery of *khas* possession by ejecting the Defendants and for mesne profits. A part of Cadastral Survey Plot No. 17/13564 is the subject-matter of suit No. 297, while the said plot together with nine others is the subject-matter of suit No. 302. The main defence of the Defendants in the suits was that they are raiyats with right of occupancy and are moreover settled raiyats of the village and therefore their interests were protected.

The learned Munsif decreed the Plaintiff's suits in their entirety consolidating the two suits into one, and awarded costs to the Plaintiff only in respect of suit No. 302 and ordered that mesne profits would be ascertained subsequently on Plaintiff's application.

On appeals preferred by the Defendants the learned District Judge held that the Plaintiff was entitled to a decree declaring his title to the plots specified in the plaint in suit No. 302. He held also that a decree in suit No. 297 was unneces-

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sary as the subject-matter of that suit, namely, a part of Cadastral Survey Plot No. 17/13564, was wholly included in suit No. 302, but he saw no reason to cancel it. As to Plot No. 17/13564, however, he found that a part of it, namely, that covered by the *kabuliyat* Ex. F was claimed by Government and had been settled by them as *khas mehal* lands with Nabin Ch. Mahajan in 1912 and re-settled with Gagan Ch. Aich in 1913. As the Secretary of State was not a party to the suit it was not right, in the opinion of the learned District Judge, to decide finally as to what was the exact area to which the Plaintiff was entitled to a decree, and so he directed that the area or the Cadastral Survey Plots should not be entered in the decree, but that the decree for *khas* possession should be limited to the portion depicted in the Commissioner's map covering an area of 1 drone 8 kanis 18 gandas which had always been admitted by Government to fall within the Plaintiff's taluq and he held that of that area the Plaintiff could safely take possession. He made a variation in the order as to costs and upheld the decree as to mesne profits.

The Defendants' chief contentions in this appeal are two :—First, that in the absence of specification of area the decree declaring the Plaintiff's title and for ejectment of the Defendants is bad in law, and second, that sec. 180 of the Bengal Tenancy Act has no application to the *chur* in question as the operation of that section is limited to *churs* to which Reg. II of 1825 applies.

With regard to the first of these contentions a bare statement of the facts is sufficient to demonstrate its futility. The taluq in question is a Noabad Taluq created by Government in 1898, and the settlement made by Government in favour of the Plaintiff's predecessors gave certain

dags which are specified in the plaint in suit No. 302. Thereafter the Government settled certain lands of the *chur* with Nabin Ch. Mahajan as per Ex. F in 1912 and the same were re-settled with Gagan Chandra Aich in 1913. Parts of the lands covered by these settlements were portions of the Plaintiff's taluq. The mistake arose from circumstances which need not be gone into here. The learned District Judge has held that the Plaintiff was entitled to a decree declaring his title to all the *dags* covered by the settlement of 1898; and there is no difficulty in that respect as the said *dags* are mentioned in the plaint. As for *khas* possession he has held that there can be no possible objection to the Plaintiff taking *khas* possession of such portions of the said *dags* to which the Government has never preferred any claim and having found from the Commissioner's map the portion so defined and being of opinion that the Plaintiff can safely take *khas* possession of that portion has awarded the Plaintiff a decree in respect of it. The Appellants' first contention, therefore, in my opinion, has no substance.

As for the second contention there is no authority for the proposition that the word *chur* is used in that limited sense in sec. 180 of the Bengal Tenancy Act. I am not prepared to accept this interpretation as I can find no principle upon which such a view may be supported. The findings of fact as to the length of occupation by the Appellants also negative any suggestion of their having acquired any protected interests in the lands.

Several other objections were urged on behalf of the Appellants, but I do not think it necessary to notice them as in my opinion, they either do not arise in view of what I have said above or are matters which really affect the question of

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appreciation of evidence with which we are not concerned in second appeal.

The appeals therefore must fail.

The cross-objection of the Respondent that he should be awarded a decree for *khas* possession in respect of all the lands with the exception of the land covered by Ex. F must also fail as it is evident from the observations of the learned District Judge that having regard to the fact that the Secretary of State was not a party to this litigation, it is desirable to confine the decree to only such lands as may safely be held to be lands to which the Secretary of State has never preferred any claim. If more lands have been excluded than what are actually claimed by Government, the Plaintiff must get the matter decided in the presence of the Secretary of State.

As the appeal and the cross-objection both fail, I would make no order as to costs in this Court.

H. C. S. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD DUNEDIN.

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

1924,

Heard, 13, May.

Judgment, 30, May.

RAI RADHA KISHUN
and ors., Appellants,

v.

J. G. SAHU and ors.,
Respondents.

Hindu law—Woman's estate—Mortgage at high rate of interest, suit to enforce—Defence pleading no necessity—Plea in general terms, if permits defence to challenge rate of interest only—Onus—Shifting of onus—Evidence that widow borrowed at high rate on another occasion, value of.

A pleading in defence in general terms that a bond executed by a Hindu woman possessing a limited estate was without legal necessity, leaves it open to the Defendant to urge that there was no neces-

sity to borrow at the high rate of interest stipulated in the bond. The onus of shewing there was necessity to borrow at that rate of interest lies on the lender. It would suffice to shift the onus, on the lender adducing evidence showing that the money could not in the circumstances have been raised at less interest.

Evidence that the widow had borrowed at high interest on one other occasion is not conclusive as to what she might have done on the occasion in question.

This was an appeal (No. 51 of 1923) from a decree of the High Court at Patna, dated the 23rd March 1920, which varied a decree, dated the 26th March 1917, of the Subordinate Judge of Muzafferpur.

Gudar Sahai on his death in 1897 was succeeded by his widow Bachu Kuar and on her death by their daughter Bhagwati Kuar. On the death of Bhagwati, the father of the present Appellants succeeded to the estate as the nearest reversionary heir.

In 1902 Bachu Kuar, the widow above named, mortgaged the estate for Rs. 775 composed of four sums borrowed by her from the mortgagees who subsequently assigned their rights to the Plaintiffs. The mortgage provided for compound interest on the mortgage money at 24 per cent. per annum with half yearly rests.

The present suit was instituted by the assignees of the mortgage against the present Appellants and the original mortgagees claiming a mortgage decree in respect of the whole of the mortgage money with compound interest as provided in the deed aggregating Rs. 14,500. The Subordinate Judge passed a decree for the Plaintiffs for Rs. 329 principal and Rs. 1,178-12-9 interest. He held that there was legal necessity justifying the loan from the mortgagees to the above

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extent but was of opinion that there was no necessity for the mortgagor to borrow money at 24 per cent. compound interest.

The High Court concurred in the finding as to the principal, but considered that it was not open to the present Appellants to raise any question as to the rate of interest which they decreed at the rate mentioned in the mortgage.

Mr. Kenworthy Brown for the Appellants.

Messrs. Dunne, K. C. and Ramsay for the Respondents-Plaintiffs.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The present action was brought to enforce a mortgage on the family estate which had been executed by a *purdanashin* lady, now deceased, who had had a widow's right in the said estate. The mortgage purported to be for Rs. 775 with compound interest at 24 per cent. and half-yearly rests. The Subordinate Judge held that the mortgage was enforceable only as to Rs. 329. Necessity as to the remainder not having been proved, he decreed for Rs. 329 as principal and for interest at only 24 per cent. simple. This brought out the interest at Rs. 1,178-12-9. The High Court agreed as to the principal but held that compound interest should be charged, which brought out the total sum at Rs. 18,548-11-4.

The view of the learned Subordinate Judge is concisely expressed in his finding on the 5th issue. He says:—

"Issue No. 5.—The amount covered by both the handnotes [Exs. 1 and 2 (a)] carried interest at 2 per cent. per month. The bond in suit was executed only a month or so after the execution of these handnotes and there is absolutely no evidence adduced by the Plaintiff to show that pressure for repayment of the amounts due on them was

so great as to compel Bachu Kuar to agree to pay compound interest at 2 per cent. with six-monthly rest. Compound interest at this rate seems to be very high and the extent of its exorbitancy can be well gauged by the fact that Rs. 775 has run to Rs. 14,500 from October 1902, to November 1915. To make the Defendants liable for such exorbitant interest the Plaintiffs were bound to prove that Bachu Kuar could not get money at a lower rate but this they have not done (*Harmanojje Narain v. Ramprosad* *). I would, therefore, allow simple interest at 24 per cent. per year as stipulated for by the notes (Exs. 1 and 2).

The learned Judges of the High Court reversed this finding because, in their opinion, there was no specific statement in the Defendants' pleading raising the question of the necessity for the rate of interest, and therefore, the Subordinate Judge was wrong in going into the matter.

This point has, in their Lordships' view, been clearly decided by the Board. Turning to the pleadings in this case the Defendants, in their written statement, allege as follows:—

"The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity."

Now, in the case of *Nazir Begam v. Rao Raghunath Singh* (1), the judgment of the Board is as follows, at p. 148:—

"In the written statement applied on behalf of the Defendants one of the points taken was that the property mortgaged was ancestral property and that there was no legal necessity to execute the document sued upon. In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the Defendants to contend that though the necessity for borrowing the principal sum was accepted there was no necessity to borrow on the very onerous

(1) L. R. 46 I. A. 145; s. c. I. L. R. 41 All. 571; 23 O. W. N. 700 (1919).

* 6 C. L. J. 462 (1907).

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terms of this mortgage. This line of defence being thus open to the Defendants the pleas laid down by this Board in *Rajah Hurronath Roy Bahadur v. Runder Singh* (2) and in *Nand Ram v. Bhupal Singh* (3) apply."

This makes clear two points. First that a plea in general terms opens the defence that there was no necessity to borrow at the high rate of interest and, second, that the onus of showing there was necessity lies on the lender. But there is further and subsequent authority. In the case of *Munna Lal v. Karu Singh* (4), the passage just cited, is repeated and affirmed, and lastly, in the case of *Ram Buhawan Prosad Singh v. Nathu Ram* (5), there is this passage:—

"It is not possible to say, after the decision of the Board in the case of *Nazir Begam* (1), already referred to, that a plea of no legal necessity for a loan and that the property is not at all liable for the payment of the amount claimed does not open the door for a Defendant to say that the rate of interest is excessive and place on the Plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made."

In view of these authorities their Lordships cannot consider the question as still open. A plea in general terms as here raises the question and the question being raised the onus is on the lender to prove that the necessity included borrowing on such terms. As in all questions of onus, a certain amount of evidence may cause the onus to shift, and evidence on the lender's part that the money could not, in the circumstances, have been

raised at less interest would suffice to shift the onus so that, if the Defendant led no evidence to controvert that statement, the lender would prevail. But when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. For these reasons their Lordships are of opinion that the judgment of the High Court cannot be supported on the grounds given.

The Plaintiffs' Counsel urged that if this view should prevail the judgment of the Subordinate Judge should not be restored *simpliciter* but the case should be remitted for further enquiry and he called attention to the fact that certain evidence proffered was refused by the Subordinate Judge as unnecessary and that a petition to the High Court for allowance of this evidence was not dealt with as, in view of the finding of the High Court, it became unnecessary to deal with it.

Now, the evidence in question consisted of the production of two bonds granted by the same widow borrowing at a high rate of interest and decree obtained on one of the bonds, and the tender of a witness to speak to the execution of one of the bonds. Their Lordships do not think that a remit is necessary. Evidence simply that on one other occasion the widow had borrowed at high interest is not in any way conclusive as of what she might have done on the occasion in question, and as no other evidence was tendered their Lordships think that the Subordinate Judge was justified in saying, as he did, that "there is no evidence adduced by the Plaintiffs to show that pressure for repayment of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 24 per cent. with a six-monthly rest."

(1) L. R. 46 I. A. 145; s. c. I. L. R. 41 All. 571; 23 C. W. N. 700 (1919).

(2) L. R. 18 I. A. 1; s. c. I. L. R. 18 Cal. 311 (1890).

(3) I. L. R. 34 All. 126 (1911).

(4) Decided 29th July 1919. Unreported.

(5) L. R. 50 I. A. 14; s. c. 28 C. W. N. 446 (1922).

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Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the decree of the Subordinate Judge restored, the Appellants to have their costs here and in the Courts below.

The petition of the Respondents for the admission of further evidence will be formally dismissed with costs.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitors: Messrs. Barrow, Rogers & Nevill for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD DUNEDIN.

LORD SALAW.

LORD CARSON.

LORD BLANESBURGH.

SIR JOHN EDGE.

1924,

Heard, 26, June.

Judgment,

26, June.

I. CHHMI NARAYAN
AGARWALA and ors.,
Appellants,

v.

RAMKISHWAR PRASAD
SINGH and ors.,
Respondents.

Indian Stamp Act (II of 1899), secs 26 and 35, proviso (a)—Mining lease—Suit for royalty exceeding amount on which stamp paid—Document, if becomes admissible on payment of penalty

The proviso (a) to sec. 35 of the Indian Stamp Act is of equal ambit with the body of the section, and just as an instrument cannot be acted upon and nothing can be recovered under it unless it has a proper stamp; so if that is not a proper stamp, it may, under the proviso, be put on afterwards on payment of a penalty and the instrument then becomes effective.

Royalty claimed under a mining lease in excess of the amount for which *ad valorem* stamp duty was paid under sec. 26 of the Stamp Act thus became recoverable on payment of the penalty as provided for by sec. 35.

This was an appeal from a decree of the High Court at Patna, dated the 9th August 1920, which dismissed an appeal from a decree of the Subordinate Judge of Purulia, dated the 27th September 1917.

This appeal raised a question as to the stamp law applicable to instruments chargeable with *ad valorem* duty where the value of the property to be affected by the instrument could not be ascertained at the date of its execution.

The parties to such instruments are allowed under sec. 26 of the Stamp Act to stamp them at any value they choose but by the same section nothing is claimable under them in excess of the value for which the stamps used would have been correct if it could have been ascertained before the execution of the instrument.

The question was whether in cases of the value of the property affected exceeding the value claimable under the stamp actually used the deed ceased to be duly stamped and could only be admitted in evidence on payment of further duty and penalty, and could thus be so stamped as to enable a larger claim to be made thereunder.

The instrument in question was a lease from the Appellants to the Respondents of certain land for use as a coal mine: in consideration of a premium (*salami*) of Rs. 1,920 and a commission of 5 annas per ton on output with a minimum of Rs. 960 per annum: it was dated the 14th December 1906 and stamped with stamps of the value of Rs. 40. Rs. 20 of this amount was the stamp duty for the premium and the balance of Rs. 20 was available to the claim for commission but any claim under it was limited to Rs. 2,000 per annum.

The Respondent on the 6th March 1917 brought the present suit against the Ap-

LACHHMI NARAYAN AGARWALA v. RAMESHWAR PRASAD SINGH.

pellants for an account of the commission due under this agreement for the years 1911-16 valuing his claim at Rs. 39,000. The Appellants pleaded that the Respondents could not in any event claim more than Rs. 2,000 a year by reason of sec. 26 of the Stamp Act and an issue was raised on the point. At the hearing the lease was tendered and admitted in evidence.

Both the Subordinate Judge of Purulia in whose Court the suit was brought and tried and the High Court decided this point against the Appellants holding that sec. 35 of the Act (which excludes from evidence instruments not duly stamped and has a proviso admitting them on payment of the proper duty and a penalty) applied. The Chief Justice who delivered the main judgment in the Court of Appeal expressed himself struck by Appellants' argument that sec. 35 could have no application to the document in question as it was duly stamped and with the authority cited in support of that argument but thought that the answer to it was that the document ceased to be duly stamped when the commission claimed exceeded the estimated amount.

The Subordinate Judge accordingly on the 27th September 1917 gave the Respondents a decree for Rs. 20,622-5-9 and the High Court on the 9th August 1920, dismissed the Appellants' appeal.

From these decrees the Appellants appealed to His Majesty in Council.

Sir Geo. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellants.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In this case, which has been heard *ex parte*, Sir George Lowndes has said everything that could be said on behalf of the Appellants, but he has not created any doubt in their Lordships'

minds that the judgment of the High Court at Patna was right. It is clear to their Lordships that the proviso (a) of sec. 35 of the Indian Stamp Act, 1899, is of equal ambit with the body of the section, and that just as an instrument cannot be acted upon, that is to say, nothing can be recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitors: *Messrs. W. W. Bax & Co.* for the Appellants.

G. D. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 142F OF 1922

IN

F. A No. 220 OF 1919.

MOOKERJEE, J.
CHOTZNER, J.
1923,
6, July.

UPENDRA NARAIN ROY
and ors., Defendants,
Petitioners,
v.
BISWESWAR ROY CHOW-
DHURY, Plaintiff,
Opposite Party.

Costs—Civil Procedure Code (Act V of 1908), sec 35—Costs, if payable by a party absent at the time of hearing—Discretion, how to be exercised.

Plaintiffs instituted a suit for establishment of their title to the disputed lands and for recovery of possession of the same. There were two sets of Defendants, viz., co-sharer Defendants and the tenant Defendants. The co-sharer Defendants although supporting the tenant Defendants in their contention yet did not enter appearance during the trial to contest the Plaintiffs' case. The first Court gave effect to the tenant Defendants' case and made a decree on that basis. On appeal by the Plaintiffs in the

UPENDRA NARAIN ROY v. BISWESWAR ROY CHOWDHURY.

High Court, the co-sharer Defendants were made parties but they did not enter appearance and were not represented at the hearing. The appeal was decreed with costs to the Plaintiffs and the decree for costs was made in terms which entitled the Plaintiffs to realise the costs from all the Defendants. The first two Defendants who did not appear at the hearing of the appeal moved the Court for amendment of the above order as to costs against them :

Held—That there is no rule of law that because a suit or appeal is heard *ex parte*, the successful Plaintiff or Appellant is not entitled to costs against the absent Defendant or Respondent.

Held further—The Court can exercise the largest discretion in the matter of costs, which, however, is to be exercised with special reference to all the circumstances of the case, including the conduct of the parties, during as well as antecedent to the suit.

SHEO DYAL TEWAREE v. BISHONATH TEWAREE (1) and BOSTOCK v. RAMSAY URBAN COUNCIL (2) discussed and approved.

This was a Rule, issued on the 7th December 1922, on the application of the Petitioner for amendment of the decree made by this Court in the appeal.

The facts of the case will appear from the judgment.

Babās Manmatha Nath Roy and Suryakumar Aich for the Petitioners.

Babus Mohinimohon Chakrabarti, Trailakhyanath Ghose and Ramaprosad Mookerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a Rule issued on an application

(1) 9 W. R. 61 (63) (1868).

(2) [1900] 1 Q. B. 357 (360).

under sec. 152 of the Code of Civil Procedure for amendment of the decree for costs made in an appeal from original decree.

The Plaintiffs instituted a suit for the establishment of their title to a half share of the lands of an Osat Taluk and for recovery of possession of their share on partition by metes and bounds. There were two sets of Defendants, *viz.*, the co-sharer Defendants and the tenant Defendants. As regards the tenant Defendants, the question in controversy was, whether a *nim howla* (Ramkanai Gupta) was real or fictitious. If the tenure was real, the Plaintiffs would not be entitled to actual possession. If it was fictitious, the Plaintiffs would be entitled to possession by ejectment of the alleged tenants. The Plaintiffs, who had acquired a share in this *nim howla*, instituted this suit on the allegation that the *nim howla* was fictitious and had no real existence. The Defendants, who are the Petitioners before us, had purchased another share in this *nim howla*; and before the institution of the suit they had maintained that the *nim howla* was real. They did not, however, enter appearance during the trial to contest the claim. The Court of first instance held that the *nim howla* was real and made a decree on that basis.

On appeal to this Court, it was held that the *nim howla* was fictitious and that the Plaintiffs were consequently entitled to possession by removal of the tenants. The first two Defendants were parties to the appeal but they did not enter appearance and were not represented at the hearing. The decree for costs was made in these terms : “The Plaintiffs are entitled to the costs of this appeal.” When the decree was drawn up the following clause was inserted thereto : “It is further ordered and decreed that the De-

UPENDRA NARAIN ROY v. BISWESWAR ROY CHOWDHURY.

fendants-Respondents do pay to the Plaintiffs-Appellants the sum of Rs. 1,800-4 as." This order, as drawn up, entitles the Plaintiffs to realise the costs from all the Defendants.

The first two Defendants have now obtained this Rule on the ground that as they did not enter appearance to oppose the appeal, the Court could not have intended to make an order for costs as against them. This position has not been maintained at the hearing and in fact could not be seriously urged. There is no rule of law that because a suit or appeal is heard *ex parte*, the successful Plaintiff or Appellant is not entitled to costs against the absent Defendant or Respondent. The question, consequently, arises whether the first two Defendants were properly included in the category of Respondents liable to pay the costs of the Plaintiffs-Appellants.

There is no dispute as to the principle applicable to cases of this character. Sec. 35 of the Code of 1908 provides that costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the purposes aforesaid. It was stated by Mr. Justice Dwarkanath Mitter in the case of *Sheo Dyal Tewarce v. Bishonath Tewarce* (1), that the question of costs is the most general question to be determined in a suit. In fact, it is the only question over which the Court can exercise the largest discretion. This discretion, however, is to be exercised with special reference to all the circumstances of the case, including the conduct of the parties. The judgment of Lord Russell, C. J., in *Bostock v. Ramsay Urban*

Council (2) shows that the Court is not confined to the consideration of the Defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation; in other words, to look at the antecedent conduct of the Defendants which led to the apparent necessity for the Plaintiffs' instituting the suit. Tested from this point of view, the Petitioners are in a situation of great difficulty. They acquired an interest in the tenure like the Plaintiffs; but while the Plaintiffs repudiated the tenure as fictitious, the Defendants throughout conducted themselves as if the tenure was genuine; their conduct has thus lent support to the case of the tenant Defendants. It was open to them to appear at the trial and to state that they had no interest in the litigation, that there was no cause of action as against them, that they did not dispute the allegations of the Plaintiffs as to the fictitious character of the tenure and that they should consequently be discharged. That was not their attitude. Their conduct antecedent to the suit unquestionably encouraged and helped the tenants. We hold accordingly that the order for costs was properly made and that the Petitioners were rightly included in the category of Respondents liable for payment of costs to the Plaintiffs-Appellants.

The Rule is discharged with costs. We assess the hearing fee at two gold mohurs.

H. C.

(2) [1900] 1 Q. B. 357 (360).

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]**MUKERJI, J.****1924,****25, June.****EMPEROR****' v. '****PANCHKARI DUTT****and ors.**

Confessions, retracted—Judge, if confined to the grounds for retraction—Criminal Procedure Code (Act V of 1898), sec 164, if applies to confessions recorded in Calcutta—Secs 1 (2), 155 and 156 (3)—Indian Evidence Act (I of 1872), sec 24—Functions of Judge in applying section, where trial by jury—Sec. 80, presumption under, if applies to confession recorded in Calcutta—Law, if any, under which the Presidency Magistrates can record confessions—Duty of the Magistrate while recording confession—Circular order of the High Court, contravention thereof, if renders the record bad—Duty of the Court in case of doubt—Deputy Commissioner of Police, Calcutta, if has power of detention for unlimited period—Delay in producing prisoner, wishing to make a statement, before Magistrate, effect of.

The two accused were arrested by the Calcutta Police and made confessions which were recorded by two Honorary Presidency Magistrates. These confessions were subsequently retracted.

Held—That in considering the question whether the confessions are admissible or not, a Judge is not confined to the grounds for the confessions as contained in the retraction, nor would the fact of putting forward some particular ground for holding the confession inadmissible relieve a Judge from looking into all the circumstances in order to judge whether the confession is admissible or not. The duty of a Judge presiding over a trial held with the aid of a jury is, under sec. 297, Cr. P. C., to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.

A Judge is not concerned with the question of the truth or falsity of the confessions, that is a matter entirely for the jury. He is only concerned with

the question as to whether they are admissible in evidence. They will be admissible only if they are voluntary. If the Judge is satisfied as to the truth of a confession but doubts its voluntary character he is bound to exclude it under the law, though such rejection amounts to excluding truth from a Court of Justice.

R. v. MANSFIELD (2), R. v. SCOTT (3) and EMPEROR v. BHAGI VEDU (4) followed.

ABBAS PEADA v. QUEEN-EMPRESS (1) referred to.

Sec. 164, Cr. P. C., in spite of the alteration that it has undergone by the amendment introduced by Act XVIII of 1923, does not apply to confessions recorded by a Presidency Magistrate in the course of investigations held by the Calcutta Police.

To decide whether a confession is irrelevant under sec. 24 of the Evidence Act, the Court will have to perform a three-fold function, viz., (a) to determine the sufficiency of the inducement, threat or promise as affording certain grounds, (b) to clothe itself with the mentality of the accused to see whether the grounds would appear to the prisoner reasonable for a supposition that is mentioned in the section, (c) to judge as a Court if the confession appears to have been caused in consequence of the inducement, threat or promise.

REG. v. BALVANT PENDHARKAR (10), EMPEROR v. MUKHUN KUMAR (11), QUEEN-EMPRESS v. DADA ANA (12), QUEEN-EMPRESS v. GHARYA (13), GHATU PRAMANIK v. KING-EMPEROR (14), EMPEROR v.

(1) I. L. R. 25 Cal. 736: s. c. 2 C. W. N. 484 (1898).

(2) 14 Cox. C. C. 639 (1881).

(3) D. & B. 47.

(4) 8 Bom. L. R. 697 (1906).

(10) 11 Bom. H. C. R. 137 (1874).

(11) I. C. L. R. 275 (1877).

(12) I. L. R. 15 Bom. 452 (1889).

(13) I. L. R. 19 Bom. 728 (1894).

(14) I. L. R. 28 Cal. 613 (1901).

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BHAGI (4), ASHUTOSH DUTT v. KING-EMPEROR (15) and KING-EMPEROR v. BASAVANTA (16) referred to.

The section does not require positive proof, as defined in sec. 3, of improper inducement to justify the rejection of the confession, the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required.

The true and generally recognised view is that a confession duly recorded by a Magistrate with the proper certificate appended to it will be admitted in evidence subject to the provisions and restrictions contained in sec. 24. Evidence Act, under which a well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession because it would be idle to expect the accused to prove the inducement, threat or promise, for in most cases such proof cannot be available.

Held—That the presumption under sec. 80 of the Evidence Act did not apply in this case as the section speaks of confessions "taken in accordance with law," and as sec. 164 of the Code of Criminal Procedure had no application, there was no law under which the Presidency Magistrates could record these confessions. They came before the Court without any presumptive force of their own and their admissibility must be judged as that of any other evidence adduced in the case.

A contravention of the circular orders of the High Court in recording confessions would not render the record bad if otherwise the confessions are voluntary.

Held, on a consideration of the circum-

stances of the case—That the grounds contained in the retractions put forward by the accused were utterly unfounded but there were circumstances in the case which made the Court hesitate to hold that they were not such as should be excluded as coming within sec. 24 of the Evidence Act and acting on the principle that in a case of doubt on the question of admissibility of evidence when it is of such vital importance to the prisoners as their own confessions one should not hold them as admissible unless one is affirmatively satisfied as to their relevancy.

In order to ensure the voluntariness of a confession the Magistrates should question the accused with a view to discover whether he confesses voluntarily and this questioning must be in pursuance of a real endeavour to find out the object of it. This requirement is not satisfied by putting a few formal questions, but it does not also imply that there must always be an enquiry as to the motive of the accused in making the confession.

THIEN MAUNG v. R. (19), JOGJIBAN GHOSE v. KING-EMPEROR (20) and other cases referred to.

Delay in producing before the Magistrate prisoners who are willing to have their confessions recorded affects the value of the confessions. If a prisoner wishes to make a voluntary statement, the Police must produce him before a Magistrate and let him do it, whatever might be its character. Whether the statement is satisfactory or inconsistent is not a question with which the Police are concerned.

Held—That the questions and answers as recorded by the Magistrate while re-

(4) 18 Bom. L. R. 697 (1906).

(15) 26 C. W. N. 54 (1921).

(16) I. L. R. 25 Bom. 168 (1900).

(19) 4 Cr. L. J. 198 (1905).

(20) 13 C. W. N. 862 (1909).

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ording the confessions did not afford any sufficient data for arriving at the conclusion that it was voluntary.

A Deputy Commissioner of Police, Calcutta, has no power of detention for an unlimited period by virtue of his being a Justice of the Peace.

IN THE MATTER OF MAHAMAD RAMJAN v. KING-EMPEROR* *referred to.*

The accused were charged with conspiracy to forge Government currency notes. The facts material for the purpose of this report will appear fully from the judgment.

Mr. B. L. Mitter, *Standing Counsel* (with Mr. A. K. Basu) for the Crown.

Mr. H. M. Bose for Panchkari and Mahadeb.

Mr. Abani Ch. Banerji for Jiban.

Mr. Nishith Ch. Sen for Haripada and Bepin.

Kailash was not defended.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—The confession of the prisoner Jibankrishna Sircar was recorded by the Honorary Presidency Magistrate Rai Bahadur Dr. Haridhan Dutt on the 15th and the 16th December 1923. It was not retracted at any time during the commitment enquiry. In his statement before the Committing Magistrate at the close of the enquiry on the 10th April 1924, the prisoner said, "I have said whatever I had to say to Dr. Haridhan Dutt in my statement before him." On the 19th May 1924 a petition, purporting to have been filed by the prisoner and bearing that date, was put up before me, retracting the confession.

The confession of the prisoner Haripada Mookerjee was recorded by the Honorary Presidency Magistrate Mr. S.

N. Roy on the 18th, 14th and 15th December 1923. On the 17th December 1923, the prisoner along with his co-accused was put up before a Stipendiary Magistrate with a charge-sheet submitted on that day and the case was adjourned to the 27th December 1923. On the last mentioned day a petition purporting to have been written by Haripada on the 23rd December 1923, on paper evidently supplied to him by the jail authorities was presented before the Magistrate, retracting the confession made and recorded as aforesaid. The 23rd of December was a Saturday and I am told that Saturday is the only day of the week on which prisoners in Jail are allowed to write letters.

In the petitions of retractation most of the grounds alleged for the confessions amount to charges of ill-treatment, torture, threat and coercion of the vilest and most brutal character, directed against Inspector Hemchandra Lahiri, the chief investigating officer in the case. Having heard the evidence in the case and taking into consideration all the circumstances disclosed therein, I have not the slightest doubt in my mind that these charges are unfounded. There is not a tittle of evidence in support of these charges; and no circumstances have been disclosed which might afford the remotest suggestion or inference of such conduct as having been likely on the part of this Police Officer; on the other hand, the circumstances which are proved in this case are utterly inconsistent with these charges. I most unhesitatingly state that nowadays no Police Officer whatever his nationality or creed may be and however much he may happen to value his appointment or its emoluments would think of stooping so low as to resort to means of the description alleged for getting a confession from

*Decided 18th September 1923. Unreported.

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an accused person. I cannot but think that the story of coercion which these retracts tell is a pure invention; and it was really gratifying to find that not much use was made of it while this Police Officer was in the witness-box under cross-examination and that the learned Counsel appearing for the prisoners in the course of their arguments on the question of admissibility of the confessions made only the faintest allusion to the misconduct which the prisoners so graphically and emphatically portrayed in their retractations. These retractations are somewhat amusing too in view of the manner in which acts and conduct on the part of the Inspector, which ultimately appeared to be the dictates of pure humanity or gentlemanliness, have been sought to be misconstrued and attributed to ulterior motives which must have been far away from his mind. It is unfortunate that the accused thought of resorting to these allegations, but I shall say no more of them as I disbelieve them *in toto*.

In his petition of retraction referred to above Jibankrishna Sircar also makes a statement to the effect that he made the confession as tutored by the Inspector and as his mind was unhinged because the Inspector had threatened to send his wife to jail and ill-treat her. Haripada Mookerjee in his petition of retraction further suggested that he had been induced to make the confession on the promise that he would be made an approver. With regard to these matters, as rightly pointed out by the learned Standing Counsel, there is no proof on the record in the sense in which the word "proof" is defined in the Indian Evidence Act; and judging from the way in which the cross-examination of the Inspector was conducted it would seem that no very special reliance was placed upon them. In considering the

question as to whether these confessions are admissible or not, I do not think, however, that I am confined to the grounds for the confessions as contained in these retractations; nor do I think that it would be just to pin the confessing prisoners down to the allegations which they have made in the fond hope of exciting suspicion or sympathy in the mind of the tribunal. It is true, as the learned Standing Counsel has argued, that the grounds alleged by the prisoners themselves in their retractations and sought to be made out by them in cross-examination should be primarily examined. The question involving a state of mind of the prisoners themselves as being due to circumstances within their special knowledge must be investigated from the point of view put forward by them; but that does not mean that the duty of the Court in deciding on the question of admissibility of the confessions ends there. In fact, I am called upon first to decide whether the confessions are admissible; the question as to the value of the retractations will only come in afterwards. I may mention that one of my duties sitting as a Judge in a trial held with the aid of a jury is to prevent the production of inadmissible evidence whether it is or is not objected to by the parties. That is expressly laid down in sec. 297, Cr. P. C.; and if that is so the fact that the accused puts forward some particular ground for holding that the evidence is inadmissible would not relieve me of my duty to look into all the circumstances in order to judge whether it is admissible or not. Not to speak of such important pieces of evidence as confessions, even with regard to evidence of much less important character which might suggest criminality or guilty knowledge on the part of the accused, the necessity on the part of the Judge to bear in mind the provisions

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of sec. 297, Cr. P. C., has been emphasized in the case of *Abbas Pada v. Queen-Empress* (1).

I am not concerned with the question of the truth or falsity of the confessions; that is a matter entirely for the jury. I am only concerned with the question as to whether they are admissible in evidence. If they are voluntary, they are admissible; of course if *prima facie* they are false, inconsistent, improbable or absurd that might suggest that they are not voluntary; but I can see none of these characteristics in these two confessions. The contents of these confessions therefore do not help me at all in determining the question one way or the other. On the other hand, instances are not unknown—in fact they are not uncommon in a certain class of cases—of voluntary confessions being absolutely false. If the present confessions were of that character, that is to say, they were voluntarily made I would be bound to admit them in evidence and put them before the jury, coupled with such directions as I should think necessary as to their falsity, for appraisalment of their worth. Again, even if I am perfectly satisfied as to the truth of a confession but I doubt its voluntary character, I am bound to exclude it under the law. It is true that such rejection amounts to excluding truth from a Court of Justice, but it cannot be helped. As Williams, J., observed in *R. v. Mansfield* (2): "It is not because the law is afraid of having the truth elicited that these confessions are excluded, but because the law is jealous of not having the truth." The reason is well put by Lord Campbell, C. J., in *R. v. Scott* (3) that "because under such cir-

cumstances the party may have been influenced to say what is not true and the supposed confession cannot be safely acted upon." In *Emperor v. Bhagi Vedu* (4) Beaman, J., very correctly summarized the position thus: "If upon weighing all the circumstances, the prisoner's denial and the probabilities, it appears to the Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it."

The question as to the admissibility of these confessions may very well be discussed from two distinct points of view: the first, relating to their voluntary character; and the second, as to the records that have been made of them.

The second point may be dealt with first. It has been contended on behalf of the defence that the confessions were not recorded in accordance with the provisions of sec. 164 read with sec. 364 of the Code of Criminal Procedure, and the requirements of those sections which are of a mandatory character not having been complied with the records of the so-called confessions are inadmissible in evidence. In support of this contention reference has been made to the amendments introduced by Act XVIII of 1923, and reliance has been placed upon the decisions in the cases of *Jaynarain Lal v. Queen-Empress* (5) and *Queen-Empress v. Sagal Samba Sajao* (6). It has been argued also that sec. 533, Cr. P. C., was never meant to cure defects of such serious character as appear in the present case and which may lead to far-reaching consequences. It is unnecessary to discuss the aforesaid decisions or the decisions in the cases of *Queen-Empress v. Rajai Mia* (7) and *Queen-Em-*

(1) I. L. R. 25 Cal. 736: s. c. 3 C. W. N. 484 (1899).

(2) 14 Cox. C. O. 629 (1891)

(3) D. & B. 47.

(4) 8 Bom. L. R. 697 (1898).

(5) I. L. R. 17 Cal. 252 at p. 259 (1890).

(6) I. L. R. 21 Cal. 642 at p. 660 (1896).

(7) I. L. R. 22 Cal. 817 (1895).

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press v. Bislam Babaji (8) in so far as they purport to take a somewhat different view. A Full Bench of this Court in the case of *Queen-Empress v. Nilmadhab Mitter* (9) expressed grave doubts whether a non-compliance with the provisions of sec. 164 read with sec. 364 of Cr. P. Code could be cured under the provisions of sec. 533, Cr. P. Code. It is not profitable to enter upon a discussion of this question as I am of opinion that sec. 164, Cr. P. C., in spite of the alteration that it has undergone by the amendment introduced by Act XVIII of 1923, does not apply to the confessions recorded in the present case. Sub-sec. 2 of sec. 1 of the Code enacts that nothing contained in the Code, in the absence of any specific provision to the contrary, shall apply to the Police in the town of Calcutta. As observed in the Full Bench decision in the case of *Queen-Empress v. Nilmaab Mitter* (9) the only section in Chap. XIV of Act X of 1882 applicable to the Police in Calcutta was sec. 155. It is true that by Act V of 1898 a new sub-section, namely, sub-sec. (3) was introduced into sec. 156. That in my opinion has not made any substantial alteration in the state of the law. The Police investigation that took place in the present case was neither an investigation in a non-cognizable case held under the orders of a Presidency Magistrate as contemplated by sec. 155, Cr. P. Code, nor an investigation into a cognizable case held under the orders of a Presidency Magistrate empowered under sec. 190, Cr. P. C., as contemplated by sec. 156, Cr. P. C. The Police investigation that took place in the present case was not therefore an investigation held under Chap. XIV. Sec. 164, Cr. P. C., expressly refers to a record made by a Presidency Magistrate

of a confession made to him in the course of an investigation under that chapter or at any time afterwards before the commencement of the trial. The section therefore is not applicable to the present confessions. It has been argued by Mr. Bose with his usual pertinacity and ability that there can be no conceivable reason for the legislature to have omitted to prescribe with reference to confessions made in the course of investigations held by the Calcutta Police, those elementary and essential safe-guards which have been so jealously provided for in other cases. I may say, I deplore the condition of things as they stand at present; but I am unable to hold that the section, in the way in which it is worded, can be taken to apply to the present confessions. I am clearly of opinion that even if the legislature meant to include the recording of all confessions to be governed by sec. 164, Cr. P. C., they have failed to express such intention in the terms they have used. It is interesting to note however that the forms used for recording these confessions are the printed forms, being High Court Criminal Form No. (m) 184 approved in letter No. 282, dated 21st August 1917, and headed as follows:—"Form of recording Confessions or Statements, sec. 164 of the Code of Criminal Procedure." These forms were also used by the Presidency Magistrates when the Code of 1898 was in force though sec. 164 of that Code was unquestionably not applicable to them, and they have also been used in recording the present two confessions. Why the legislators have permitted this anomaly to continue is not for me to enquire and I refrain from saying anything further with regard to that matter. That these forms have been supplied for the use of Presidency Magistrates for recording these confessions clearly suggests that it was

(8) I. L. R. 21 Bom. 495 (1896).

(9) I. L. R. 15 Cal. 595 (F. B.) (1888).

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intended that they must not overlook the spirit of the salutary provisions contained in that section. In view of my conclusions as to the applicability of sec. 164 to the present case, the arguments based on the supposed defects in the recording of the confessions must fail.

I now turn to the question of admissibility of the confessions from the point of view of their character as such.

For this purpose it is first of all necessary to refer to the provisions contained in sec. 24 of the Indian Evidence Act. Sec. 24 runs thus :—

“ A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

There are words and expressions in this section to which one must pointedly direct his attention in order to construe the section. There occurs the word “ appears ”; the “ inducement, threat or promise having reference to the charge against the accused person ” must proceed from a person in authority, but nothing is said as to the person to whom it is to be directed; it is enough if such inducement, threat or promise would in the opinion of the Court be sufficient to give the accused person grounds which would appear to the accused person (and not the Court) reasonable for supposing that by making the confessions he would gain an advantage or avoid an evil of the

nature contemplated in the section. It will be seen therefore that the mentality of the accused has to be judged rather than that of the person in authority. That being so, not merely actual words, but words accompanied by acts or conduct as well on the part of the person in authority, which may be construed by the accused person, situated as he then is, as amounting to an inducement, threat or promise, will have to be taken into account. A perfectly innocent expression, coupled with acts or conduct on the part of the person in authority, together with the surrounding circumstances may amount to inducement, threat or promise. In scrutinising a case from the point of view of sec. 24 of the Evidence Act the Court will have to perform a threefold function. It will have, as a Court, to determine the sufficiency of the inducement, threat or promise as affording certain grounds; it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that is mentioned in the section; lastly, it will have to judge as a Court if the confession appears to have been caused in consequence of the inducement, threat or promise. The use of these vague expressions has been deliberately made with the object of securing absolute fairness in the matter of admitting confessions in judicial proceedings. It is indeed very difficult to lay down a hard and fast rule as to the sufficiency of the circumstances which would make the confession irrelevant under the provisions of this section. Reported decisions afford us little help in this direction. A study of the cases, bearing upon the question, which are too numerous to mention, would show that anything ranging between the barest suspicion on the one

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hand and absolute certainty on the other has been held to be sufficient to satisfy the requirements of the section. In this connection reference may be made to *Reg. v. Balvant Pendharkar* (10), *Emperor v. Mukhun Kumar* (11), *Queen-Empress v. Dada Ana* (12), *Queen-Empress v. Gharya* (13), *Ghatu Pramanik v. King-Emperor* (14), *Emperor v. Bhagi* (4) and *Ashutosh Dutt v. King-Emperor* (15). The true view seems to have been taken in the case of *Queen-Empress v. Basvanta* (16), where it was said that the section does not require positive proof (as defined in sec. 3 of the Act) of improper inducement to justify the rejection of the confession; the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required. There is some diversity of judicial opinion on the question regarding the onus of proof as to the voluntary character of a confession, viz., whether the prosecution will have to prove affirmatively that it was voluntarily made or they should do so only in the event of a doubt arising in the mind of the trial Judge [see for instance the observations of Parke B. in *R. v. Warringham* (17) and of Cave, J., in *R. v. Thompson* (18)]. It is unnecessary to go into this matter, with regard to which there was for some time a diversity of judicial opinion in this country as well, for having regard to the wording of sec. 24 of the Indian Evidence Act and also to the presumption attaching to certain recorded confessions, and arising under sec.

80 of the Act, the true and generally recognised view is that a confession duly recorded by a Magistrate with the proper certificate appended to it will be admitted in evidence subject to the provisions and restrictions contained in sec. 24; that under the latter section a well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise, for in most cases such proof cannot be available.

So far as these confessions are concerned, if I am right in the view that I have taken, viz., that sec. 164, Cr. P. C., has no application to them, then there is no other law that I know of under which the Honorary Presidency Magistrates could record these confessions. Sec. 80 of the Evidence Act, speaking as it does of confessions "taken in accordance with law," does not apply to these confessions. They come before the Court without any presumptive force of their own and their admissibility must be judged as that of any other evidence adduced in the case. The Honorary Presidency Magistrates, I take it, would undoubtedly not have recorded the confessions unless they considered them as being voluntarily made; but my duty is to investigate into the circumstances in order to ascertain whether the confessions were voluntary.

In order to ensure the voluntariness of a confession the questioning of the accused before he makes the confession forms a factor, the importance of which can seldom be overestimated. It has been enjoined in decisions of which the number is legion that the Magistrate must question the accused with a view to discovering whether the prisoner confesses volun-

(4) 8 Bom. L. R. 697 (1906).

(10) 11 Bom. H. C. R. 137 (1874).

(11) 15 C. L. R. 275 at p. 281 (1877).

(12) I. L. R. 15 Bom. 452 (1889).

(13) I. L. R. 19 Bom. 728 at p. 731 (1894).

(14) I. L. R. 28 Cal. 613 at p. 617 (1901).

(15) 28 C. W. N. 54 (1921).

(16) I. L. R. 25 Bom. 1685 (1900).

(17) 2 Den. C. C. 447n (1851).

(18) [1893] 2 Q. B. 12 at p. 17.

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tarily, and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by putting a few formal questions [*Thien Maung v. R.* (19), see also *Jog-jiban Ghose v. King-Emperor* (20), *R. v. Kadar Ghulam Mahmud* (21), *Emperor v. Jibodhan* (22) and *Emperor v. Ragho Laya* (23)]. Let us for a moment advert to the present confessions and see how they come to be recorded. With regard to the confession of the prisoner Jibankrishna Sircar, his confession was recorded on the 15th and 16th December 1923. So far as the latter date is concerned the Magistrate is not sure that he put any questions to the accused to ascertain whether he was making the confession of his free will. His memorandum with regard to that date runs as follows :—[“Jibankrishna Sircar was brought to me by Ram Kritartha Misser, Head Constable G. D. at 3-15 P.M. to-day when he continued to make his statements as recorded below. This was done at my office No. 81, Harrison Road, where none except Jiban and myself were present, the Police being asked to leave.”] The accused had been sent away the day before in the custody of the Police and was produced by the Police again on the 16th. It is clear that the Magistrate should have warned the accused and questioned him. This he did not do and therefore there is nothing to show, nor does it appear that there was anything before the Magistrate to satisfy him, that the confession which the accused was making on that date was voluntary. It is clear that the statements made on the

16th cannot be received in evidence as having been voluntarily made. As for the part of the confession recorded on the 15th December 1923, the questions and answers recorded by the Magistrate run in these terms :—

“Q.—Can you tell me the time during which and the places where you have been under the control of the Police?

A.—I was arrested at 162, Cornwallis Street at 4-30 P.M., on 1st December 1923, in the city of Calcutta. I was taken to my house No. 124, Musjidbaree Street at 6 P.M. on 1st December 1923. I was sent to you from Lall Bazar lock-up at 11 A.M. on 15th December 1923 and after remaining in the Bankshall Court-house for sometime I came before you at about 2-30 P.M., when the Police left me.

Q.—I have to explain to you that you are not bound to make a confession and if you do so it may be used as evidence against you. Are you still prepared to make a confession?

A.—Yes, I intend to do so.

Q.—You do so voluntarily?

A.—Yes.

Q.—You realise that I am a Presidency Magistrate and am recording your confession voluntarily made?

A.—Yes.

Q.—If you are prepared to tell me anything in connection with the case for which you have been arrested please do so in the form of a narrative.”

(Then follows the narrative.)

With regard to the first of these questions the answer given by the accused did not inform the Magistrate where the accused had been between the 1st December 1923 when he was arrested till he was produced at the Bankshall Street Police Court at 11-30 A.M. of the 16th. Could the Magistrate from this answer judge in

(19) 4 Cr. L. J. 198 (1905).

(20) 13 C. W. N. 862 (1909).

(21) 8 Bom. L. R. 950 (1906).

(22) 18 Cr. L. J. 623 (1917).

(23) 18 Cr. L. J. 721 (1917).

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what sort of custody he was during that time or whether he was in custody at all? If the Magistrate was to form an opinion as to the character of the confession which the accused was about to make—that is to say, whether it was voluntary or not—he could, I venture to think, form none from this answer. The next question assumes that the accused was ready to make a confession when he was produced, a fact which the accused had not admitted till then; and after warning the accused the question aims at ascertaining whether he is still prepared to make a confession. That is quite a different thing from trying to ascertain whether the confession was voluntary. The third question, if it is a question at all, proceeds on the same assumption; and it is more an assertion than a question. The fourth is objectionable as it shows that the Magistrate has already made up his mind to record the confession and assumes a knowledge on the part of the accused which assumption is wholly unwarrantable. The third and the fourth questions, moreover, scarcely called for an answer from the accused. The last question is hardly a question, being rather a direction given to the accused as to how he should proceed to make his statement. I am not at all satisfied that these questions and answers afforded the Magistrate any sufficient data for arriving at his conclusions. It may be that there were other questions and answers, but even then I do not know what they were, and I am not prepared therefore to act upon the opinion of the Magistrate that the confession was voluntary—an opinion for which, it may be that he had ample justification.

As to the confession of the accused Haripada Mookerjee, the same was recorded by the Magistrate Mr. S. N. Roy on

the 13th, 14th and 15th of December 1923. On the 18th December the questions and answers recorded ran as follows:—

Q.—When were you first arrested by the Police?

A.—I was arrested at 4 A.M., on Tuesday, the 4th December 1923, in the town of Calcutta, 11, Goalapara Lane.

I was taken to Burtola Thana at 4 A.M., on Saturday, the 1st December 1923. I was sent to you from Lalbazar Police Office at 2 P.M., on the 13th December 1923.

Q.—Are you willing to make a statement voluntarily?

A.—Yes.

Q.—You must know that any statement you might make might be used as evidence against you. Bearing this in mind, are you willing to make a statement?

A.—Yes, I am willing to make a statement.

Q.—Are you implicated in any crime?

A.—Yes, I am (then follows the narrative).

The first question only enquires how many days before the accused had been arrested and the answer gives him no idea where he had been during the interval, not even if he had been out on bail in the meantime or not. The second question wants to know from the accused the answer which the Magistrate will have to give on a consideration of the facts and circumstances; and the third question involves a warning, omitting the most important information that he was a Magistrate, a fact which the accused must know in order to relieve him of the influence, if any, under which he may have decided to confess. The last question is useless for this purpose.

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[The memorandum relating to the 14th December 1923 runs as follows:—

“Before I began, I asked all Police Officers to leave my room and the room was clear of all such persons. The accused was placed in charge of a personal servant of mine. I again warned the accused that he was not bound to make a statement and any statement which he was going to make must be made voluntarily. The accused said that he was making all statements voluntarily.

14-6-23.”]

It is sufficient to say with regard to this memorandum that the Magistrate did not think it necessary to enquire where the accused had been since he had left the day before and it does not appear the accused was told that he was before a Magistrate. The direction by the Magistrate to make the statement voluntarily is quite a different thing from questioning him to find out whether he is making the statement voluntarily [*Faqir v. R.* (24)].

[The memorandum relating to the 15th December 1923 runs as follows:—

“Before I began to record the statement of the accused, I cleared the room of all Police Officers and men. The accused was placed in charge of a personal servant of mine.

“I again warned the accused that he was not bound to make a statement and any statement which he was going to make must be made voluntarily. The accused said that he was making all statements voluntarily.

15-12-23.”]

Similar observations apply to this memorandum as have been made with regard to the memorandum of the 14th, and further it is open to this objection that it directs the accused to make the

(24) I. L. B. 2 Lab. 325 (1921).

statement voluntarily. The Magistrate, in my opinion, wholly misunderstood his function in advising the accused as he seems to have done. An opinion formed by the Magistrate upon materials such as are disclosed by the record that he made—and I do not know what other materials he may or may not have elicited in the course of his conversations with the accused—is not such as I would be justified in acting upon as well-founded. I may say that I do not agree with the contention put forward on behalf of the defence based on the dictum of Roe, J., of the Patna High Court in the cases of *Emperor v. Ragho Laya* (23) and *Emperor v. Jiubodhan* (22) that there must always be an inquiry as to the motive of the accused in making the confession—a dictum which has not been approved of by the same Court in the cases of *Emperor v. Dewan Kahar* (25) and *Thibu Bhogta v. Emperor* (26) and the Full Bench decision in *Ghinuz Oraon v. R.* (27), but it is clear to my mind that the questions put to the accused must be directed to eliciting facts which will enable the Magistrate to judge of the character of the confession that the accused is about to make, and not merely repeat some set formulæ which the accused can scarcely appreciate, and merely ask him whether his confession is voluntary, a question which he will answer in the affirmative the more readily the greater the influence, if any, that he may be labouring under.

Punctiliousness and care in the recording of confessions being of the utmost importance and it being essential that the Magistrate should satisfy himself in

(22) 18 Cr. L. J. 623 (1917).

(23) 18 Cr. L. J. 721 (1917).

(25) 24 Cr. L. J. 497 (1922).

(26) 24 Cr. L. J. 649 (1923).

(27) 3 P. L. J. 291; [1918] Pat. 57 (F. B.) (1917).

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every reasonable way that the confession is made voluntarily, certain safe-guards have been provided in the shape of rules framed in 1917 by the Calcutta High Court for the guidance of the Magistrates and they were amended in 1919. These rules I am informed were issued to all Subordinate Courts including the Court of the Chief Presidency Magistrate, Calcutta, in the shape of Agenda and Corrigenda to the Court's General Rules and Circular Orders, Criminal. These rules run thus :—

1. Where at any place or station there are present more Magistrates than one, confessions should in general be recorded by the Magistrate specially selected for this purpose by the District Magistrate, or, failing such selection, by the Magistrate senior in rank or class.

2. Confession should be ordinarily recorded in open Court during Court hours, provided that if the Magistrate is satisfied, for reasons to be recorded in writing on the form of confession, that the recording of a confession in open Court should be liable to defeat ends of justice, the confession may be recorded elsewhere.

3. The immediate examination of an accused person directly the Police bring him into Court should be deprecated, and when feasible a few hours for reflection in circumstances in which he cannot be influenced by the Police should be given him before his statement is recorded.

4. During the examination of the accused and the record of his statement, unless in the opinion of the Magistrate the safe custody of the prisoner cannot otherwise be secured, Police Officers should not be present. In particular the Police Officers concerned in the investigation of the case or in the arrest or

production of the accused should be excluded.

5. When the accused is produced, the Magistrate should ascertain when and where the alleged offence was committed and by questioning the accused should further ascertain when and where the accused was first placed under Police observation, control or arrest.

6. The Magistrate should next question the accused in order to ascertain whether he is about to speak voluntarily. It should be made clear to the prisoner that he is free to speak or to refrain from speaking as he pleases, and he should be warned that if he chooses to speak, anything he says will be used in evidence against him.

7. When, upon questioning the prisoner and from observation of his demeanour, the Magistrate has reason to believe that the prisoner is speaking or is about to speak voluntarily, the Magistrate should then proceed to record his statement. While carefully avoiding anything in the nature of cross-examination the Magistrate should endeavour to record his statement in the fullest detail, and to this he may properly put such questions, not being leading questions, as may be necessary to enable the prisoner to state all that he desires to state and to enable the Magistrate clearly to understand his meaning.

It will be seen that cls. (2) and (3) of the said rules were ignored in this case by the two learned Magistrates. One of the learned Magistrates admitted not having any knowledge of the rules and the other was not asked about them, but the way in which he too proceeded can only be attributed to his ignorance of them. A contravention of the Circular Orders deplorable though it is, would not, however, render the record bad if otherwise

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I am satisfied that the confessions were voluntary. In the case of *The Public Prosecutor v. Sharabu Chennayya* (28), it was held that the non-compliance with an order of Government as to the formalities to be observed in recording confessions does not render the confession inadmissible in evidence and the Court has to determine whether the confession was voluntary. But at the same time I must say that when the proper precautions and safe-guards have not been taken in making the record, I am not prepared to place implicit reliance upon the recollection or opinion of the Magistrates, for to do so would be to surrender my own judgment to theirs. The position would have been quite different if the confessions did not stand before me divested of the presumption under sec. 80 of the Evidence Act and had been duly recorded under some provisions of the law, or at any rate if I was able to hold that all proper precautions had been taken in recording them.

Leaving then out of account the opinions which the learned Honorary Magistrates formed as to the voluntary character of these confessions and taking the confessions stripped of a presumption which would attach to them if they had been recorded under any provision of law, let us examine the situation in the light of the circumstances which appear upon the evidence. These circumstances may, for the sake of convenience, be noted down categorically:—

1. By the 8th of December 1923, both the prisoners had finished making their statements before the Police, and in fact if I appreciate the evidence correctly, both were ready from before that date to have their confessions recorded. Jiban's statement had been finished by the 6th Decem-

ber and his confession was recorded on the 15th and 16th December. Haripada's statement had been finished on the 8th December and his confession was recorded on the 13th, 14th and 15th December. This delay in placing the prisoners before Magistrates for having their confessions recorded has been accounted for by Inspector Lahiri by stating that a day or two was taken up in consulting legal advisors and the rest of the period was wasted in an endeavour to get hold of Magistrates who would do the work. He has graphically described the difficulties he experienced and how he tried stipendiary Magistrates first and failing to get one who would take up the work, he went from door to door to avail of the services of Honorary Magistrates. The explanation to my mind is perfectly true and the state of affairs perhaps lamentable. But I do not understand why legal advice has to be taken in the matter at all; for I am not aware that there is any option in the matter or justification to withhold from a prisoner an opportunity to make his statement before a Magistrate when he has expressed his willingness to do so. It has been observed by this Court on more occasions than one that the Police have nothing to do with the question whether a statement was satisfactory or inconsistent, and if a prisoner wishes to make a voluntary statement the Police must produce him before a Magistrate and let him do it whatever might be its character. Delay in producing prisoners who are willing to have their confessions recorded has been always held to affect the value of the confessions [*Emperor v. Noni Gopal Dutt* (29)] and that is so because of the principle that such confessions cannot safely be regarded as voluntary. As I have said the delay is deplorable; and the

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fact remains that for eight days at least in the case of one prisoner, and for four days at least in the case of the other the recording of the confessions was delayed.

2. The prisoners were in the custody of the Police, Jiban from the 1st December 1923 and Haripada from the 4th December 1923, until they were produced before the Magistrates for recording their confessions. According to the evidence of Inspector Lahiri the accused persons used to be taken to the Deputy Commissioner of Police for being present at the "Reports" and for that purpose were in or near his office for about three hours every day, thereafter such of them as were required to accompany the investigating Police Officers for the purpose of pointing out places or other similar purposes were sent out in their company and on their return all together were sent to the Lal Bazar lock-up where they remained during the night. A question has been raised as to the legality of this custody. On a consideration of relevant provisions of the Calcutta Police Act (Bengal Act V of 1866), I am disposed to take the view that there is no power of detention for an unlimited period such as is claimed on behalf of the prosecution in the Deputy Commissioner by virtue of his being a Justice of the Peace. It is said that it is understood generally that there is such a power, there being, in fact, no limitation prescribed anywhere, and sec. 61 of the Criminal Procedure Code not being applicable to the Calcutta Police. That no doubt is so, but I am aware that in the matter of *Mohamed Ramjan v. King-Emperor**, Walmsley, J., held a detention under similar circumstances as improper, presumably on the ground that no such unlimited power exists. So far as

the present case however is concerned, I do not think there was any such detention as would justify me in drawing an inference against the prosecution on that account. It is true that illegal or improper detention by the Police has always been held as vitiating a confession and has in some cases been held to lead to a presumption that there was ill-treatment. In this connection reference may be made to the cases of *Queen-Empress v. Sagal Samba* (6), *Queen-Empress v. Narayan* (30), *Mobarakah v. King-Emperor* (31), *Amir Khan v. King-Emperor* (32), *Jogjiban Ghose v. King-Emperor* (20), *R. v. Gobardhan* (33), *R. v. Mohabir* (34) and *R. v. Appabin Bapu* (35). I am however unable to assent to the proposition so broadly suggested by Candy, J., in the case of *Queen-Empress v. Narayan* (30) that pressure was to be presumed from Police custody, where he observes: "Is it reasonable to suppose that during all that time (meaning the period of custody) no pressure was put upon the accused by the Police to induce them to confess?" I am unable to hold also that the custody and detention in the present case was of such a character as would lead to such a presumption. Were it necessary for my purposes to rest my decision on the question of legality of this detention, I would have felt inclined to reserve the question as a point of law for decision by a larger Court.

3. The confessions were recorded without proper safe-guards in the shape of compliance with the statutory rules framed

(6) I. L. R. 21 Cal. 642 at p. 660 (1898).

(20) 13 C. W. N. 862 (1909).

(30) I. L. R. 25 Bom. 543 at p. 547 (1901).

(31) 23 C. W. N. 886 (1919).

(32) 7 C. W. N. 457 (1903).

(33) I. L. R. 9 All. 528 (1887).

(34) I. L. R. 18 All. 78 (1895).

(35) 1 Bom. L. R. 857 (1899).

* Decided 18th September 1922. Unreported.

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by this Court. They were recorded partly in open Court and partly in the private residences of the Magistrates without any sufficient grounds for doing so. Moreover there was no time given to the prisoners to reflect.

4. The confessions were recorded piecemeal, the prisoners being during the intervals in Police custody as they were before. This, in my opinion, is to be seriously deprecated. Once a prisoner has begun to confess, he places himself in a position from which it is difficult for him to extricate himself, and thereafter the slightest hint from his prosecutor is sufficient to induce him to say anything and everything that may suit the prosecution.

5. The questions put to the prisoners and the warnings given to them in my opinion were not at all sufficient as I have indicated above.

6. Since their arrest and prior to the confessions, the prisoners were practically all along in Police custody, and that for a sufficiently long period. During this long period they were very often in the company of Police Officers and it is idle to expect that the Police Officers would be able to tell us exactly all the conversations that must have taken place between them and the prisoners during the same.

7. It is admitted that rebukes were administered to one of the prisoners at the time of the search. These rebukes, it is true, were not objectionable for the particular purpose for which they were administered; but their effect might linger on the mind of the prisoner and lead him to believe that unless he confessed the consequences might be serious.

8. Twice at least the prisoners were taken to the barracks attached to the quarters of the investigating officer, and kindly treated to dinner. There may be nothing really objectionable in this; but it un-

doubtedly creates a feeling of obligation in the mind of the accused.

9. Some law books, including a copy of the Criminal Procedure Code, which admittedly contains provisions relating to the granting of pardon to approvers, were given to the prisoners to study, though I am prepared to believe it was given with a perfectly genuine desire that they should know all the consequences of making confessions. Results indirectly attained in similar circumstances without precautions being taken to remove the impression created in the mind of the prisoner have sometimes been treated as results of inducement [*R. v. Boswell* (36), *R. v. Blackburn* (37) and *R. v. Dingley* (38)].

10. The two co-accused Nilmadhab and Lalit who were subsequently made approvers and who, judging from what took place afterwards, it is difficult to believe did not know from before that they would be made such, were not segregated from these prisoners and had been together in the lock-up for several nights.

11. Radharani Dasi, the wife of Jiban-krishna Sircar, was arrested on the night of the 1st December; and although the Deputy Commissioner of Police had, and if I may say so, very rightly in the exercise of his discretion, made up his mind not to proceed against her within a day or two after her arrest, she was kept on bail and her surety had to appear every day before the Police; and in point of fact Radharani Dasi has not yet been formally discharged.

12. It was suggested by the defence that the co-accused Mahadeb was put up before the Honorary Presidency Magistrate Mr. G. C. Mandal on the 15th December, that he was then asked to be made an approver, that the learned Magistrate having told

(36) 6 Cav. & M. 584.

(37) 6 Cox. 333 (1853).

(38) 1 C. & K. 637 (1845).

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him that he had nothing to do with that matter, Mahadeb refused to make a confession and was sent to jail-hajat at his own request. It was suggested that two days after when he appeared again he expressed unwillingness to confess. This, as I have said, is only a suggestion; but it is not possible to verify it as the learned Magistrate has, I am informed, no recollection of the matter at all, and the records relating thereto are not available and could not be traced.

13. There was an epidemic of a desire to confess such as would suggest a race for a pardon which not uncommonly occurs in this country when a number of persons are suspected of an offence and some of whom have already confessed and are being taken out for verification.

Each one of these circumstances may be susceptible of an explanation and some indeed are capable of satisfactory explanations; but the cumulative effect of all these circumstances throw a cloud of distrust over the confessions sufficient to bring them within the purview of sec. 24 of the Evidence Act.

The learned Standing Counsel has urged that so far as Jiban's confession is concerned, he never thought of retracting his confessions during the long period from the 15th December to the 10th April during which he was in jail custody, that far from repudiating his confession or resiling from it, he referred to and stuck to it even, on the 10th April on which date he was examined before the Committing Magistrate, that he only retracted the confession in this Court only two days before the trial commenced. I have taken these facts seriously into my consideration; but I am not satisfied, having regard to the position which his wife still occupies that any very great weight should be attached to his failure to retract the con-

fession earlier than he has done. With reference to the confession of Haripada, the learned Standing Counsel has urged that he did not retract his confession on the 18th December when he was placed before the Magistrate, but filed on the 26th, which was the next date that he appeared before him, a petition of retraction purporting to have been dated the 23rd. It is significant, however, that on the 18th the two approvers were also placed before the Magistrate along with him, and judging from the wording of the petition that was filed on that day on behalf of the prosecution for segregating them from the other accused on the ground that they had made full disclosures in their confessions, Haripada cannot be blamed if he waited to see whether he would be lucky enough to be made an approver. It may be surmised that when he found that the choice had fallen on Nilmadhab and Lalit he hastened to retract his confession.

My findings therefore are that the grounds contained in the retractions put forward by the two prisoners are utterly unfounded and untrue, but that there are circumstances in the case which make me hesitate to hold that they are not such as should be excluded, as coming within sec. 24 of the Evidence Act; and acting on the principle that in a case of doubt on the question of admissibility of evidence when it is of such vital importance to the prisoners as their own confessions, one should not hold them as admissible unless one is affirmatively satisfied as to their relevancy—a principle upon which Parke, B., proceeded in the case of *R. v. Warringham* (17) and as it is the duty of the prosecution to prove that the confessions were voluntarily made as was laid down in the case of *Asutosh Dutt v. King-*

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Emperor (15) and they have failed to do so, I rule the confessions out as irrelevant.
D. N. S.

[CRIMINAL[REVISIONAL JURISDICTION.]

REV. (Mis^o) No. 104 OF 1924.

SUBRAWARDY, J.	}	GOLAM BARI GAZI,
MUKERJI, J.		Petitioner,
1924,		v.
4, November.		YAR ALI KHAN,
		Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 363 and 526—Transfer by High Court on the application of complainant—Magistrate's note on record of deposition of witness giving rise to ground for transfer.

Where in recording the evidence of a witness for the prosecution the Magistrate made a note to the effect that the witness faltered and it appeared from his demeanour that he had not told the truth and the complainant moved the High Court for a transfer of the case :

Held—That it was desirable that the case should be transferred to some other Magistrate.

This was a Rule granted on the 9th September 1924 on an application made by the Petitioner for the transfer of the case under sec. 323, I. P. C., pending before Babu S. Banerji and M. H. Alum, Bench of Honorary Magistrates at Alipur, to the file of some other competent Court for trial.

The facts of the case as stated in the petition were as follows:—On the complaint of the Petitioner above-named the Opposite Party was summoned under sec. 323, I. P. C., by S. M. Morshed, Deputy Magistrate of Alipur, and the case was subsequently transferred to a Bench of Honorary Magistrates. Then the case was adjourned on several

occasions either at the instance of the prosecution or the accused. On 30th July 1924 cross-examination of the complainant and prosecution witnesses Nos. 2, 3 and 4 was finished but the learned Bench Magistrates ordered that the examination of the prosecution witness No. 1 should be expunged from the record, as the latter could not attend Court owing to his illness. This was done inspite of the complainant's prayer for a day's time only to produce the witness. During the cross-examination of the prosecution witnesses the learned Magistrates remarked against the veracity of prosecution witness No. 2. The complainant thereupon moved the learned District Magistrate of 24-Parganas for transfer of the case to some other Court, and the learned Additional District Magistrate of 24-Parganas, Mr. K. B. Das Gupta by his order, dated the 29th August 1924, held *inter alia*, "The learned Magistrates have not acted improperly or illegally in any way and their explanation should satisfy the Petitioner (complainant) that their remark was confined to witness No. 2 only. The Petitioner has, in these circumstances, no reasonable cause for apprehension in his mind. The case, a simple one, is already very old and there have been 17 adjournments already and both parties unnecessarily harassed . . . The petition for transfer is rejected." On 3rd September 1924 the learned trying Magistrates fixed 10th September 1924 for argument and orders. On the 9th September 1924, the complainant moved the Hon'ble High Court and a Rule was issued why the case should not be transferred to some other Magistrate.

The learned Additional District Magistrate submitted an explanation, the material portion of which was to the following effect:—"It would appear from

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the explanation of the trying Magistrates that they did not act illegally or irregularly and their action could not raise any apprehension in the Petitioner's mind that he would not get substantial justice. It is a petty case, which has protracted for a long time. The Petitioner has been granted too many adjournments including several which were not justified."

The learned Bench Magistrates in their explanation to the Hon'ble High Court stated *inter alia* that the case was a petty one and fixed for argument only, the complainant was guilty of laches all through and had been granted sufficient adjournments, that the trying Court penalised both prosecution and defence for their laches, that as regards the veracity of prosecution witness No. 2, the learned Magistrates say in their explanation that they embodied its remark as enjoined under sec. 363, Cr. P. C. and that no exception was taken by prosecution to that and the learned Magistrate also drew the attention of the Judges to the delay in moving for transfer.

Babu Radhikaranjan Guha for the Petitioner contended that having regard to the circumstances the complainant had reasonable grounds of apprehension in his mind.

Babu Narendra Nath Chaudhury for the Opposite Party contended (a) that complainant could not ask for a transfer, (b) the remark as to prosecution witness No. 2 was justified under sec. 363, Cr. P. C., and the trying Magistrates could not only note the demeanour but also note down their remarks on the demeanours.

The JUDGMENT OF THE COURT was as follows :—

The learned vakil appearing on behalf of the Opposite Party seeks to justify the

remark which was noted in the deposition of P. W. No. 2 by a reference to the provisions of sec. 363, Cr. P. C. That section no doubt empowers a Magistrate to record such remarks, if any, as he thinks material respecting the demeanour of such witness whilst under examination. The remark in question is in these words :—"The witness falters and from his demeanour it appears that he has not told the truth." It is clear that so far at any rate P. W. No. 2 is concerned, the witness has been altogether disbelieved by the Magistrates and they have taken the trouble of recording the fact while recording the deposition of the said witness. This in our opinion is a matter which must be taken into consideration in determining whether the case should go on before the Magistrates any longer. We think that on the whole it is desirable that the case should be transferred to the file of some Magistrate other than the learned Honorary Magistrates who have dealt with it, and we order accordingly.

The Rule is made absolute.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD CARSON.

MR. AMEER ALI.

1924,

Heard, 19, 20, 22,

23 and 28, May.

Judgment, 26, June.

NAYAK VAJESINGJI
JORAVARSINGJI and
ors., Appellants,
v.

THE SECRETARY OF
STATE FOR INDIA
IN COUNCIL,
Respondent.

Cession of territory by treaty—Act of State—Reservation of proprietary right of subjects, if enforceable in Court by latter—Subsequent recognition of right by new Government, necessity to prove—Onus—Pleadings—Government, if has to plead "Act of State"—General proclamation to uphold existing rights, if gives subjects right to enforce treaty—Potta and kabuliyat, exchange of, if im-

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*ports conferment of farming or proprietary right—
Costs—Arrangement of records, duty of solicitor
as to*

When a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. The result, in all cases, is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the High Contracting Parties.

SECRETARY OF STATE FOR INDIA v. BAI RAJBAL (1), SECRETARY OF STATE FOR INDIA v. KAMACHEE BOYE SAHABA (2) and COOKE v. SPRIGG (3) referred to.

A general proclamation by the new Government that existing rights would be upheld does not confer on the municipal Courts the right to adjudicate as upon rights which existed before the cession. It can in any case never prevail against exact determinations in individual cases made upon investigation, e.g., in this instance, that the Naik Appellants were not entitled to hereditary rights but might be continued as lease-holders so long as they behaved themselves.

(1) L. R. 42 I. A. 229: s. c. 19 O. W. N. 1087 (1915).

(2) 7 M. I. A. 476 (1859),

(3) [1899] A. C. 572.

Once cession is admitted, the onus is cast on the claimants to show acts of acknowledgment which give them the right they wish to be declared. It is not necessary for the Government to take the plea of Act of State.

The mere fact that the document of title held by the Appellants was called a potta and that they executed a kabuliyat in similar terms is not conclusive of the question of whether they were mere lease-holders, i.e., farmers of revenue, or were true proprietors paying a jammabundi to the overlord, for the term potta might quite appropriately be used for the instrument fixing such jammabundi.

Animadversions by the Judicial Committee on the confusing arrangement of the records, which, had the Appellants been successful, their Lordships would not have hesitated to penalise by disallowing in toto the solicitors' fee for perusing the record.

These were consolidated appeals from three decrees, dated the 17th January 1917, of the High Court at Bombay, which affirmed decrees, dated the 24th February 1913, of the District Judge of Ahmedabad.

The Appellants instituted the suits against Government for, *inter alia*, declarations that they held the lands in suit as proprietors and not as lessees or otherwise as tenants from Government.

They claimed that they and their ancestors had respectively held the lands as proprietors for two centuries, first under the Mahrattas and then under the British rule.

The three estates in suit were situated in the Panch Mahals and were known as Tanda, Chandwana and Katwada.

In 1852-53 the Panch Mahals formed part of the estate of the Maharaja Scindia

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who in that year gave a 10 years' lease to the E. I. Company. Before the expiry of the term, *viz.*, in December 1860, Scindia ceded the Panch Mahals to the British Government in exchange for other lands of equal value elsewhere.

The *pottas* which had been granted expired in 1863, and were renewed from time to time until the completion of the survey of the District in 1880. In 1881 Government decided that the Naiks should be offered leases for 20 years on certain terms as to quinquennial increases of rent and otherwise and the Naiks remained in possession on the terms therein stated for the said period. From time to time the Naiks preferred petitions that they should be "restored to their proper and rightful rank of Talukdars," and in 1902, after enquiry, Government conveyed to them the decision that although there was no objection to the Appellants being addressed as "Talukdars" yet that the nature of their tenure was that of lease-holders.

On the expiry of the 20 years' term of the Naiks' tenancies Government decided to offer them estates for a further term of 15 years.

The Naiks refused to entertain this offer and gave notice of their intention to bring suits for the declarations mentioned above. The suits were instituted on the 6th November 1908 and were dismissed by the District Judge by decrees passed therein on the 24th February 1913. The Plaintiffs appealed and their appeals were heard by a Bench of the High Court consisting of Scott, C. J. and Beaman, J., who on the 17th January 1917 delivered judgment and passed decrees affirming those of the District Court.

The learned Judges considered that the ruling in *Secretary of State for India*

v. *Bai Rajbai* (1) was applicable to the case. Accordingly they disposed of the appeals on the documents bearing dates subsequent to the cession of the Panch Mahals to the British Government. They concurred with the District Judge's conclusion on the evidence that the Plaintiffs had failed to prove that they were proprietors of the said estates or had long possession in that character, and they dismissed the appeal.

Messrs. A. M. Dunne, K. C. and Parikh for the Appellants.

Sir Geo. Lowndes, K., C. and Mr. Kenworthy Brown for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In these consolidated appeals the three Naiks of Tanda, Chandwana and Katwada respectively, sue the Indian Government for a declaration that they are proprietors of the whole lands in the Talukas belonging to them and that they are not bound to accept a lease of the same in the terms offered to them by the Government in 1907. They admit that they are bound to pay a *jammabundi* or revenue contribution but contend that there the right of the Government of India ends. Their demand was refused by the District Judge and his judgment was confirmed on appeal by the High Court.

The lands in question are situated in Panch Mahals and, previously to 1860, were in the domain of Scindia of Gwalior. On December 12th of that year Scindia ceded this territory to the British Government by a treaty of which Art. 3 is as follows:—

"The Maharaja transfers to the British Government in full Sovereignty the whole of His Highness' possession in the Panch

(1) L. R. 42 I. A. 229; s. c. 19 C. W. N. 1087 (1915).

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Mahals and to the south of the river Narbada also Pargana Kumghar on the Betwa river on the following conditions:—

"1st. That for the lands transferred by His Highness, the British Government shall give in exchange lands of equal value calculated on both sides on the present gross revenue

"3rd. That each Government shall respect the conditions of existing leases until their expiry, and that in order that this may be made clear to all concerned, each Government shall give to its new subjects leases for the same terms of years and on the same conditions as those which they at present enjoy.

"4th. That each Government shall give to its new subjects 'Sanads' in perpetuity for the rent-free lands—the Jageers,* the perquisites and the hereditary claims (*i.e.*, 'Huks and Watans') which they enjoy at present under the other Government."

Their Lordships will have occasion presently to enquire into the circumstances of an earlier date, but, for the moment, they pause at this date because what happened in 1860 determines the law of the case. This law was most clearly laid down in the judgment of the Board delivered by Lord Atkinson in the case of *Secretary of State for India v. Bai Rajbai* (1). Their Lordships do not propose to repeat what was there said. It was no new law that Lord Atkinson laid down. The same had been held in the case of *Secretary of State for India v. Kamachee Boye Sahaba* (2) and *Cooke v. Sprigg* (3). But a summary of the matter is this; when a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession fol-

lowing on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the High Contracting Parties. This is made quite clear by Lord Atkinson at p. 268, when, citing the Pongoland case of *Cooke v. Sprigg* (3) he says: "It was held that the annexation of territory made an Act of State and that any obligation assumed under the treaty with the ceding State either to the sovereign or the individuals is not one which municipal Courts are authorised to enforce." Their Lordships have thought it necessary so far to repeat what has been said before, because the Appellants' counsel sought to make two points. He said that Act of State had not been pleaded before the Judge of first instance and ought not to be given effect to now. Their Lordships think that at least the Appellants themselves recognised the true situation when, in para. 6 of the plaint, they say: "After the advent of the British rule the ancestors of the Plaintiff used to be treated as proprietors of the estates in the same way as the other Talukdars in the Panch Mahals." But in truth no plea specifically using the words "Act of State" is required. If there existed a right, either admitted or that could be established

(1) L. R. 42 I. A. 229; s. c. 19 C. W. N. 1087 (1915).

(2) 7 M. I. A. 476 (1859).

(3) [1899] A. C. 572.

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lished by decree of Court, and that right
it was alleged was taken by an Act of
State, it would be necessary so specifically to plead, but that is not the situation. The moment that cession is admitted the Appellants necessarily become Petitioners and have the onus cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared. The other point was that, in virtue of certain general declarations, the Appellants became entitled to enforce the treaty. The general declarations will be subsequently examined. If they give a right of themselves well and good, but they can never have the effect of altering the law as above stated, that is to say, of making the Appellants, so to speak, a party to the treaty with a right to enforce the conditions of the same in a municipal Court.

The whole object accordingly of enquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing the proprietary right which the Appellants claim. The Appellants first sought to prove that under Scindia they were proprietors. The defender retorted that they were merely farmers of revenue. Certain documents were produced out of the Gwalior repositories and controversy was raised as to whether they were genuine or had been tampered with. Their Lordships, for the reasons of law above stated, think it quite unnecessary to consider this question because their view of what was the tenure under Scindia has no bearing on the question. The view of the officials of the Government as to that would influence them to make up their minds as to what title should be given or recognised, but even then, as far as their Lordships are concerned, it is what they did after investigation, not what they

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thought at investigation, that is matter of moment.

The first touch between the Government of India and these people did indeed precede the cession. In 1850-51, owing to frontier troubles, it was thought expedient that a lease of all this territory should be granted to the company, who thereupon managed the territory, respecting the rights of the inhabitants as they found them. As a matter of fact the ancestors of the Appellants at that time were the holders of *pottas* for an unexpired term, these *pottas* having been granted by Scindia and payments were under them made payable to the company. Their Lordships will at once, in order to show that they have not been swayed by any contrary contention, make the concession that the mere fact that the document of title held by the Appellants is called a *potta*, and that they executed a *kabuliyat* in similar terms is not conclusive of the question of whether they were mere lease-holders, *i.e.*, farmers of revenue, or were true proprietors paying a *jammabundi* to the overlord. The term *potta* might quite appropriately be used for the instrument fixing such *jammabundi*. The term of the existing *pottas* expired in 1859, and in February 1860 Captain Buckle, who was in charge for the Government (who had by this time succeeded the Company), granted, on the part of the Government of Scindia, three *pottas* to the Appellants for a period of three years from 1860 to 1863. One of these *pottas* may be taken as a sample. The *jammabundi* for each year is fixed at Rs. 5,617-5-3. This was made up of Rs. 5,000 for the "*jammabundi* revenue," Rs. 217-2-5 for a balance and Rs. 600 a debt due to Jamadar Satarkhan. This last was an old debt due by the Naik which the Government was making him

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pay. Cl. 2 provides for the Naik finding security from a banker, a proceeding unnecessary if the land could have been attached, but quite necessary if the lessee was not proprietor but merely a farmer of revenue. Then there is a clause binding the Naik at the termination of the *potta* to "hand over" the villages to the Government.

In 1860, in December, as already stated, came the cession. Immediately after the cession the Government set itself to enquire what were the estates transferred and what were the tenures of their new subjects. This was necessary, first of all, because as land of equal value elsewhere was to be ceded to Scindia, it was necessary to note the exact value of what had been taken over, and also because undoubtedly the Government wished to give effect to the terms of the treaty above quoted and in particular to the fourth head of the 3rd clause. Accordingly Captain Buckle, who was in charge, was told to make enquiries and furnish exact lists, giving particulars of extant leases, also the names of all Jaghirdheers and their tenures and all charitable and rent-free holdings. Buckle made a report and in this report he enters the Appellants as mere lease-holders and not as Jaghirdheers holding proprietary interests. No doubt this was, so to speak, behind the backs of the Appellants but it is significant as being the foundation of the action which followed. The *pottas* which had been granted expired in 1863, consequently they had to be renewed. The Government officers proposed some increase of rent. In the meantime some outsiders made offers to take leases of the 3 Talukas for a rent preposterously higher than anything hitherto received. The Naiks had got wind of this and made representation to the Government in August

1863. Their prayer is worded, "As Government had been taking care of us they will be graciously pleased to grant us a *potta*, to do which they are quite competent."

The Government came to the conclusion that they would not accept the outsiders' offer in view of the long time that the Naiks had had possession and renewed on the same terms. In 1868 the question came up again. There was a long enquiry by the Government as to the precise position of the Naiks. As an interim arrangement a lease was granted on the old terms to endure till the survey. This lease also provided for handing back the villages at the expiry of the period. The enquiry dragged on for some years, but in 1876 the Government came to a decision that the Naiks were not entitled to hereditary rights, but might be continued as lease-holders so long as they behaved themselves. This determination was conveyed to the Naiks by letter of 12th June 1876, which contains the following passage:—

"It appears that under the old rule the Pattas (leases) of these villages were also given several times to other people besides these Naiks, and from this it appears that their status may not be of hereditary Talukdars; but for about the last fifty years the *vahivat* (management) has been smoothly carried on by the houses (families) of the three Naiks under their respective Pattas and Meherban Propert Saheb and Major Voice Saheb have expressed their opinions that the management under the Patta may continue with the Naiks so long as they properly take care of the villages. Hence this question is decided accordingly. The Pattas of the three Talukas are to be continued till the survey takes place. The Survey Department has taken the trigonometrical Survey of the three Talukas and it may be suitable to fix the amounts of the Pattas, keeping in view the trigonometrical measurements at the time of the Survey.

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No hereditary right of the Naiks is admitted in the preparation of the Pattas."

In 1881, the survey having been introduced, the Government came to a resolution as to what leases should be granted. They were to be on a sliding scale calculated on the survey assessment and allowing the Naiks a 10 per cent. margin. This proposal must have been communicated to the Naiks, though there is no direct evidence to that effect, for in 1883 there is a petition from the Naiks complaining of the proposal as calculated to impoverish them, complaining of the taking away of the forest land, and offering as evidence of right a document granted in Scindia's time. This petition was refused in 1883 and the refusal communicated to the Naiks. In 1887 the question of the forest land arose in an acute form. The Naiks petitioned against the taking of the forest land by the Government. In the petition they really sought to re-open the whole question. Thus, in Art. 7 of the petition of 31st October 1887, they say as follows:—

"7. If our right is considered by the Government as specially that of Ijardar mentioned above, it is a great mistake; we have the right of ownership over our village, which is handed down from generations; we had been recovering and we have been recovering the Jamabandi tax, Vaje (payment in kind), etc., from our villages in any manner we like. Also we gave (land) to others free from any tax; we had been and have been giving as a loyal subject to the late and present Government a certain amount as Chauth in lieu of remaining under their protection."

This petition was considered, was not sanctioned, and a reply sent in the negative on 26th April 1888. Under the Forestry Acts the Naiks could have appealed against this order, but did not do so.

In 1902 the Naiks again sought to

raise the whole question by sending a memorial to the Government, in which they went over the whole ground again and claimed to have proprietary rights. This was sent to head-quarters, when a report from the Under-Secretary, *inter alia*, said as follows:—

"4. The question as to the proprietary rights of these Naiks in their villages was fully inquired into and decided in the year 1880, and we are of opinion that no valid reason has now been shown for re-opening it after so long an interval of time. We are also of opinion that as the status of the memorialists is that of mere lease-holders, holding their leases at the pleasure of Government, their claims to the sole proprietary title in the forests within the limits of their villages cannot be admitted"

And the final determination of the Government was conveyed in a resolution of 13th December 1902:—

"The evidence collected by Mr. Beyts clearly showed that these Naiks never acquired the position of Talukdars, but that they were merely lease-holders, and in paragraph 1 of Government Resolution No. 2,783, dated 31st May, 1890 (copy appended), the following orders were passed by this Government."

In 1904 there was a final report from the Government officials as to the leases, which, as already noticed, had not actually been granted. By this time there had been complaints of what the Naiks had been doing, and some of the officials were anxious that no new leases should be granted to the Naiks, but that the whole villages should be made *kasla*. The Government, however, determined that the Naiks should have another chance, and the leases were offered, upon which they took the present proceedings.

It is abundantly clear from what has been above set forth that, although the Government officials took great pains to determine what was the position of the Naiks, they came to the conclusion that

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their rights were not those of hereditary proprietors. To say that is, in view of the law as laid down above, to say enough, but their Lordships will notice what has been urged on the other side. It is pointed out that the Naiks have been in the saddle for a long time. This is true, and it is to this fact that they held their position as lease-holders at all. But for that long possession the villages would have been made *kasla* as others had been.

Then it is said that, by the terms of certain proclamations, the Government acknowledged the right. The proclamations in 1852, when there was merely a transference for administration purposes, are neither here nor there. When we come to the cession the proclamation referred to is in these terms:—

"I wish to let you know in time that the laws of the British Empire will be in force from the 1st of May next in the Panch Mahals.

"2. It has hitherto been the practice to reserve Civil suits against the lands or houses for arbitration.

"3. That can no longer be the case; a suit once filed cannot be withdrawn unless by the consent of the complainant and the law will be enforced.

"4. As a friend of all your ancient houses I wish to warn you before-hand against debt. If you wish to preserve your present position, you should avoid it as the most unfortunate thing which can happen to you."

Then follows a list of names, among which are persons who have had acknowledged to them a real proprietary right, and in this list occurs the names of Katwada, Chandwana and Tanda. There is also, especially in the Naiks' petition, reference made to 'proclamations made at the time of the Durbar. There are two answers to be made to an argument founded on such documents. The first is that a mere general statement that existing rights would be upheld could never

prevail against exact determinations such as have been above set forth. The second is that any statement in general terms that rights will be respected must necessarily mean as these rights are on investigation determined by the Government officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a municipal Court the right to adjudicate as upon rights which existed before cession, is, in their Lordships' opinion, to misapprehend the law as above set forth. It was also urged that the Government had recognised certain free grants which had been made in the past by the Naiks. This is true. But the Government had directed a special head of inquiry to be made as to free grants. The wish not to disturb persons whose tenure had been, *de facto*, free was a generous policy. But to infer from this generosity that the Government was admitting that the grants had originally been properly made and that from that admission flowed the further admission that the Naiks were true proprietors is to make a mere inference override a direct statement. One other matter may be noticed. The Naiks' susceptibilities seem to have been aroused by the term "Ijardars" being used as to them, and requested that the term "Talukdars" should be used. The Government reply is as follows:—

"In reply to his petition, dated 26th September 1898, to the address of Government, Naik Ratansing Pratapsing of Tanda in the Dohad Taluka of the Panch Mahals District is informed that Government have no objection to his being addressed as 'Talukdar' instead of a 'Patadar' in official communications, but it should be distinctly understood that this concession will not in any way affect the orders passed by Government in

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May 1880, regarding the tenure of the Petitioner's holding."

Now, the resolution of 1880 referred to was the foundation of the proposals as to the 10 per cent. margin, which, denying the proprietary rights of the Naiks, was objected to by the petition which was refused in 1883.

For these reasons their Lordships are satisfied that this appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Their Lordships feel bound to call attention to the state of the record. In the teeth of directions issued from the office no trouble whatsoever had been taken with the arrangement of the record, and it came before their Lordships in quite a disgraceful state of confusion. Had the Appellants been successful their Lordships would not have hesitated to disallow *in toto* the solicitors' fee for perusing the record.

Solicitors: Messrs. T. L. Wilson & Co. for the Appellants.

Solicitors: Solicitor, India Office for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1589 of 1922.

<p>GREAVES, J. MUKERJI, J. 1925, 6, January.</p>	}	<p>NALINI KANTA MUKHERJI and ors., Defendants, Appellants, v. HARI NIKARI and anr., Plaintiffs, Respondents.</p>
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Fraud—Suit for setting aside ex parte fraudulent decree, if lies, when summonses were served—Falsity of claim and adducing of perjured evidence, if constitute sufficient fraud for vacating the previous decree—Civil Procedure Code (Act V of 1908), Or. 9, r. 13, proceeding under, if operates as res judicata in the subsequent suit on the point of service of summons.

N. brought a suit in the Small Cause Court against H. on a hand-note and obtained an ex parte decree. H. unsuccessfully applied under Or. IX, r. 13, C. P. C., to set aside the ex parte decree contending that summonses had been suppressed, and eventually instituted a suit in the Munsif's Court to set aside the ex parte decree on the grounds that the claim was a false one and the decree was obtained by perjured evidence. The suit was decreed by the lower Appellate Court on the grounds, firstly, that H. knew nothing about the ex parte case, and secondly, that the claim was fraudulent as the hathchitta upon which the original suit was based was made out in the absence of H. and was an untrue document:

Held—That so far as the second ground of the decision is concerned, the balance of authority is that no suit lies and it is not open to raise pleas of this nature, if the suit has been decreed after contest, or if the suit has been decreed ex parte and it is established that summonses were served on the Defendants.

MAHOMED GULAB v. MD. SULLIMAN (1) followed.

As to the first ground about non-service of summons, the decision of the Small Cause Court under Or. IX, r. 13, C. P. C., did not operate as res judicata in the present case on the point of service of summons, there being matters in the present suit which could not have been brought to the Small Cause Court.

KHAGENDRA NATH v. PRANNATH, (2) relied on.

This was an appeal preferred on the

(1) I. L. R. 21 Cal. 612 (1894).

(2) L. R. 29 I. A. 99; s. c. I. L. R. 29 Cal. 395; 6 C. W. N. 473 (1902).

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16th July 1922 against a decree of the District Judge of Zillah Jessore (Mr. M. C. Ghosh), dated the 4th April 1922, reversing a decree of the Munsif, 1st Court at Jhenidah (Babu Bagola Prasanna Basu), dated the 29th November 1920.

The facts will fully appear from the judgment.

Babu Abinas Chandra Ghose for the Appellants.—It has been uniformly held that falsity of claim and adducing of perjured evidence constitute no such fraud as would vitiate a decree. Cites *Mahomed Gulab v. Mahomed Sulliman* (1), *Abdul Huq v. Abdul Hafez* (3), *Mosuful Huq v. Surendra Nath* (4), *Kasishur v. Amiruddin* (5), *Manindra v. Hari* (6), *Sarat v. Mecher* (7), *Ram Narain v. Tooki Sao* (8) and *Kadirvelu v. Kuppuswami* (9). There are only two cases against me—*Kedar Nath v. Hemanta Kumari* (10) and *Lakhmi Charan v. Nur Ali* (11). The learned Judges deciding these two cases have since veered round and appear to be inclined to the contrary view. These cases have always been distinguished on the special fact that in either of them the Defendant was prevented from placing his defence before Court in the *ex parte* case. As regards the suppression of service, the point was abandoned in the trial Court, and the unsuccessful application under Or. IX, r. 13 concludes the point. Cites *Khirode Chandra v. Sm. Ashtullabu*

(12) and *Jangal Chaudhury v. Laljit Pasban* (13).

Babu Nirode Bandhu Roy for the Respondents.—The judgment in the Or. IX proceeding does not bar the raising of the question of non-service of summonses in a suit for setting aside a fraudulent decree. Cites *Khagendra v. Prannath* (2) and *Radha Raman v. Pran Nath* (14). Moreover, that judgment was given by a Court of Small Causes. That Court found in favour of regularity of service without examining the necessary witnesses. Non-service of summonses has been held to be a fraud. Refers to *Janki Kuer v. Thakur Rai* (15).

Babu Abinas Chandra Ghose in reply.—The Privy Council cases cited by the other side do not lay down the proposition of law so broadly, they proceed on their own facts. In *Khagendra Nath's* case (2) there were other outstanding circumstances of fraud. Some finality ought to be attached to the judgment given under Or. IX, r. 13, either by virtue of sec. 11, Exp. 4, C. P. Code, or under the broad principles of *res judicata*. The Patna case cited by the other side does not touch the present controversy.

The JUDGMENT OF THE COURT was as follows:—

GREAVES, J.—This is an appeal by the Defendants in a suit against a decision of the District Judge of Jessore, dated the 4th April 1922, reversing a decision of the Munsif of the 1st Court at Jhenidah. It will be convenient first of all to state

- (1) I. L. R. 21 Cal. 612 (1894).
- (3) 14 C. W. N. 695 (1910).
- (4) 16 C. W. N. 1002 (1912).
- (5) 23 C. W. N. 133 (1918).
- (6) 24 C. W. N. 133 (1919).
- (7) 29 C. W. N. 11 (1924).
- (8) [1920] Pat. 98.
- (9) I. L. R. 41 Mad. 743 (F. B.) (1918).
- (10) 18 C. W. N. 447 (1913).
- (11) I. L. R. 38 Cal. 936: s. c. 15 C. W. N. 1010 (1911).

- (2) L. R. 29 I. A. 99: s. c. I. L. R. 29 Cal. 395; 6 C. W. N. 473 (1902).
- (12) 20 C. W. N. 845 (1916).
- (13) [1921] Pat. 3.
- (14) I. L. R. 28 Cal. 475: s. c. 5 C. W. N. 757 (P. C.) (1901).
- (15) [1923] Pat. 336.

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the facts. In the year 1916, the present Appellants instituted in the Court of Small Causes, a suit against the Respondents on a hand-note. A month after the institution of the suit, namely, on the 28th April 1916, the present Appellants obtained an *ex parte* decree against the Respondents for a sum of Rs. 59-8 as. The case of the Respondents is that they knew nothing of that decree until the 7th of June 1919, when certain moveable articles of theirs were seized in execution of the decree. Thereupon the present Respondents applied under Or. IX, r. 13, C. P. C., to set aside the *ex parte* decree, contending that summonses had been suppressed. These proceedings were contested, but the present Respondents failed in their application, and it was thus held that summonses were duly served on the present Respondents. As a result of the Respondents' failure in these proceedings, they, on the 15th January 1920, instituted the present suit to set aside the *ex parte* decree on the grounds that the claim was a false one and the decree was obtained by perjured evidence. We have the plaint before us and it also appears that the Respondents contended in the suit that they had never been served with summonses, and that a false return of service was made by the process-server at the instance of the present Appellants. The case came on for hearing before the Munsif, who decided, as I have already stated, on the 29th November 1920, adversely to the present Respondents. He states with regard to the issues Nos. 5 and 6, which were the issues with regard to service and other matters, that it was not pressed before him that any fraud had been practised on the Court. The learned District Judge has reversed the decision of the Munsif and hence this appeal.

The reversal of the Munsif's decision

was arrived at, so far as I can see, on two grounds, *firstly*, the summonses were not served and the learned District Judge finds that the Plaintiffs knew nothing about the *ex parte* case; and *secondly*, on the ground that the claim was fraudulent. The learned District Judge finding that the *hatchitta* upon which the original suit of the Appellants was based was made out in the absence of the Respondents and that it was an untrue document. So far as the second ground of the decision is concerned, there has been some conflict of authorities in this Court; but we think the balance of the authority is that it is not open to raise pleas of this nature, if the suit has been decreed after contest, or if the suit has been decreed *ex parte* and it is established that summonses were served on the Defendants. Numerous authorities have been cited before us, but it is not, I think, necessary to refer to them. As I have already stated, the balance of authority is in favour of the contention of the Appellants before us that under the circumstances which I have stated no such suit lies. This is in accordance with a decision in the case of *Mahomed Gulab v. Md. Sulliman* (1) of Sir Comer Petheram and Mr. Justice Ghose. As I have already stated, this decision has not been uniformly followed, but the balance of authority is in favour of the correctness of that decision. We therefore come to the first ground of the decision of the District Judge, namely, that there was no service of summonses upon the present Respondents. In this appeal it is urged before us that that contention is not open to the Respondents, having regard to the decision in the proceedings under Or. IX, r. 13, to which I have already referred, and that is the

(1) I. L. R. 21 Cal. 612 (1894).

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main question which arises for our consideration. It is urged on behalf of the Appellants that having regard to that decision, and upon the authorities which have been cited to us and upon the general principles, that decision amounts to a *res judicata* with regard to this question, and that it is not open in the present suit to the Respondents to again agitate that question. It is further contended that before the Munsif this point in fact was abandoned. So far as the question of abandonment is concerned, we do not think that this argument is well-founded, having regard to the plea that was made in para. 1 of the plaint and having regard to the evidence that was given in the case and the finding of the lower Appellate Court that the Plaintiffs, that is to say, the present Respondents, knew nothing about the *ex parte* case.

The other point is, however, a somewhat difficult one. On behalf of the Respondents, we were referred to the case of *Khagendra Nath Mchata v. Pran Nath Ray* (2), where their Lordships of the Judicial Committee decided that the rejection of an application under secs. 108 and 311 of the old Code of Civil Procedure was not a bar to the re-agitation in a subsequent suit of questions, some of which fell to be decided under the provisions of secs. 108 and 311. The Appellants before us contend that that authority has no application to the present case as there were clearly matters in that suit which could not have been raised in the application under the two sections of the Code of Civil Procedure to which I have referred, and that in the present case every matter with regard to service of summons could have been and was raised

in the proceedings under Or. IX, r. 13 of the Code of Civil Procedure.

I think myself that the case of the Judicial Committee to which I have just referred stands on somewhat peculiar grounds, but we think that that case has some bearing on the present appeal, because there were matters in the subsequent suit out of which this appeal arises which could not have been raised on the application under Or. IX, r. 13, as that was an application to the Munsif, the original suit having been brought to the Court of Small Causes, as I have already stated.

For these reasons we think that the decision under Or. IX, r. 13, C. P. C., does not operate as *res judicata* in the present appeal and accordingly there is a finding of fact of the lower Appellate Court that summonses were never served on the present Respondents. This being so, we think that the decision of the District Judge is correct, although we do not agree with the reasons for that decision, which are contained in his judgment. The present appeal accordingly fails and must be dismissed with costs.

MUKERJI, J.—I agree.

J. N. R. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1156 OF 1922.

SUHWARDY, J.	} PRYAMBADA DEBI, Defendant, Appellant, v. MONAHAR MUKHOPADHYA and ors., Plaintiffs, Respondents.
CUMING, J.	
1924,	
Heard, 13, November, 4 and 5, December.	
Judgment, 19, December.	

(2) L. R. 29 I. A. 99; S. C. I. L. R. 29 Cal. 395; 6 C. W. N. 473 (1902).

Choukidari Chakran lands resumed by Government and transferred to Zemindar—Suit by Zemindar.

PRYAMBADA DEBI v. MONAHAR MUKHOPADHYA.

dar against putnidar for assessment of fair and equitable rent—Liability of putnidar to pay rent—Non-payment of rent for twelve years, effect of.

The Plaintiff who was the Zemindar sued the putnidar for assessment of fair and equitable rent on certain Choukidari Chakran lands which were resumed by Government and transferred to the Zemindar :

Held—That inasmuch as the kabuliyat did not show that at the time of the inception of the lease the profit from the Choukidari Chakran lands was included in the assets on which the rent was assessed the Zemindar was entitled to have rent assessed upon these lands.

That at the time of the grant the Zemindar had some interest in the lands which he could transfer to the putnidar and therefore from the inception of the putni tenancy the putnidar was the tenant of those lands and the resumption by Government and transfer to the Zemindar created no new jural relation between the parties.

The fact that the putnidar did not pay rent for more than 12 years did not give him a right by adverse possession to hold the land without payment of rent.

This was an appeal preferred on the 25th May 1922 against the decree of Babu Nani Gopal Mukherjee, Additional Subordinate Judge of Zillah Burdwan, dated the 20th of February 1922, affirming the decree of Babu Satya Prasanna Mazumdar, Munsif, 4th Court at that place, dated the 31st of May 1920.

The material facts will appear from the judgment.

Sir Provas' Chandra Mitter and Babu Sitaram Banerjee for the Appellant.

Dr. Dwarkanath Mitter and Babu Hiralal Chakrabutty for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—In the suit out of which this appeal arises the Plaintiff sued the two Defendants for the assessment of a fair and equitable rent on certain lands on the following allegations.

The Plaintiff is the Zemindar of a 12 annas 16 gandas share in Mouza Sangrai. The Defendant No. 1 is the putnidar under him for the whole of the share (12 annas 16 gandas) that he holds in Mouza Sangrai. Within the village there were certain Choukidari Chakran lands. These Choukidari Chakran lands were resumed by Government and transferred to the Zemindar by two deeds, one Ex. 1, dated the 16th October 1901, which covers 25 bighas 9 cottals odd of land, the other Ex. 2, dated 15th April 1914, which covers 6 bighas odd of land. The Defendant has refused to pay him any rent for these lands and hence the suit.

Defendant No. 2 contended that he had no interest in the land in dispute and this contention has been found in his favour.

Defendant No. 1 contended that she was only in possession of 16 bighas out of the 25 bighas covered by Ex. 1 and that the 6 bighas covered by Ex. 2 do not appertain to Mouza Sangrai but to a different Mouza. Further she has contended that the suit is barred by limitation.

Both the lower Courts have held that the lands in suit appertain to Mouza Sangrai; that the Defendant is not in possession of 8 bighas out of the 25 covered by Ex. 1; that she is in possession of the lands covered by Ex. 2 and she is liable to pay rent to the Zemindar for these lands and have assessed the amount of rent. It has also been found that the suit is not barred by limitation.

In appeal to this Court the Defendant has put forward three contentions :—

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(1) She is not liable to pay rent for these lands.

(2) She had been dispossessed of some of the lands and so is entitled to a suspension of the whole rent.

(3) That the suit is barred by limitation.

I will deal first of all with her contention that she is not liable to pay any rent for these lands.

Her case on this point is as follows:—

These lands were included in the land of which she took settlement at a certain rent. The contract covered all the lands within the Mouza including the Choukidari Chakran lands. Therefore her rent cannot be increased. In support of her contention she relies on the case of *Narpat Singh v. Bhupendra Narain Singh* (1). This case undoubtedly supports the case of the Appellant. In that case the Plaintiff who was the *putnidar* sued to recover *khas* possession of certain resumed Choukidari Chakran lands on the ground that they were included in the *putni* taluk granted to his predecessor-in-interest. The trial Court and first Appellate Court held that he was entitled to possession on paying rent to the Zemindar for the resumed lands. This Court (Greaves and B. B. Ghose, JJ.) on appeal held, relying on the decision of the Judicial Committee in the cases of *Ranjit Singh Bahadur v. Kali Dasi* (2) and *Ranjit Singh Bahadur v. Maharaj Bahadur Singh* (3) that the *putnidar's* interest in such lands is derived from the *putni* itself and that this being so it was difficult to see on what principle the Zemindar could claim to vary the *putni* by en-

hancing the rent in respect of lands which were included in the original demise even assuming that the profit of these lands were not taken into accounts in fixing the rent. The Respondent contends that the learned Judges have misread and have not appreciated the two judgments of the Privy Council on which they have based their decision and that it is contrary to a long line of decisions in this Court, the most recent decision being the case of *Maharaja Bejoy Chand v. Krishna Chandra* (4) (Chatterjea and Newbould, JJ.).

It is therefore necessary to examine the cases. The first case to be referred to is *Ranjit Singh Bahadur v. Kali Dasi Debi* (2), a decision of the Privy Council, because the Respondent has attacked the decision in *Narpat Singh v. Bhupendra Narain Singh* (1) on the ground that the learned Judges have misconstrued it and that it does not support the view the learned Judges have taken. In that case the *putnidar* who was the Plaintiff sued the Zemindar for recovery of possession of certain resumed Choukidari Chakran lands which had been transferred to the Zemindar, the Defendant, by Government.

The trial Court, the Subordinate Judge, decreed the Plaintiff's suit and stated that the condition on which the land should be held by the Plaintiff must form the subject of a separate suit. On appeal to the District Judge the decree of the trial Court was upheld. The Zemindar then appealed to this Court and this Court (Holmwood and D. Chatterjee, JJ.) affirmed the judgment of the lower Appellate Court except that they remand-

(1) 26 C. W. N. 943 (1922).

(2) L. R. 44 I. A. 117; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(3) I. L. R. 46 Cal. 173; s. c. 23 C. W. N. 198 (P. C.) (1918).

(1) 26 C. W. N. 943 (1922).

(2) L. R. 44 I. A. 117; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(4) 84 C. L. J. 275 (1920).

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ed the case to the lower Court to determine the conditions on which the lands were to be held by the *putnidar*.

The Zemindar appealed to the Privy Council who dismissed the appeal.

This case therefore did not decide that the *putnidar* was entitled to hold the lands without the payment of any additional rent. In fact as far as can be seen it was never suggested in that suit that the *putnidar* should not pay additional rent for these lands.

The order of remand to ascertain the terms on which the land should be held was not challenged.

The other case referred to, *Ranjit Singh Bahadur v. Maharaj Bahadur Singh* (3), does not appear to touch on this point.

The Respondent has referred us to a number of cases which it is now necessary to consider.

In the case of *Hari Narain Majumdar v. Mukund Lal Mundul* (5) the *putnidar* sued for the recovery of possession of certain resumed Choukidari Chakran land which had been transferred by the Government to the Zemindar.

In that case it was held that the *putnidar* was entitled to possession on paying to the Zemindar such rent for these lands as corresponded to the proportion between the gross collections and the *putni* rent formerly paid by him. The next case to be considered is that of *Kazi Newaz Khoda v. Ramjadu Dey* (6) (*Rampini and Mookerjee, JJ.*). In this case also the *putnidar* sued to recover possession of certain Choukidari Chakran lands resumed by Government and transferred to the Zemindar.

(3) I. L. R. 46 Cal. 173 : s. c. 23 C. W. N. 198 (P. C.) (1918).

(5) 4 C. W. N. 814 (1900).

(6) I. L. R. 34 Cal. 109 : s. c. 11 C. W. N. 201 (1906).

It was held that he was entitled to recover possession on condition that he paid the Government revenue assessed on them.

The next case that requires consideration is the case of *Maharaja Bejoy Chand v. Krishna Chandra* (4) (*Chatterjea and Newbould, JJ.*). In this case the learned Judges reviewed all the previous cases including the cases to which I have already referred. The learned Judge held that the decision of the question must ultimately depend upon the mode in which the rent was assessed at the inception of the *putni*. If at the time of such assessment the profits of all the lands including Chakran land were taken fully into account, the Zemindar would have clearly no right to claim any rent in addition to the *putni* rent. Mookerjee, J., in a later case held that if there is no indication in the contract between the parties that at the time of the inception of the grant, the *putni* rent was assessed on the basis of the assets of all the lands situated within the ambit of the *putni* inclusive of the Choukidari Chakran lands, the *putnidar* should be made liable to pay some additional rent to the Zemindar on account of these lands [*Mehli Hussein v. Umes Chandra Mookerji* (7)]. In view therefore of the long series of cases which support the view taken by Chatterjea and Newbould, JJ., in this case, we are not pressed by the decision in the case of *Narpat Sing v. Bhupendra Narain Singh* (1) and it therefore remains to be determined whether at the time of the inception of the lease we are now considering, there is any indication that the

(1) 26 C. W. N. 943 (1922).

(4) 34 C. L. J. 275 (1920).

(7) I. L. R. 45 Cal. 685 (1917).

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profit from these Choukidari Chakran lands was included in the assets on which the rent was assessed. There is nothing as far as can be seen in the *kabuliyat* to show that they were. I am therefore of opinion that the Zemindar is entitled to have rent assessed upon these lands.

The next contention put forward by the Appellant is that she has been dispossessed of some of the lands and so she is entitled to a suspension of rent for the whole of the lands. There is no substance in this contention. She has not been dispossessed of any of these lands because she has admittedly never been in possession of the land that she now claims to have been dispossessed from, neither is there any evidence or allegation that she asked the Zemindar to put her in possession.

She then contends that so far as the land covered by the grant of the 16th October 1901 is concerned the claim of the Zemindar is barred by limitation.

There is no substance in this contention, as pointed out in the case of *Ranjit Singh Bahadur v. Kali Dasi Debi* (2), that these Choukidari Chakran lands must be held to form part of the lands granted by the *putni* lease.

At the time of the grants the Zemindar had some interest in the land which he could transfer to the *putnidar*. Therefore from the inception of the *putni* tenancy the *putnidar* was the tenant of these lands and the resumption by Government and transfer to the Zemindar created no new jural relation between the parties. The fact that the *putnidar* has not paid rent for more than 12 years would not give him a right by adverse possession to hold the land without paying rent. He did not to the knowledge of the

landlord assert any right to hold the lands without payment of rent for more than 12 years. The cross-appeal by the Respondent has not been argued and is dismissed.

The result is that the appeal is dismissed with costs.

SUHRAWARDY, J.—I concur in the judgment delivered by my learned brother but I think it due to the respect to which the decision in *Narpat Singh v. Bhupendra Narain Singh* (1) is entitled that I should add a few words in defence of the view I have adopted. It is conceded by Sir Provas Mitter for the Appellant that the Judicial Committee do not in the case of *Ranjit Singh Bahadur v. Kali Dasi Debi* (2) decide the precise question raised in this case—the question of the liability or otherwise of the *putnidar* to pay additional rent to the Zemindar for the Chakran lands. But reading that decision closely it appears that their Lordships approved the decisions of this Court which had held that the *putnidars* were entitled under the terms of the lease to resume Chakran lands released to the Zemindar but were liable for additional rent for such lands. At p. 119 of the 44th Volume of the India Appeals Reports it is said that the counsel for the Appellant Zemindar conceded that the decisions in India beginning with *Hari Narain v. Mukund Lal* (5) were against him as holding that the *putnidar* is entitled to possession of such lands, with the exception of the case of *Kashim Sheik v. Prosanna Kumar* (8), which by the way is not directly in point, were against him. It is in approval of these

(1) 26 C. W. N. 943 (1922).

(2) L. R. 44 I. A. 117; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(5) 4 C. W. N. 814 (1900).

(8) I. L. R. 33 Cal. 596; s. c. 10 C. W. N. 595 (1906).

(2) L. R. 44 I. A. 117; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

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decisions that their Lordships conclude this judgment with the following observation—"It is a satisfaction to their Lordships to find that the view above expressed is that hitherto almost universally adopted in Indian Courts."

There is another way of ascertaining what their Lordships really decided in *Ranjit Singh v. Kali Dasi* (2). It was an appeal from a judgment of this Court reported under the same title [*Ranjit Singh v. Kali Dasi* (9)]. In that case the learned Judges of this Court held that the *putnidar* or the *dar-putnidar* is entitled to the Choukidari Chakran lands and remanded the case for consideration of the conditions on which the transfer from the Zemindar to the *putnidar* should be made on the principles laid down in *Hari Narain v. Mukund Lal* (5). The Judicial Committee by dismissing the appeal practically approved the course adopted by this Court. The decision of the Judicial Committee far from supporting the views taken in *Narpat Singh's* case (1), is an authority for the proposition that the *putnidar* is entitled to hold the lands but on terms, viz., on payment of fair and equitable rent. The Appellant, however, argues that under sec. 51 of Act VI of 1870, B. C., the *putnidar* is entitled to hold the lands rent-free or without paying additional rent for them. Sec. 51 does not go so far and its scope is, as held by the Judicial Committee, to sustain the contract between the Zemindar and the *putnidar* under which the *putnidar* is entitled to possession of the lands as part of his tenure.

In view of the opinion we have expressed which is in conflict with that taken in *Narpat Singh's* case (1) we are asked to refer the question raised in this case to a Full Bench. I do not think such a course is necessary as we have chosen to follow a chain of earlier decisions of this Court ending with *Gopendra Chandra v. Taraprasanna* (10) and *Maharaja Bijoy Chand v. Krishna Chandra* (4). As I think the decision of the Judicial Committee in *Ranjit Singh's* case (2) was not correctly placed before their Lordships who decided *Narpat Singh's* case (1), I respectfully decline to follow it.

I agree that the appeal should be dismissed with costs.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

NO. 850 OF 1921.

SUHRAWARDY, J.
CHOTZNER, J.
1924,
6, March.

CHATTRA NATH CHOW-
DHURY and ors.,
Defendants, Appellants,
v.
BABAR ALI and ors.,
Plaintiffs, Respondents.

Rent-free title, presumption of—Long possession without payment of rent—Batwara papers, evidentiary value of—Presumption under sec. 103B, Bengal Tenancy Act (VIII of 1885), rebuttal of.

Where a tenant sued for a declaration that no rent was payable in respect of his tenure which was entered as rent-paying in the record-of-rights to which he was no party, and it was found by the Courts below that for more than 60 years no rent was paid and the landlord failed to prove that he ever realised rent, and that in partition proceedings between the De-

(1) 26 C. W. N. 943 (1922).

(2) L. R. 44 I. A. 117: s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(5) 4 C. W. N. 814 (1900).

(9) I. L. R. 37 Cal. 57 (1909).

(1) 26 C. W. N. 943 (1922).

(2) L. R. 44 I. A. 117: s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(4) 34 C. L. J. 275 (1920).

(10) I. L. R. 37 Cal. 598 (1910).

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pendant landlord and his co-sharers under the Estates Partition Act, the lands in suit were described as rent-free:

Held—That upon the facts found the tenant had proved a rent-free tenure.

Long possession without payment of rent may in certain circumstances justify the inference of rent-free title. An open and adverse assertion by a tenant that the land which he has held is rent-free may, after the lapse of the period of limitation, create a presumption that the tenure has been held without payment of rent as against the landlord. The tenant may by assertion of adverse title acquire a limited interest in the land which he holds.

JAGDEO NARAIN SINGH & BALDEO SINGH (1) and BIPRADAS PAL CHOWDHURY v. MONORAMA DEBI (2) referred to.

JAFER AHMED v. BIRENDRA KISHORE MANIKYA (3) distinguished.

Entries in batwara papers prepared under the Estates Partition Act are valuable pieces of evidence.

This was an appeal against a decree of the Subordinate Judge of Zillah Dinajpur (Babu Surendra Krishna Ghosh), dated the 9th October 1920, affirming a decree of the Munsif at that place (Babu Jagadish Chandra Sen), dated the 10th May 1919.

The facts of the case material to this report are as follows:—

Plaintiffs brought the suit out of which this appeal has arisen for establishment of their *nishkar* right in the lands in suit, and for a declaration that the said lands were not liable to be sold in execution of rent decrees obtained by the Defendants

landlords against one of the tenants, and for confirmation of possession. Plaintiffs' case was that they were purchasers of the *nishkar* right in the lands from Mahammad Hossain (3rd sharer) and Sherajuddin, Momin and Reajuddin (each of 1/9th share, Momin's share was not purchased), and from Mohammad Ali, Mobarak Ali and Teyazuddin each holding 1/9th share. Plaintiffs therefore claimed 8/9th share of the *nishkar* leaving Momin's 1/9th share. The area of the entire *nishkar* lands was alleged to be 52 and odd bighas. Plaintiffs claimed to have purchased the aforesaid shares of the *nishkar* lands by *kobalas* in the years 1303 and 1305 B. S. The disputed lands were entered as *nishkar* in the *batwara* papers prepared in the years 1896 to 1898 under the provisions of Estates Partition Act and in the said *batwara* the disputed lands were given in the shares of the landlords, Defendants Nos. 1 and 2. Record-of-rights, they alleged, was prepared under Chap. X of the Bengal Tenancy Act in the year 1905-1906, wherein the landlords, Defendants Nos. 1 and 2, fraudulently caused the disputed lands to be entered in the names of the other tenants Defendants, as being liable to assessment of rent, without service of any notice upon the Plaintiffs; that the record-of-rights was finally published behind the back of the Plaintiffs on the 18th March 1905, and a sum of Rs. 15 was fixed as rent of the disputed lands under sec. 105 of the Bengal Tenancy Act on the 18th March 1906. The only persons impleaded in the record-of-rights were Momin Ali, Mahammad Hossain and Mobarak Ali. In the sec. 105 proceeding Momin Ali and the heirs of Mahammad Hossain and Mobarak Ali were alone impleaded. Plaintiffs appeared in the said proceed-

(1) L.R. 49 I. A. 399; s. c. 27 C. W. N. 925; 36 C. L. J. 499 (1922).

(2) 22 C. W. N. 396 (1917).

(3) 22 C. L. J. 126 (1913).

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ing and sought to defend the *nishkar* character of the lands, but they were not allowed to press the point. Their prayer for treating their petition as a plaint under sec. 106, Bengal Tenancy Act, was also disallowed.

The landlords, Defendants Nos. 1 and 2, sued for recovery of rent for the years 1313-1315 B.S. against Momin Ali claiming *jama* at the rate of Rs. 15 in Suit No. 463 of 1909 and obtained a decree on 13th September 1909, and again obtained another decree against him on the 30th January 1914 in Suit No. 140 of 1913 for the years 1316-1319 B. S. In execution of the latter decree the landlords claimed to have purchased the disputed lands in auction sale on 4th May 1914. Plaintiffs therefore brought this suit for a declaration of their *nishkar* right and for the reliefs stated above.

The landlords, Defendants Nos. 1 and 2, contested the suit, and their defence, *inter alia*, was that the Plaintiffs had no *nishkar* right in the disputed lands.

The Court of first instance decreed the suit. Plaintiffs' *nishkar* right in the suit lands was declared, and Plaintiffs' possession in the same was confirmed, and it was further declared that the suit lands were not liable to be sold in execution of the rent decrees mentioned above.

The following portions of the Munsif's judgment will be found material:—

“ Plaintiffs and their predecessors have been in possession of the land in suit without payment of rent for more than 40 years. The long and uninterrupted possession for such a length of time without payment of rent raises the presumption in favour of the Plaintiffs that the lands are really rent-free.

In the case of *Jaffer Ahmed v. Maharaja Birendra Kishore Manikya Bahadur*

(3), it has been held that long possession without payment of rent may justify an inference of rent-free title.

The same principle was enunciated in the Letters Patent Appeals Nos. 68 to 70 of 1914, *Bipradas Pal Choudhury v. Monorama Debi* (2), where it is held that long possession without payment of rent raises a presumption of *lakhiraj* right. The pleader for the Defendants argued that in these cases possession without payment of rent for more than 50 years was established, whereas in the present case there is no evidence of possession for such a length of time, hence the principle laid down in this case is not applicable to the fact of the present case. I am unable to agree with the contention of the pleader. The evidence adduced in this case by the Plaintiffs goes to show that the disputed lands were held rent-free for more than 40 years. The *batwara* proceedings were initiated 22 years ago, the lands were found rent-free at that time, there is recital in Plaintiffs' '*kobala*' that Panjaton Mea, who was not seen by a person whose age is 42 years, possessed the lands, without payment of rent. The lands were in possession of Plaintiffs' vendors and their predecessors for more than 40 years. No sort of rebutting evidence was adduced by Defendants to show that Defendants even realised rent for the disputed lands. The principle enunciated in these reported cases supports Plaintiffs' case that Plaintiffs and their predecessors held the lands under rent-free title. After Plaintiffs succeeded in establishing that the lands are held rent-free from a long time extending for more than 40 years, burden of proof is shifted upon the Defendants to prove that the lands are

(2) 22 C. W. N. 396 (1917).

(3) 22 C. L. J. 126 (1913).

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mal lands and liable to assessment of rent, but Defendants entirely failed to discharge the burden. No sort of evidence was adduced in this case by the Defendants. Defendants simply rely upon the record-of-rights prepared in the year 1905, the correctness of the entries in the record-of-rights is disputed by the Plaintiffs.

* * * * *

The Revenue Officer, although he took the entries in the *batwara* papers to be correct, added a new entry below rent-free, that the lands are liable to assessment. Nothing has been shown by the Defendants under what circumstances this alteration was made by the Revenue Officer. The entry was not disputed by any party. If any new evidence was adduced by Defendants before the Revenue Officer, the evidence should have been brought here. The entry that the lands are liable to assessment was made behind the back of the Plaintiffs. . . .

The presumption of the correctness of the entry under sec. 103, Bengal Tenancy Act has been rebutted by Plaintiffs' evidence in this case. The entry in the record-of-rights that the lands are liable to be assessed with rent has been shown to be incorrect. The subsequent proceedings under sec. 105, Bengal Tenancy Act, were based upon the incorrect entry, hence the assessment of rent at the rate of Rs. 15 per month is not binding upon the Plaintiffs. Plaintiffs are not liable to pay any rent for the disputed lands.

After a full consideration of the evidence adduced in this case by the parties and the circumstances of the case, I am inclined to hold that Plaintiffs have got *nishkar* right in the disputed lands. I decide this issue in Plaintiffs' favour."

On appeal by the Defendants Nos. 1 and 2, the Subordinate Judge of Dinajpur

affirmed the decision of the Munsif and dismissed the appeal.

The following portions of the judgment of the lower Appellate Court will be found material :—

"The present suit was instituted on the 4th of August 1914 after the auction-sale of the *jote* in the rent decree against Momin Ali, that in the partition that took place between the proprietors landlords in the year 1896 to 1897 the lands in suit fell to the share of the Defendants Nos. 1 and 2 and their co-sharers treated these lands as *nishkar*. The question for determination is whether the Plaintiffs have got their *nishkar* status in the lands?

The defence disputed their *nishkar* status; the Plaintiffs sought to support their *nishkar* status by reference to the entry in the *batwara* papers prepared under the Estates Partition Act which admittedly shows the status of the holders as *bromothar*; the *batwara* papers as prepared from the rent rolls supplied by all the co-sharers indicated that there did exist the *nishkar jote* at the time of the *batwara*, that the same existed also prior to the *batwara* is also indicated by the recitals in the ancient documents filed by the Plaintiffs—the *batwara khatian* proved that the lands were rent-free in the proceedings between the years 1876 to 1898 for a period of 20 years or thereabout.

Entries in *batwara* papers as to the amount of rent payable by tenant are evidence in the same way as entries in the record-of-rights, *Janki Dobey v. Kirtarath Roy* (4). The *kobalas* under which the Plaintiffs purchased date from 1303 to 1305 and 1306 from certain co-sharers. The lands in possession of the *pro forma* Defendants co-sharers in the

(4) 13 C. W. N. 93 (1908).

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nishkar who did not sell their share have been separated and described in separate schedules.

The settlement entry did not decide the rights between the Plaintiffs and the Defendants landlords. An entry was made in the absence of the Plaintiffs under sec. 105 showing that the lands were liable to payment of rent. When the *lakhraj*dars went to put in appearance in the proceedings they were shut out from appearing in the proceedings.

It does not appear if the landlords supplied any additional data negating the right of assessment against the Plaintiffs. There is no question that the tenure in question has been all along treated as transferable tenure and the landlords made no attempt to oust the Plaintiffs. The document filed by the Plaintiffs showed that the *lakhraj* or rent-free tenure has been sold many times before the Plaintiffs acquired it by purchase, that the tenure in question was enjoyed rent-free for more than forty years before Plaintiffs' purchase appears to be proved beyond the shadow of a doubt, the *batwara* proceedings cover a period of 20 years showing enjoyment of rent-free status by the predecessors-in-interest of the Plaintiffs. The Defendants landlords sought to suggest that the Plaintiffs themselves paid rent but the petition in question was denied by the Plaintiffs and the landlords Defendants made no allegation in the defence that they ever recovered rent from the Plaintiffs. The total absence of any such evidence on the part of the landlord is consistent with the petition being of very questionable evidentiary value.

In my opinion the evidence adduced in the case tends to indicate enjoyment of the Plaintiffs as *lakhraj* inspite of the entry in their absence in the settlement

record showing the lands as liable to assessment.

The evidentiary value of the presumption from the settlement entry in the facts and circumstances of this case is altogether insufficient to rebut the inference or presumption of *lakhraj* right (rent-free status) of the Defendants in the tenure in question.

Long possession without payment of rent in open defiance of the landlord's claim for rent is very strong presumptive evidence of rent-free title, *Jafer Ahmed v. Birendra Kishore Manikya* (3) and *Bipradas Pal Choudhury v. Monorama Debi* (2). In these circumstances I am unable to find that the presumption regarding assessable character of the tenure should prevail against the Plaintiffs who were not parties to the same and whom the proceedings simply ignored and shut out when they sought to challenge the entry.

In the view I take the settlement entry regarding the assessable character of the lands does not indicate that the Plaintiffs are liable to assessment, rather the facts proved in this case show overt and open user by the Plaintiffs inspite of the aforesaid entry. In my opinion the presumption of the correctness of the entry under sec. 103, Bengal Tenancy Act, has been sufficiently rebutted by Plaintiffs' evidence of user by themselves and their predecessors. The subsequent proceedings for assessment being based on an incorrect entry, the assessment is not binding on the Plaintiffs.

In the view I take I agree with the learned trial Court in its conclusion and dismiss the appeal with costs."

Against the aforesaid decision of the Subordinate Judge the landlords, Defen-

(2) 22 C. W. N. 396 (1917).

(3) 22 C. L. J. 126 (1913).

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dants Nos. 1 and 2, preferred this second appeal.

Babu D. N. Bagchi for the Appellants.

Rai Surendra Chandra Sen Bahadur (with *Babu Hemendra Chandra Sen*) for the Respondents.

Babu Biraj Mohan Majumdar for the minor Respondents.

The JUDGMENT OF THE COURT was as follows :—

The suit out of which this appeal has arisen was brought by the Plaintiffs-Respondents for declaration that no rent is payable in respect of the holding in their possession. During the settlement proceedings in the District the Respondents were not made parties and the tenure was recorded as rent-paying, the rent being fixed at Rs. 15. They then applied under sec. 105, Bengal Tenancy Act, to have the entry corrected, but they were not allowed to proceed with their application as they were not parties to the settlement proceeding—they being purchasers from some of the recorded tenants. Thereupon they brought the present suit for establishment of their *nishkar* right in the disputed land and also for declaration that the disputed lands are not liable to be sold in execution of rent decrees obtained by the landlords Appellants against one of the tenants. Both the Courts have found in favour of the tenants. The appeal is by the landlords.

Three points have been raised in this appeal. It is argued in the first place that the burden of proof ought to have been placed upon the Plaintiffs inasmuch as the alleged *lakhraj* tenure is situated within the ambit of the Defendants' zemindary; and reliance has been placed for this proposition upon the case of *Jagdeo Narain Singh v. Baldeo Singh*

(1). The second contention of the learned vakil is that the Courts below have erred in receiving in evidence certain *batwara* papers. It is also argued that the Courts below have not given proper weight to the presumption arising in favour of the correctness of the record-of-rights under sec. 103B of Bengal Tenancy Act. Lastly it is urged that the Court of Appeal below has relied upon certain ancient documents which were found by the first Court to be not genuine which finding has not been displaced by the Court of Appeal below.

This last-mentioned point may be disposed of summarily by observing that the lower Appellate Court has not placed any reliance upon these ancient documents in coming to a decision on the merits of the case, but has only mentioned the existence of these documents in narrating the Plaintiffs' story of their claim. Before proceeding to consider the various points raised, it is profitable to refer to the findings of fact arrived at by the Courts below. They have found that the Defendants have failed to prove that they ever realised rent for this tenure, that there is evidence that at least for more than 60 years no rent has been paid in respect of this tenure, that in the year 1896-1897 there were partition proceedings between the landlords including the Appellants under the Estates Partition Act and in the *batwara* papers of these proceedings the lands are described as rent-free. On these facts the Courts below have come to the conclusion that the Plaintiffs have succeeded in proving that the tenure is rent-free. There is one other finding reached by the lower Appellate Court which goes to the very root of the matter. It

(1) L. R. 49 I. A. 399 : s. c. 27 C. W. N. 925 ; 86 C. L. J. 499 (1922).

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holds that long possession without payment of rent in open defiance of the landlord's claim for rent is a very strong piece of presumptive evidence of rent-free title; and support for this view has been derived from the cases of *Bipradas Pal Choudhury v. Monorama Debi* (2) and *Jafer Ahmed v. Birendra Kishore Manikya* (3) which are authorities for the proposition that long possession without payment of rent may in certain circumstances justify the inference of rent-free title. An open and adverse assertion by a tenant that the land which he has held is rent-free may, after the lapse of the period of limitation, create a presumption that the tenure has been held without payment of rent even as against the landlord. The tenant may by assertion of adverse title acquire a limited interest in the land which he holds. In the present case all the elements requisite for the conclusion that the tenants are holding this land rent-free for a long time are present and cannot now be questioned; and we cannot say as a matter of law that the Courts below have erred in drawing an inference from these facts. No doubt, as has been laid down by the Judicial Committee in the case above cited, where lands are within the zemindary of the landlord, it was for the tenant to prove the source of the acquisition of his right. But in that case the facts were totally different from those in the present case. In that case the land had been held in *ticca* from a very long time and the fact that the tenant never paid rent to the *ticcadar* was held not to affect the zemindar's right. There is one piece of evidence which is exceedingly damaging to the Defendants' case. There were proceedings in 1896

under the Estates Partition Act between the landlords to which the tenants were not parties. It appears that in those proceedings it was conceded by all the landlords that the lands in suit were held rent-free by the tenants; and we have no doubt that in adjusting the assets of the different co-sharers at the time of the partition these lands were treated as rent-free and in the division of the estate they were allotted to the Appellants. Besides, it being admitted by the Appellants that the lands were at that distant date considered to be rent-free, it would not be right now to allow the Appellants, after the assets of their share had been ascertained on the basis that these lands were rent-free, to recover rent in respect of these lands and thereby to put them in a more advantageous position than their other co-sharers. We fail to see why the *batwara* papers should not be used as evidence in the case. In our opinion, they are very valuable pieces of evidence.

Then with regard to the presumption as to the correctness of the record-of-rights, the learned Judge gives his opinion, on this question in these words: "In these circumstances I am unable to find that the presumption regarding the assessable character of the tenure should prevail against the Plaintiffs who were not parties to the same and to have the proceedings simply ignored and shut out when they sought to challenge the entry." In another passage the learned Judge observes as follows: "In my opinion the presumption of the correctness of the entry under sec. 103, Bengal Tenancy Act, has been sufficiently rebutted by Plaintiffs' evidence of user by themselves and their predecessors." These findings upon the evidence conclude this question. We think that the findings arrived at by

(2) 22 C. W. N. 396 (1917).

(3) 22 C. L. J. 126 (1913).

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the Courts below are based upon evidence and no error in law has been committed in arriving at those findings.

The appeal is accordingly dismissed with costs.

H. C. S. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1362 OF 1924.

GREAVES, J.	{	• SURENDRA NATH
CHAKRAVARTI, J.		TAGORE, Petitioner,
1924,		v.
5, December.		K. S. BONNERJEE and ors., Opposite Party.

Land Acquisition Act (I of 1894), secs. 18, 21, 30 — A claimant, if and when has locus standi at the hearing of reference under sec 18, though himself not an applicant for such reference— Civil Procedure Code (Act V of 1908), sec 115, revision under.

Upon a reference under sec. 18 of the Land Acquisition Act made at the instance of some claimants, another person who was one of the claimants before the Collector and the nature of whose claim was set out in the reference is a person who is entitled to be present at the hearing of the reference.

Semle :—Mention of his claim in the Collector's reference under sec. 18, amounted to a reference under sec. 30.

This was a Rule granted on the 25th November 1924 against the orders of the President of the Calcutta Improvement Tribunal (Mr. S. C. Banerji), dated the 30th August and 26th September 1924.

The Petitioner was mortgagee of a piece of land in Upper Circular Road acquired under the provisions of the Land Acquisition Act (I of 1894). During the pendency of the proceedings for acquisition he put in a claim on 19th September 1922 in respect of the money awarded when he was informed that an award had already been made on 31st August 1922. No notice of the proceedings

having been served on him under sec. 9, sub-sec. (3), sec. 10 or sec. 12 (a), the Petitioner could not appear on 31st August 1922. The Collector then on the application of the claimants other than the mortgagee claimant, made a reference to the Calcutta Improvement Tribunal under sec. 18 of the Land Acquisition Act. In his said reference under sec. 18, the Collector mentioned the Petitioner (mortgagee) to be a person interested in the land as a claimant and entitled as such to the compensation money, as also the nature of his claim. The Petitioner was then served with a notice under sec. 20 and he then put in a written statement of his claim on 8th August 1924.

Then on 30th August 1924, the date fixed for hearing the reference under sec. 18, the President of the Calcutta Improvement Tribunal made an order that the Petitioner's (mortgagee's) claim could not be entertained before him because no award was made in his favour, he did not apply for or obtain any reference under Part III and because there was no reference under sec. 30.

Mr. Gunada Charan Sen and Babu Prasanta Bhusan Gupta for the Petitioner.

Babu Kusi Prasun Chatterji for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

This Rule is directed against two orders of the President of the Calcutta Improvement Trust Tribunal, dated the 30th August and the 26th September 1924. The matter arose in this way. Land acquisition proceedings with regard to certain lands in Upper Circular Road were pending before the Land Acquisition Collector. The Petitioner was the mortgagee in respect of three pro-

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perties with only one of which we are concerned for the purposes of this application, it being No. 123-2, Upper Circular Road. The Petitioner put in a claim in respect of the money awarded on the 19th September 1922. After he had put in this claim he was informed that an award had been made in respect of one of the properties, namely, No. 123-2, Upper Circular Road, on the 31st August 1922. The Petitioner states that he did not appear before the Land Acquisition Collector, as he had had no notice served on him of the proceedings. On the 28th November 1922, the Collector made a reference under the provisions of sec. 18 of the Land Acquisition Act to the Improvement Trust Tribunal. In that a reference was made by the Collector to the claim of the Petitioner who was the mortgagee of the shares of one of the beneficiaries in the estate of the late Raja Radha Kanta Deb. The Improvement Trust Tribunal served notice on the Petitioner under the provisions of sec. 20 of the Land Acquisition Act, calling on him to submit statements of his claim. The notice was served on the 14th January of this year and a written statement was put in by the Petitioner on the 8th August last. No objection was taken by any of the parties to this. The 30th August 1924 was fixed by the Tribunal for the hearing of the reference made by the Collector under sec. 18, which was made at the instance of some of the lessees of the estate. On the 30th August 1924 the President of the Tribunal made an order which is objected to. He said that as regards the Petitioner, his claim could not be entertained on the reference as no award had been made in his favour and he did not apply for or obtain any reference under Part III of the Act and

that the Collector had not made any reference under the provisions of sec. 30 of the Land Acquisition Act. So I have already stated, it is this order of the 30th August 1924, to which I have just referred which is complained of before us. The other order of the 26th November 1924 is merely an order by the President of the Tribunal refusing to review his order of the 30th August. Now it seems to us that the order of the 30th August 1924 is wrong. Sec. 18 provides that any person interested who did not accept the award may, by a written application to the Collector, require the matter to be referred for determination of the Court, whether the objection be to the measurement of the compensation and to the persons to whom it is payable or to the apportionment of the compensation among the persons interested. Now it is sought to support the order of the President by a reference to the provisions of sec. 21 which states that the scope of an enquiry on proceedings arising under a reference such as the one to which I have referred shall be restricted to the consideration of the interest of the persons affected by the objection, and it is said that the order of the President is correct, because the Petitioner is not a person affected by the objection which is made by the lessee with regard to the apportionment. But we think, having regard to the fact that in the reference of the 20th November 1922, a reference was made to the Petitioner as one of the claimants, the nature of his claim being set out, he was clearly entitled to appear before the Tribunal for the purposes of the reference under sec. 18, and in so far as the President states that the Collector has made no reference with regard to the claim of the Petitioner under sec. 30, it seems to us that the re-

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ference to the Petitioner's claim in the reference of the 20th November 1922 really amounts to a reference under sec. 30. Even if this is not so, we think that under the circumstances of the case, namely, in view of the reference to the Petitioner's claim made by the Collector, he is clearly a person who is entitled to be present at the hearing of the reference under sec. 18 of the Land Acquisition Act. It appears moreover that there is no dispute with regard to the Petitioner's mortgage and he is, we think, clearly entitled to appear before the Tribunal and to make such representation as he may desire to make with regard to the apportionment of the compensation to the beneficiaries through whom he claims and the allocation to him of a portion of that share in satisfaction of his mortgage.

In the result, we make the Rule absolute for the reasons I have stated above. We make no order as to costs.

H. D. C.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SHAW.

LORD BLANESBURGH.

MR. AMER ALI.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

1924,

Heard, 18 and

19, February.

Judgment,

18, March.

SETH HUKUM
CHAND and ors.,
Appellants,
v.

RAJA RAN BAHADUR SINGH
and anr.,
Respondents.

Chota-Nagpur Encumbered Estates Act (VI of 1876), secs 2, 3, 10, 12, 13 to 18, 19, 21—Manager, position and powers of, with reference to estate—Whether he is servant or agent of Government—Agreement for lease with Government to which Manager no party, if specifically enforceable Execution of formal contract when condition precedent to enforceability of contract.

The Manager appointed under the Chota Nagpur Encumbered Estates Act is alone fully and completely vested in the management of the estate and the vesting in him continues during the tenure of his office. The owner being expressly disabled from making any effective contract with regard to the property, no other officer, whether political or departmental, could occupy the place or enjoy or exercise the rights of the disposal of the estate, the management whereof is vested in the Manager and the Manager alone. The Manager is neither the servant nor the agent of another, be that other either a private intervener or a public or political or departmental officer. The Manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act.

Where negotiations carried on between certain persons and the officials of the Government to which the Manager for the time being was no party terminated in a letter written by the Lieutenant Governor stating that the Government would accept a proposal to grant a lease, provided that an agreement embodying the terms was prepared and executed by the proper officer representing the Court of Wards; but no such agreement was in fact prepared or executed:

Held—That the execution of the agreement by the Manager was under the terms of the letter a condition precedent to the formation of a binding contract, and it was more than a condition precedent, since there was no agreement at all to which the person in titulo domini, namely, the Manager, was a party such as could be specifically enforced.

VON HATZFELDT WILDENBURG v. ALEXANDER (1) referred to.

(1) [1912] 1 Ch. 284.

SETH HUKUM CHAND v. RAJA RAN BAHADUR SINGH.

This was an appeal from a decree, dated the 4th June 1919, of the High Court at Patna, affirming a decree, dated the 24th July 1917, of the Subordinate Judge of Hazaribagh.

The Plaintiffs (Appellants), as the nominated representatives of the Digambari sect of Jains, sued the Raja of Palgunj and the Manager of his estate appointed under the Chota Nagpur Encumbered Estates Act No. VI of 1876 for specific performance of a contract for the permanent lease of the Paresh Nath Hills and for other relief. The second Respondent, who alone contested the present appeal, represents the Sitambari Jains, and purchased the right, title and interest of the Palgunj estate in Paresh Nath Hills in 1918. Negotiations for the lease were entered into between the Plaintiffs, as representatives of the Digambari community, and the Government who at the time were contemplating the erection of a sanatorium on the Hills for Europeans.

The terms on which the lease should be granted were embodied in a letter addressed to the solicitor to the Government of India, dated the 30th November 1908, and a premium of Rs. 50,000 was paid.

The Plaintiffs prayed for specific performance of the above terms of agreement.

The Defendants contended that there was no concluded agreement and that none of the persons conducting the negotiations had any authority to enter into a binding contract. The Subordinate Judge held that an agreement had been concluded but that the Manager of the Palgunj estate who alone was authorised to make the agreement had not made or authorised it and that the agreement was void by reason of the provisions of sec. 17 of the Chota Nagpur Encumbered Estates Act VI of 1876. The High Court

affirmed the decision of the Subordinate Judge, holding further that the agreement sought to be enforced by the Plaintiffs was merely executory.

The facts are more fully set out in the judgment of the Judicial Committee.

Messrs. Dunne, K. C. and Kenworthy Brown for the Appellants.

Mr. DeGruyther, K. C., Sir G. Lowndes, K. C. and Mr. Dabé for the Respondent No. 2.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 4th June 1919, which affirmed a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated the 24th July 1917.

The prayers contained in the suit are numerous, but the outstanding and substantial questions which were argued before the Board were two in number. The first was for a declaration that an agreement dated the 30th November 1908, "is binding upon the Defendant." The second is for specific performance of this agreement, and that possession be made over with the demised property to the Plaintiffs and the sum of Rs. 50,000 as, and by way of, compensation of damages paid to the Plaintiffs. Shortly stated, the suit is one for specific performance of an agreement prefaced by a declaration that that agreement is binding.

The question of who are the parties to the suit raises an important question in the case. The Defendant is thus named:—

"Raja Ran Bahadur Singh, son of Raja Paresh Nath Singh, deceased, holder of the Palgunj Estate in Hazaribagh, by his re-

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presentative and guardian for this suit Babu Krishna Chandra Ghosh, Manager of the said Palgunj Estate appointed under the Chota Nagpur Encumbered Estates Act (VI of 1876) and residing at Hazaribagh aforesaid."

Raja Ran Bahadur Singh was part owner of the sacred range of hills after-mentioned. But at all the material dates the management of his estate was under the Chota Nagpur Encumbered Estates Act, 1876, and an order pursuant thereto pronounced on the 13th December 1902, and duly published on the 28th January 1903, vested in the Manager, Babu Krishna Chandra Ghosh. It was thereafter, and at the time of the lodging of the defence, vested in another Manager, Babu Janki Nath Gupta, who had been appointed Manager with effect from the 25th May 1914, by order dated the 3rd and published on the 5th July 1914.

This second Manager, as such, sold the right, title and interest of Ran Bahadur Singh and the Palgunj estate,—in other words, sold the Paresh Nath Hills,—to the compearing Respondent, by sale deed dated the 9th March 1918. This was the result of a compromise arrived at and approved by the Court as in the interests of both the Raja Bahadur Singh and another Raja, the Raja of Nowagarh, between whom another suit was thus arranged in the months of the preceding January and February.

These details are only here referred to, to explain the appearance of the second Respondent. He represents the Sitambari community of Jains, and he, as representing such community, is purchaser of the hills as just mentioned. The present suit, however, the result of which if favourable to the Appellants, would upset the compromise and sale just enumerated, has reference to another and a prior

agreement alleged to have been concluded at an anterior date.

The alleged agreement, specific performance of which is asked in this suit, is said to have been made during the regime of the first Manager, Mr. Chandra Ghosh, and though not, of course, made with the Raja, was (so it is contended) such an agreement as would bind him and his encumbered estate.

The Raja Ran Bahadur Singh himself, although a nominal Respondent in the appeal, was not represented before the Board.

The agreement consists of a series of letters, the most important of which are dated 25th, 26th and 30th November 1908; the last of these bears to be an acceptance of certain modified terms of agreement as set forth in the letter of the 26th November. It bears to be for a permanent lease of the whole hill which "will be granted to the Digambar Jains subject to the terms and conditions and reservations hereinafter contained so that the hill may be protected from everything repugnant or opposed to the feelings or religious tenets of the Jains. A premium is to be paid of Rs. 50,000, and an annual sum of Rs. 12,000 by way of rent." Various other provisions were made with reference to timber, minerals, village rights, etc. The remarkable feature of the transaction is that it is not a transaction with the person vested in the management of the property, namely, the Manager, but is with the servants and officials of the Lieutenant-Governor of Bengal.

The facts have been stated in both the judgments of the Court below with much clearness and care. The following description of these sacred hills is taken from the judgment of the High Court:—

"The range of hills known as Paresh Nath

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Hill lies in the Hazaribagh District and runs roughly from East to West. It has a central range about a mile and a quarter long with outlying spurs, a part of which is Government property. The greater part of the hill, however, is claimed as part of the Palgunj Zamindari. For many years this hill has been an object of adoration by the Jains who hold an Ekrarnama from the father of the present Raja of Palgunj agreeing to grant them such lands on the hill as they may need for the purpose of building temples. Indeed at one time they went so far as to claim the hill as their own under Sanads granted by Akbar and Ahmad Shah. These, however, were found by the Calcutta High Court to have been spurious documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims resort there for worship and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard rightly or wrongly as an interference with their vested rights."

There were in the hills many interests, legal, customary and religious, which had to be considered. Some lease-holders had already vested interests therein. The Sontal tribes claimed a right of hunting wild animals over the whole range. The Zemindar of Nowagarh had a claim to the property of the southern slopes of the hill as part of his Zemindary. Certain rights had been granted by way of lease to a Mr. Boddam, under which the lessee had made tea-gardens and erected a piggery. As the taking of life was a violation of the religious feelings and beliefs of the Jains this establishment tended to be provocative of confusion and disorder.

In 1907, the Governor-General of India had approved of a scheme for opening a sanatorium and residential buildings for Europeans on the western spur of the

central slopes of the range. The crest of the central range is dotted over with small temples or tonks, which the Jains are allowed to enter and there to worship the "charans" or footprints of the saints in whose honour the tonks had been erected. Much had to be done by way of demarcation of boundaries as well as an adjustment of rights.

It was in these circumstances, after the Government approval of the erection of a sanatorium that the hill was visited by the Lieutenant-Governor of Bengal, Sir Andrew Fraser. Following upon his visit there took place the correspondence which has been referred to, the governing object of which no doubt was to have the hill taken in lease by the Jains from those in right of it by law. The principal of these was the Raja already mentioned, the Zemindar of Palgunj. His estate, as stated, was under a Manager appointed by virtue of the Chota Nagpur Encumbered Estates Act.

It is important now to consider what are the position, legal status and rights of such a Manager in law. Under sec. 2 of the Act VI of 1876, called "The Chota Nagpur Encumbered Estates Act, 1876," it is provided that when the holder of immoveable property is a minor or of unsound mind, or when his property has been attached in execution of a decree of a Civil Court, then, upon application, the Commissioner may, with the previous consent of the Lieutenant-Governor, "appoint an officer (hereinafter called the Manager) and vest in him the management of the whole or any portion of the property." Sec. 3 declares the effect of the order and is important. It provides in particular:—

"Thirdly, so long as such management continues:—

"(a) the holder of the said immoveable property and his heir shall be incompetent

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to mortgage, charge, lease or alienate their immoveable property or any part thereof or to grant valid receipts for the rents and profits arising or accruing therefrom.

* * * * *

(c) the holder of the same property and his heir shall be incapable of entering into any contract which may involve them, or either of them, in pecuniary liability.'

Elaborate provisions are made for the performance of the Managers' duties, including the recovery of all rents and profits, the disbursements therefrom and the settlement of duties. Under sec. 10 an appeal is granted to the Deputy Commissioner, within whose jurisdiction the property is situated, against refusals, admissions or determinations of claims by the Manager, failing which appeal the Manager's determination is final. Under sec. 12, if the debts and liabilities are paid and discharged, or an arrangement made for satisfaction accepted by the creditors and approved by the Commissioner, the holder or his heir are to be re-invested in the property, or such part thereof, as has not been sold by the Manager under the power contained in sec. 18, but subject to the leases and mortgages, if any, granted and made by the Manager under the powers herein-after contained.

Under secs. 13 to 18 the wide powers of the Manager are set forth. In particular under secs. 17 and 18 powers to demise the property for a term of years or in perpetuity, powers of mortgaging and selling by auction, etc., are all given to him.

Up to this point it is clear that the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas, on the other hand, the Manager is vested and alone vested with such powers. The latter is, in short, in the

eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

Under sec. 19, of which much was made by the Appellants, power was given to the Lieutenant-Governor of Bengal to regulate a variety of matters by making rules which have expressly to be rules "consistent with this Act."

Under sec. 20 it is provided:—

"Whenever the Commissioner thinks fit, he may appoint any officer to be a Manager in the stead of any Manager appointed under this Act; and thereupon the property then vested under this Act in the former Manager shall become vested in the new Manager. Every such new Manager shall have the same powers as if he had been originally appointed."

Sec. 21 may also be reckoned as relevant, namely:—

"Every Manager appointed under this Act shall be deemed a public servant within the meaning of the Indian Penal Code."

In the opinion of the Board it is necessary to give very full and careful effect to the position of a Manager vested under the Act in the management of the property of the nature already described. It is in their Lordships' opinion clear that the owner of such property is expressly disabled from making any effective contract with regard to it and it is equally clear that no other officer, whether political or departmental, could occupy the place, or enjoy or exercise the rights, of the disposal of the estate, the management of which estate is vested in the Manager and the Manager alone.

It may well be that as the Manager was in the list of public servants his conduct as such servant may have been open to comment by those in higher official rank, and it may also be that a successor to him might be appointed; but the

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moment such a successor was appointed the predecessor was divested and the successor invested with all the rights and title. Under the Encumbered Estates Act, the Manager for the time being stands responsible in law for fidelity in the discharge of the entire duties of management, disposal, realisation and restoration with regard to the estate under his care.

It is the further opinion of the Board that in the performance of such duties the Manager is neither the servant nor the agent of another, be that other either a private intervener or a public or political or departmental officer. The Manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act.

It may well be that political and social considerations may induce a certain course of policy with regard to portions of property under a Manager's charge and that communications may accordingly be addressed to him, in so far for instance as they bear upon the safety of the property, or the possible injury or advantage to the rights committed to the Manager's charge. But the Manager must, with all his local knowledge, consider these problems for himself, and with regard to the acquisition or disposal of the estate or a permanent lease thereof, it is clear that the responsibility lies upon him as the principal in the transaction.

It must not be supposed that such considerations were absent from the mind of the Lieutenant-Governor in the course which he was anxiously pursuing for the appeasement of any trouble in the district. The contrary is the case, and in the letter of the 26th November 1908, from the representatives of the Digambari

Jains, the following express proviso was accordingly made :—

"We hereby accept the terms modified as above provided that a short agreement embodying these terms be prepared and executed by (1) the Deputy Commissioner or such other officers, representing the Court of Wards as is authorised to assign such agreement, (2) the Raja of Palgunj, and (3) ourselves as representing the Digambari Jains."

On this, three points have to be noted :

(1) In the negotiations reference is made to officers representing the Court of Wards. That, of course, is a mistake in terms; but it is a recognition that the property is under management other than that of the owner and that a public official is in control of it.

(2) No agreement, embodying the terms, was ever prepared. Certain communications passed with solicitors, and a draft lease was attempted, but the negotiations with regard to that broke down.

(3) As to the provision that an agreement was to be prepared and executed by the three persons there named, none of them ever executed such an agreement, and in particular the Manager of the Encumbered Estate not only never did so, but he declined to give his assent to carrying out of any transaction upon the lines indicated.

In view of what has been already said as to the position and rights of the Manager under the Encumbered Estates Act, it will be manifest that the letters founded upon as an agreement in respect of which specific performance should be asked, did not constitute any agreement with the one person who, by law, could be a contracting party with regard to the estate under his charge, and, therefore, that upon that ground neither he nor anyone authorised by him, or entitled to act

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in his name, having entered into the alleged agreement, the ground of action for specific performance fails.

But their Lordships, out of respect for the High Court who have investigated the whole complex subject with much care, do not wish to indicate any dissent from the opinions of the learned Judges on the assumption that the above proviso would have been a condition precedent. They will assume for the moment that this alleged contract was entered into with a person entitled so to do. On that assumption they are of opinion, agreeing with that of the learned Judges, that the proviso did constitute quite clearly a condition precedent. To take the consent of the Manager and the adhibition of his authority by his signature to the transaction—to take that point alone, it seems beyond question that it was most natural and proper, and indeed necessary, that that agent should be personally satisfied, and after investigation, should personally approve of the merits of the transaction under which he was to dispose of a most important part of the real estate committed to his charge. It is further clear that in such circumstances it would be a misuse of language to describe his signing the contract and becoming bound as Manager and in that capacity dominus of the estate, as a mere provision of a formal character and of a purely executory nature. The Manager's consent, authority, and signature went to the root of the alleged bargain which had been come to. In a very full and strong sense the proviso cited was a condition precedent to the transaction.

The cases upon the subject are legion and one citation very properly noted in the judgment of Mullick, J., may be here repeated, namely, that made from the judgment of Lord Parker (as he after-

wards was) in the case of *Von Hatzfeldt Wildenburg v. Alexander* (1):—

"It appears to be well settled by the authorities," says that learned Judge, "that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain: or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Their Lordships revert to the question only again to note, however, that the proviso is, in their opinion, much more than a condition precedent.

This is a negotiation carried on by a civil officer who is not the owner of the ground and who is not acting either as master or principal of, the person who is the owner of the ground. Accordingly, specific performance of any contract so entered into is an impossibility in law because the owner of the ground and the person *in titulo domini*, namely, the Manager, is no party to the contract which is asked to be specifically enforced. That is an end of the case in its legal aspect.

But their Lordships think it right to add that on a matter of fact they see no reason to differ from the judgment of the High Court where it is stated:—

"It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh; this gentleman was no party to the agreement and so far as the evidence goes there is nothing to show that

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he was even consulted during the negotiations and before the agreement was entered into."

Further, it is permissible to think that if the Manager had been applied to, he would have made just such enquiries as were made later by the Settlement Officer, Mr. Reid, when he was asked to report upon difficulties which emerged with regard to carrying the projected policy forward. Mr. Reid narrates the conflict of opinion and otherwise between this Sitambari Society of the Jains and the Digambari Society. He refers to the litigation that has occurred, to the intrusions which have been made upon the hill, as already alluded to in this judgment, and to the conflict of title with regard to certain portions of it; and he concludes by stating in effect and quite frankly that he thinks the proposed lease is inadvisable and illegal. He then adds these observations:—

"The Digambar Society would proceed to erect new tonks, some of them possibly adjacent to the already existing tonks which are managed by the Sitambars. The Sitambars would of course object, and would fall back on their rights, under the agreement of 1872. To enforce their legal rights, they would no doubt resort to violence, and very likely the site of every proposed new tonk would be the scene of a riot of greater or lesser magnitude. I understand that it is not the local authorities but the local Government who proposed to sanction the lease of the hill to the Digambari Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease, it is evidently one which cannot be carried through."

This citation has only been made to indicate the serious responsibility that would have rested upon the Manager in

becoming a party to such a transaction and the necessity for his personally acting with much circumspection. It is not for this Board to express any opinion whatsoever upon the conflicting points of policy or otherwise appearing in these discussions, but the futility of the attempt made on legal grounds in the present suit to have specific performance of the bargain not made with the Manager at all, is now obvious.

The judgments of the Courts below are accordingly affirmed.

There are two further points to which it may be necessary briefly to allude. The negotiations canvassed in this information took place during the regime of Manager No. 1, and in accordance with the opinion of the Board confirming that of the High Court no concluded agreement as the result thereof was ever arrived at. During the regime of Manager No. 2 a compromise was entered into of certain conflicting rights and this compromise was recorded and decree passed in accordance therewith on the 24th February 1909. Accordingly, the attempted bargain in the first regime came to nothing: the compromise in the second regime resulted in a transfer of the hill to the Respondent No. 2 and that bargain was duly confirmed by the Court.

"It must be taken that the compromise entered into with the Manager of the Palgunj Estate in Appeal No. 551 of 1914 and the conveyance made in pursuance thereof are binding on the Raja of Palgunj and his estate to the same extent as if the latter had been himself the contracting party."

These are the words taken from the judgment of Mullick, J., and their Lordships are of opinion that it was an undoubted sound conclusion to be drawn as in these words:—

"There was, therefore, an implied obliga-

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tion on the transferor not to derogate from the grant."

The Board is of opinion that the correct course was taken upon this point of the compromise of the suit and upon the attempt of the Raja of Palgunj to interpose on the subject.

The last question raised is as to what is to become of the Rs. 50,000 which was transmitted in the form of a cheque for Rs. 50,000 on the Bank of Bengal by Pundit Mohan Krishna Dhar, dated the 3rd November 1908, per a letter from him to the Private Secretary of the Lieutenant-Governor. The disposal of that remittance still stands upon the footing set out in the letter of the 6th September 1910 by Mr. Gourlay, the officiating Secretary to the Government of Bengal, to Messrs. Morgan & Co. printed on p. 15 of the Record. This letter concludes in the following terms:—

"I am, therefore, to request that you will be so good as to inform your clients that the arrangement proposed in November 1908, has fallen through and that the Accountant General, Bengal, has been asked to refund them with interest at 4 per cent. (the Bank rate of fixed deposits) the sum of Rs. 50,000 which they had paid as premium."

The right to ingather that sum still stands upon that letter and the money will no doubt be repaid upon demand by the proper authority accordingly.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitor: Mr. T. Page Thomas for the Appellants.

Solicitors: Messrs. Ranken, Ford & Chester for the Respondent No. 2.

G. D. M.

(MATRIMONIAL JURISDICTION.)

(Full Bench.)

A.P. No. 2 OF 1924.

SANDERSON, C. J.

NEWBOULD, J.

RANKIN, J.

1924,

Heard,

17, November.

1925,

Judgment,

13, January.

W. H. THOMAS

v.

MRS. THOMAS and

anr.

Marriage, dissolution of—Indian Divorce Act (IV of 1869), sec. 2—Petitioner, a Christian and a resident of India—Remand for finding—Damages, on what principles to be assessed.

In a divorce case, in order to grant any relief under the Indian Divorce Act, the judgment must show that the case comes within the provisions of sec. 2 of that Act, that the Petitioner is a Christian and a resident of India at the time of presenting the petition.

SINGRAI SANTHAL v. PURAIGT SANTHALNI (1) referred to.

In order to assess damage the Court should direct its inquiry towards ascertaining what damage the Petitioner has sustained owing to the action of the co-Respondent, and the damage he has sustained would be the same whether the co-Respondent is a rich man or a poor man.

KEYSE v. KEYSE AND MAXWELL (2) referred to and distinguished.

The District Judge of Chittagong on 24th March 1924 passed a decree for the dissolution of marriage in this case and the records and proceedings were sent to the High Court for confirmation of the said decree.

This Court (consisting of the Chief Justice, Newbould and Buckland, JJ.), on

(1) 81 C. L. J. 840 (1920).

(2) L. R. 11 P. D. 100 (1883).

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17th November 1924, remanded the case, when the following observations were made by :—

SANDERSON, C. J.—In this case we are of opinion that the matter must be remanded to the learned District Judge on the ground that in our opinion the judgment of the learned Judge is not sufficient.

In the first place there is nothing in the learned Judge's judgment to show that the case comes within the provisions of sec. 2 of the Indian Divorce Act, 1869. That section provides that "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the Petitioner professes the Christian religion and resides in India at the time of presenting the petition." There is no finding as to the matters referred to therein. The section further provides "or to make decrees of dissolution of marriage except in the following cases (a) where the marriage shall have been solemnized in India; or (b) where the adultery complained of shall have been committed in India."

All that the learned Judge says in his judgment is as follows:—"I am satisfied of the factum of adultery, and that the Petitioner has in no way connived at or condoned it. The marriage is therefore declared to be dissolved."

This Court requires specific findings in respect of the material facts which it is necessary for the Petitioner to prove in order to bring the case within sec. 2 of the Divorce Act.

We have referred to this matter on several occasions; and, it is sufficient for me to refer to the case of *Singrai Santhal v. Puraigi Santhalni* (1).

In the second place it is not clear to this Court whether the learned Judge has proceeded upon the correct principle

in assessing the damages at Rs. 20,000. The learned Judge said: "Apart from any question of sentiment, the wrong inflicted upon him is one for which he deserves substantial compensation, and moreover it is more than likely that he will incur considerable expense in the matter of the disposal of the two children of the marriage."

For the purpose of stating the correct principle reference may be made to the charge to the jury of the learned President of the Probate Division in the case of *Keyse v. Keyse and Maxwell* (2), which is as follows:—

"There is no doubt about the adultery, it has been proved and admitted; and the question therefore that remains for you to consider is what damages, if any, the co-Respondent is to pay. Now I am obliged to explain the principle upon which damages are to be given; and, first, you must remember that you are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given. But, undoubtedly if it is proved that a man has led a happy life with his wife, that she has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from her husband, then the jury will take those facts into consideration. But the question in this case, as in so many others, is, whether or not these losses have been cast upon the Petitioner by the action of the co-Respondent. If he did not seduce her away from her husband that makes a very material difference in considering the amount of damages

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to be given. In considering these questions undoubtedly the conduct of the husband must be looked to. Here the husband and wife had been leading an unhappy life before they parted, and he knew she had no means of living. It is for you to judge whether he had really made any effectual efforts to discover where she was, I mean, in the sense of being such as a man would really take if he had his heart in the inquiry. If you come to the conclusion that he did not make any earnest inquiry after her, that is a fact you could consider when you are considering the question of the damages he has sustained by some man consorting with his wife afterwards. What can any husband expect who has separated from his wife, who, he knows, has no means? What will follow? Why, that in the ordinary course of things she may yield to the temptation of securing support from some other man. Therefore, take those matters all into your consideration in determining whether or not the Petitioner is entitled to damages, and if so, to what amount.

(In the course of the summing-up a juror asked what were the means of the co-Respondent).

The President :—" I am not at all surprised at your asking the question ; but that indicates the great misapprehension that exists on this subject. It is not a single case, but it is very often asked. But do you not observe, on the principles that I have explained to you, the means of the co-Respondent have nothing to do with the question? The only question is, what damage the Petitioner has sustained and the damage he has sustained is the same whether the co-Respondent is a rich man or a poor man."

The case must therefore be remanded

to the learned Judge to be dealt with in accordance with the foregoing observations. It may be necessary for him to take further evidence with regard to some of the above-mentioned material facts. That is a matter for the learned Judge.

NEWBOULD, J.—I agree.

BUCKLAND, J.—I agree.

On 23rd December 1924 the case came before the District Judge when he observed :—

" My predecessor granted the Petitioner a decree of dissolution of marriage but the case was remanded for a finding whether the Court had jurisdiction and for reconsideration of the question of damages. I have further examined the Petitioner. He is a Christian and was resident in Chittagong at the time when he presented the petition. The marriage was solemnized in Scotland but the adultery complained of took place in Calcutta. This Court therefore has jurisdiction to make a decree of dissolution of marriage, subject to confirmation by the High Court.

It has already been found by my predecessor that the Respondent committed adultery with the co-Respondent, Victor Massey. The damages were assessed at Rs. 20,000 as claimed in the petition. The Petitioner allowed his wife to stay in Calcutta from February 1923 and to take up employment there. He explains his reasons for agreeing to this, *viz.*, the children were being sent to school in Darjeeling, his occupation involves much absence from home and he thought some occupation would be good for her health. He came back to Chittagong about Christmas 1923 and he expected that she would stay with him permanently but shortly afterwards discovered that she had

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been unfaithful to him in Calcutta and elsewhere with the co-Respondent. I accept the explanation given by the Petitioner but the fact remains that when adultery took place, Mrs. Thomas was not living with her husband. The Petitioner's children had already been sent to school at Darjeeling and the Petitioner will not have to make new arrangements to look after them except during the holidays. Taking into consideration these facts, I assess the damages at Rs. 3,000. The Petitioner is entitled to his costs from the co-Respondent."

On 13th January 1925 when the findings came after remand the Petitioner appearing in person the following order was passed by the Court.

SANDERSON, C. J.—This case was remanded to the District Judge for certain findings. The learned Judge has now come to a conclusion in respect of the matter about which this Court desired the findings, and the result is that, in my opinion, the same should be confirmed.

NEWBOULD, J.—I agree.

RANKIN, J.—I agree.

P. D.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 1855, ETC., OF 1921.

GREAVES, J.
GRAHAM, J.
1924,
17, July.

PRASANNA KUMAR RAY,
Defendant, Appellant,
v.
ARUN CHANDRA
SINGHA, Plaintiff,
Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 105, 105A—Suit by landlord for additional rent in respect of additional area—Decision of Special Judge appealable to High Court when question of principle as to basis upon which rent is to be settled is involved—Duty of Special Judge to settle just

and equitable rent irrespective of contract between parties—"Khod khasta nal," if of 16 cubits or 14 cubits—Finding as to the length of such nal, a finding of fact when such finding is based on evidence and not merely on construction of kabuliyat.

The Appellants were tenants under the Respondents who sued for additional rent in respect of additional area. In the dowl kabuliyat it was stipulated that for excess lands found on measurement the tenant would pay separate rent according to the khod khasta nal and khod khasta rate of the Pergana. The tenants contended that the khod khasta nal meant a pole of 16 cubits while the landlords contended that it was one of 14 cubits. The Special Judge in reversing the decision of the Settlement Officer accepted the latter contention:

Held—That there being nothing in the kabuliyat for guidance as to the proper meaning of the expression "khod khasta nal" evidence was admissible to show what the expression meant in the zemindari in question and the finding, of the Special Judge based on evidence was a finding of fact binding on the High Court in second appeal.

Where the decision of the Special Judge does not merely settle a rent but involves some question of principle as to the basis upon which rent is to be settled the decision of the Special Judge is appealable to the High Court.

That in coming to a decision under sec. 105 of the Bengal Tenancy Act, the Special Judge would consider the rate of rent mentioned in the kabuliyat but if he finds that a strict adherence to the rate mentioned in the kabuliyat would make the rent in excess of what he considers a fair and equitable rent he is bound by the terms of sec. 105 to so adjust the rent, irrespective of any contract between the parties, as to make it just and equitable.

PRASANNA KUMAR RAY v. ARUN CHANDRA SINGHA.

These were appeals against the decree of B. Sen, Esq., Special Judge of Zillah Noakhali, dated the 21st of April 1921, affirming the decree of Babu Nibaran Chandra Das Gupta, Assistant Settlement Officer of that District at Feni, dated the 24th of April 1919.

The facts of the case will appear from the judgment.

Babu Charu Chandra Biswas in Nos. 1180, 1209, 1210, 450, 451 and 463, *Babus Panchanan Ghose* and *Girish Chandra Bannerjee* in Nos. 1811 to 1814 and 1874, *Babu Hemendra Kumar Das* in Nos. 2266, 329 and 330, *Babus Jogesh Chandra Ray* and *Bhagirath Chandra Das* in No. 1855, *Babus Jogesh Chandra Ray*, *Suresh Chandra Talukdar* and *Mohendra Kumar Ghose* in Nos. 2236, 413, 956 and 957, *Babu Jitendra Kumar Sen Gupta* in Nos. 2372, 2472 and 2428, *Babu Suresh Chandra Talukdar* in Nos. 2604 and 2605, *Babu Santosh Kumar Bose* in No. 395, *Babu Bepin Chandra Bose* in No. 412, *Babu Subodh Chandra Ray Choudhury* in Nos. 1476, 1477, 1801, 1802, 1893 and 1894, *Babu Mohendra Kumar Ghose* in Nos. 1062 and 1063 and *Babu Ram Doyal De* in Nos. 419 and 420 for the Appellant.

Babu Charu Chandra Biswas in Nos. 1855, 2236, 2266, 2372, 2427, 2428, 2604, 2605, 329, 330, 412, 413, 966, 957, 1062, 1063, 1476, 1477, 1801, 1802, 1893, 1894, 419 and 420, *Babu Giriya Prasanna Ray Choudhury* in No. 395, *Babu Jitendra Kumar Sen Gupta* in No. 451, *Babu Nagendra Chandra Choudhury* in No. 450, *Babu Bhagirath Chandra Das* in Nos. 463 and 1813, *Mr. Maity* and *Babu Apurba Charan Mookerjee* in No. 1811, *Babus D. L. Kastgir* and *Radha Benode Pal* in No. 1874, *Babus Suresh Chandra Talukdar* and *Mahendra Kumar Ghose* in No. 1210 (S. A.

Nos. 419 and 420 of 1922, 2236 of 1921, 2372 of 1921, 412 and 413 of 1922, 1855 of 1921, 329 and 330 of 1920, 2427 of 1921, 2605 of 1921, 1801 and 1802 of 1922, 395 of 1922, 1476 and 1477 of 1922, 1893 and 1894 of 1922, 956 and 957 of 1922, 1062 and 1063 of 1922) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—These appeals are appeals by the tenants in suits by their landlord, under the provisions of sec. 105 of the Bengal Tenancy Act, claiming additional rent in respect of additional area. The Assistant Settlement Officer in the first Court decreed the suits and held that for measuring the additional lands a pole or *nal* of 16 cubits should be employed; the landlord appealed against the decisions of the Assistant Settlement Officer in so far as he decided that the pole or *nal* to be employed for measurement should be a pole or *nal* of 16 cubits. The landlord's contention was that according to the true construction to be placed upon the dowl in the various suits the pole or *nal* to be employed was one of the 14 cubits and the Special Judge who heard the appeals has agreed with this contention. These appeals are directed against this decision and this is the only point which arises in these appeals. The Special Judge disposed of all these appeals by reference to a judgment which he gave in another case, which is not under appeal, in which the same point arose and he has incorporated that judgment in his judgments in all the cases from which these appeals arise. The dowls in all the cases are, we are told, substantially the same and the appeals have been argued on this basis but the dowls bear different dates between the years 1259 B. S. and 1280 B. S. and in

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Appeals Nos. 1476, 1477, 1801, 1802 and 1898 of 1922 the dowls bear date before the year 1267 B. S. The two appeals first argued before us were Nos. 419 and 420 of 1922, so it will be convenient to refer to the dowls of these two appeals.

Those who appeared in the other appeals all adopted the arguments advanced on behalf of the Appellants in Appeals Nos. 419 and 420 of 1922 and in some cases supplemented these arguments, but although in some cases reference was made by them to the dowls of their particular appeals it was not suggested that there was any material difference in the dowls so as to affect the point arising in these appeals.

The dowl *kabuliyat* in Appeal No. 419 of 1922 is dated the 11th Magh 1259 (23rd January 1853) and the interest thereby created is a taluki interest. The dowl refers to the land being settled as being *khas mehal* in own cultivation (*mehal khas khod khasta*) in possession of self and measuring according to the measurement of 1249-1256 B. S. made by a pole of 16 cubits of 18 inches each 4 kanis odd. Some discussion arose as to the meaning of the words *khod khasta* "in own cultivation" and it was suggested that it meant that the intermediate interest, that of the Talukdar, having come to an end the tenants on the land were paying their rent direct to the zemindar, but there is no evidence of this and we must, I think, take the words as meaning that the lands were being cultivated by the zemindar either through raiyats or by hired labour. The words cannot be strained to mean of necessity cultivation by raiyats.

The document further states that the land was surveyed by the Amin during the Ekandas Survey as appertaining to *khod khasta* and that it was measured

by a pole of 16 cubits of 18 inches each and found to measure 5 kanis odd. The document concludes with these words which have caused the present controversy :

"If on fresh measurement excess land be found I (that is, the tenant of the taluk) shall pay separate rent for the same according to the *khod khasta nal* and *khod khasta rate* of the Pergana."

It will be convenient to state again the point in controversy which arises on these words. The Appellant tenants contend that "*khod khasta*" *nal* means the *nal* or pole of 16 cubits used in the previous measurement of 1249-1256 and also used at the time this dowl was executed. The landlord Respondent contends that the words "*khod khasta*" *nal* mean a raiyati *nal* or pole of 14 cubits.

The Special Judge has, as already stated, accepted the landlord's contention finding that the words "*khod khasta*" in the expression "*khas khod khasta*" in the early part of the dowl has not the same meaning as the words "*khod khasta*" appearing in the concluding words of the dowl before the words "pole" and "rate." He says that if it had been intended to measure excess lands for the purpose of assessing additional rent with a 16 cubits *nal* (which was the *nal* used for measuring taluks) there would have been no need to use the words that the excess area would be measured with *khod khasta . nal* and assessed at *khod khasta rate* and he holds that these words mean the pole and rate applicable in the case of cultivating raiyats.

He concludes his judgment by recording this finding, "On a consideration of the entire evidence, oral and documentary, I hold that *khod khasta nal* meant the *nal* applicable to raiyats and such *nal*

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was 14 cubits of 16 inches." It was not suggested before us that if evidence was admissible to 'prove the meaning of " *khod khasta* " there was no evidence to support this finding although it was suggested that there was no finding that in 1259 B. S. there was any raiyati *nal* in their zemindary. Of course in second appeal not having ourselves seen the evidence we must in default of any contention to the contrary assume that there was evidence to support this finding. I cannot, however, but think from a perusal of the judgment of the Special Judge that he has relied on 'some evidence which should not have been relied on, I mean by this to refer to his reference to 'other dowls, for clearly the language of other documents not in suit cannot be called in aid to construe the words of a particular document which is in suit.

If the question to be decided in these appeals is a question of fact this finding is binding on us in second appeal, but if the question is one to be determined on the construction of the dowls alone this is a question of law and falls for us to decide.

The Special Judge has referred in his judgment to a previous decision of this Court in Appeal from Appellate Decree No. 2468 of 1886 and this has been pressed on us on behalf of the Appellants as having already decided the point arising in these appeals and it will be convenient to refer to it now.

The question there was the same as arises in these appeals, namely, the size of the measurement pole to be used in measuring 'excess lands held in Talukdari Settlement. The dowl in that case which was of 1267 B. S. contained this provision :

" Should upon fresh measurement the area of the land be found to be in excess

of that specified in the lease we shall pay rent for the same separately at the Pergana *khod khasta* rate and standard of measurement."

It was contended in that case on behalf of the landlord, that the standard of measurement used for raiyats should be applied whilst the tenant Defendant contended that the standard of measurement should be the same as that applied in ascertaining the area of the taluk.

This Court accepted the tenant's contention. The Court was influenced in its decision by the fact that the acceptance of the landlord's contention involved applying one standard of measurement to ascertain if in fact there was excess area and if excess area was found another measurement in order to ascertain the area to be assessed to rent, but the main ground for the decision was the finding of fact of the District Judge that the standard of measurement for raiyats was not settled in the zemindary until some years after the dowl in suit which was stated 1267. It seems to me therefore that this decision does not help us as it was really arrived at upon the finding of fact arrived at on the evidence in that case. Moreover we have not the dowl which was in suit before us and we do not know what it contained apart from the passage cited in the judgment. The main contention urged on behalf of the tenants in these appeals was that the Special Judge was wrong in saying that the word *khod khasta* at the end of the dowl meant something different from the meaning to be attributed to the word in the earlier part of the dowl and it was urged that as a 16 cubits pole was used in measuring what was described as *khod khasta* land at the time the dowl was executed, the words " according to *khod khasta nal* " must mean that the same standard of measurement was to be

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applied for the purpose of measuring any excess land for the purpose of assessing additional rent. It was further argued that there was no evidence and no finding that in 1259 B. S. there was any *nal* of 14 cubits in use in the zemindary and that in the absence of any such evidence or finding the words "*khod khasta nal*" must refer to the *nal* of 16 cubits which was used for measurement at the inception of the tenancy. On behalf of the landlord it was said that the appeals were concluded by the finding of fact to which I have already referred and we were referred to the cases of *Nafar Chandra Pal Choudhury v. Shukur Sheikh* (1) and *Krista Das Law v. Abdul Karim* (2) as to the disability of this Court in second appeal in interfering with this finding. The applicability of these cases depends on whether the matter before us is merely a question of construction of the dowls upon the documents themselves or whether evidence was necessary and therefore admissible to determine the meaning to be attributed to the words "*khod khasta nal*" in the dowls. The cases above referred to did not depend upon the construction of any document.

We were further referred to *Chitenay v. Brazilian Submarine Telegraph Company* (3) as authority of the proposition that the meaning of words is a question of fact. But here again it has first to be determined whether extrinsic evidence is necessary, and therefore admissible to determine the meaning of the words "*khod khasta nal*" in the dowls. If such evidence is admissible then doubtless we are bound by the finding of fact of the Special Judge.

It was further urged that as there were no appeals against the additional rent allowed to the landlord the appeals were futile unless there was a remand, but I do not think there is anything in the point as the basis of calculation was assailed, and if this falls the calculation based thereon must necessarily fall.

The rest of the argument addressed to us on behalf of the landlord rested on the meaning to be applied to the words "*khod khasta nal*" and was based on extrinsic evidence. It seems to us unnecessary to deal with this as if extrinsic evidence is admissible the landlord is entitled to rely on the finding of the Special Judge in his favour as to the meaning of the words "*khod khasta nal*." It is now necessary to return to the dowls themselves. I cannot find that anywhere in the earlier part of the dowls the words "*khod khasta*" or "*khod khast*" are used in connection with the word *nal*. All that is stated is that the land to be demised which had formerly been (as appears from the documents) let out as a *putni* taluk was then in the zemindar's possession and was "*mehal khas khod khasta*," that is, vacant land in self cultivation and that when this land was measured between 1249 and 1256 (presumably for the purpose of creating the former *putni* taluk which had come to an end) a pole of 16 cubits was used. I think all that can be gathered from this is that a pole of these dimensions was used presumably when the former *putni* taluk was created.

The document then proceeds that what had formerly been held as the *putni* taluk of Sitaram Sen but now was in self cultivation had (presumably for the purpose of creating a new *putni* taluk) been again measured with a pole of 16 cubits. I do not think that from these words it can be inferred that the 16 cubits pole is the

(1) I. L. R. 46 Cal. 189: s. c. 23 C. W. N. 845 (P. C.) (1918).

(2) 25 C. W. N. 128 (1920).

(3) [1891] 1 Q. B. 79 at p. 85.

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khod khasta pole or *nal*, I only infer from the words that the 16 cubits pole was the pole used when a *putni* taluk was created and I can infer nothing else. The result is that you have, I think, nothing in the dowls themselves to guide you as to the meaning of the expression "*khod khasta nal*" and I think, therefore, that evidence was admissible to show what the expression "*khod khasta nal*" meant in this reminary. The Special Judge had found upon the evidence that it meant a pole of 14 cubits and I think that this is a finding of fact which is binding on us in second appeal.

There is this additional argument, I think, in favour of his decision, namely, that the word *khod khasta* as applied to *nal* must, having regard to the position of the words, have the same meaning as it has when used in connection with the word *rate* and I find it difficult to attribute to the words "*khod khasta rate* of the Pergana" the meaning we are asked to put upon them, namely, that this is the rate which appears in the dowls as the rate charged for *khod khasta* land. In the result we dismiss these appeals with costs, hearing-fee Rs. 16 in each case to the appearing Respondents.

In No. 2604 of 1921.

GREAVES, J.—This is an appeal by the tenant. The landlord sued under sec. 105 of the Bengal Tenancy Act claiming from the holder of a taluk additional rent in respect of excess area found on measurement and asking for the settlement of fair and equitable rent. The claim was allowed and the rent fixed by the Assistant Settlement Officer. The tenant appealed against the assessment to the Special Judge on the ground that lands of another taluk (No. 2042) had been wrongly included in his taluk in arriving at the excess area and in assessing rent. The

Special Judge found against the tenant's contention holding that there was nothing to show that lands of another taluk had been included. The record-of-rights was in the landlord's favour and the presumption raised by the entry therein has not been displaced.

It is said, however, on the tenant's behalf that both Courts wrongly refused to direct production of certain *chittas* and *khatians* and to direct that the *chittas* should be relaid by local investigation, and that an application requiring the Plaintiff to file the dowl of taluk No. 2042 was wrongly refused. The Special Judge finds as to the first application that it was made to the Assistant Settlement Officer on the day of the trial and that it was not pressed and as to the second application that it was made after the evidence was closed and that it was rightly rejected and that the objection was frivolous and that there was no reason to disbelieve the dowl filed by the landlord. The appeal is concluded by the findings of fact of the Special Judge and we think that the two applications to which I have referred were rightly rejected.

The appeal is dismissed with costs one gold mohur to the appearing Respondents.

In No. 2266 of 1921.

GREAVES, J.—This is an appeal by a tenant and the first point raised in the appeal is the same as that raised in Appeal No. 419 of 1922 and in the other appeals heard along with that appeal. The other point raised is that the Court below has allowed the landlord additional rent without assigning any reason for so doing. The number of this case in the first Court was 15532 and the first Court has found as regards the first point that excess land is to be measured by a *nal* of 14 cubits which it finds is the measurement of the *khod khasta nal*. The dowl in this case

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recognised a distinction between the *khod khasta* rate and the taluki rate, so clearly in this case having regard to the finding of fact of the first Court which was not displaced in appeal (and indeed I am not sure that there was any appeal on this point by the tenant to the lower Appellate Court as the appeal to that Court was by the landlord against the additional rent allowed) and also having regard to the construction of the dowl itself the standard of measurement was rightly fixed at 14 cubits. As to the second point, the first Court allowed as the fair rent for the excess land Rs. 24-14-5 which was considerably less than might have been allowed had the whole of the excess, which calculated at the rate prevalent in the Pergana amounted to Rs. 49-15-0, been allowed. The lower Appellate Court allowed an additional rent of Rs. 5-14 but even this is less than might have been allowed by some Rs. 19, so it is not apparent what grievance the tenant has except that no reason was given by the lower Appellate Court for allowing the increase of Rs. 5-14-0, but that Court has fixed what it considered the fair rent and as the total rent fixed as the fair rent does not exceed 50 per cent. of the gross assets we do not see that the tenant has any real complaint. The appeal fails on both points and is dismissed with costs one gold mohur to the appearing Respondents.

Cross-objections in Appeals Nos. 419 and 420 and 450 of 1922, and Appeals Nos. 1180 of 1922, 1209 and 1210 of 1922, 450 and 451 of 1922 and 463 of 1922, 1811-1814 of 1922 and 1874 of 1922.

These three cross-objections and the appeals are by the landlord who applied under the provisions of sec. 105 of the Bengal Tenancy Act for the settlement

of fair and equitable rent in respect of the excess lands found on the measurement of certain *putni* taluks held by the Defendants. The question which arises in the cross-objections and appeals is as to how the amount of rent in respect of these excess lands is to be calculated. The Courts below in fixing the rents have not given the full amount of rent which would result from calculating what the rent would be if the whole of the excess area found on re-measurement was assessed for rent at the rate mentioned in the dowl *kabuliyat* but have fixed what they considered a fair and equitable rent in the circumstances. The landlord contends that he is entitled to have the rent assessed in accordance with the contract contained in the dowl *kabuliyats* although I understand him to be willing that where the rent for excess land added to the original *jama* exceeds 50 per cent. of the gross assets the total rent plus the amount to be allowed for excess area should not exceed 50 per cent. of the gross assets.

The covenant by the tenant in the various dowl *kabuliyats* is to all intents and purposes the same, namely, that where increase of area is found upon fresh measurement he will pay rent for the same according to the measurement and rate mentioned in the dowl. It is not, I think, necessary to refer to the details in all the appeals for we only have to decide the principle which is to be followed in making the calculation of the rent payable by the tenant for the excess area found on measurement, but it will be convenient to make two references to illustrate the point.

In No. 419 of 1922 the Assistant Settlement Officer, basing his measurement on a pole of 16 cubits, found the excess to be 1 drone 2 kanis 2 krants and calculating this at the *kabuliyat* rate

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allowed the full amount of Rs. 51-1-9 but the Special Judge, basing his measurement on a pole of 14 cubits, found the excess to be 1 drone 7 kanis 4 gandas 3 karas 2 krants which calculated at the *kabuliyat* rate would make the rent payable for the excess land Rs. 66-11-0, but instead of allowing this amount the Judge has allowed only Rs. 58 although this added to the existing rent of Rs. 133-8-3 makes the total *jama* less than 50 per cent. of the gross assets which amount to Rs. 419-7-9.

Again in No. 1180 of 1922 although, according to the calculation of the Assistant Settlement Officer, the rent for excess area calculated at the *kabuliyat* rate amounts to Rs. 52-3-6 only Rs. 8-6-0 has been allowed and the Special Judge, although the rent for excess area on his calculation should be Rs. 68-1-6, has only allowed Rs. 14, although this added to the existing rent makes the total *jama* less than 50 per cent. of the gross assets which amount to Rs. 336-12-4.

In Appeal No. 451 of 1922 another point arises, it being urged on behalf of the landlord that there has been too large a deduction made for *nalayek* or waste land and the same point is made as has been referred to above that rent should have been allowed for the whole excess area found by measurement at the *kabuliyat* rate which would amount to Rs. 133-11-0, whereas the Assistant Settlement Officer has allowed Rs. 93-7-0 and the Special Judge Rs. 103. It is noticeable in this case that if a larger allowance had been made the total *jama* would have exceeded 50 per cent. of the gross assets.

A further objection is raised to the admission of Ex. A, a *chitta khatian* which it is said was put in after the case was closed with the result that the Plaintiff could not adduce rebutting evidence. It appears that the amount of waste land was

questioned in the written statement and that the landlord therefore had notice of the contention supported by Ex. A and we think therefore that the landlord should have called evidence on the point and that Ex. A was rightly admitted; this being so, there is nothing in the point raised as to area of the waste land allowed being excessive.

The main contentions raised in these appeals on behalf of the tenants were (1) that no appeal lay as the decisions of the Courts below merely settled the rent and (2) that in any case in proceedings under sec. 105 of the Bengal Tenancy Act the Assistant Settlement Officer and the Special Judge were not bound by any contract between the parties but could fix a rent which they thought fair and equitable. So far as the first point is concerned we think that an appeal lies as the question to be decided involves not merely deciding what rent is payable but deciding the question of the principle to be followed in arriving at the rent payable. It is true that the point involved does not fall expressly within any of the issues set out in sec. 105A of the Bengal Tenancy Act and the cases seem to show that where these questions arise an appeal lies to the Court, but we think that if the decision of the Special Judge does not merely settle a rent but involves as here some question of principle as to the basis upon which rent is to be settled the decision of the Special Judge is appealable to this Court.

As regards the second question it has been held that the provisions of sec. 105 of the Bengal Tenancy Act are applicable not only where no rent has been fixed but also where the rent has been fixed by agreement of parties, *Aktowli v. Tarak Nath Ghose* (4) and *Jogendra Mohan Das*

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v. *Janaki Nath Saha* (5). Consequently it seems to us that where, as here, the landlord has invoked the provisions of sec. 105 he cannot contend that the Judge is necessarily bound in fixing the rent to adhere to the rate mentioned in the *kabuliyat*. No doubt the Judge would take this into account but we think that if he finds that a strict adherence to the rate mentioned in the *kabuliyat* would make the rent in excess of what he considers a fair and equitable rent he is bound by the terms of sec. 105 to so adjust the rent, irrespective of any contract between the parties, as to make it just and equitable. The case of *Matungini Dassi v. Ram Das Mullick* (6) which is said to support the contrary view was not a suit under sec. 105 of the Bengal Tenancy Act. We think therefore that it was open to the Special Judge to adopt the course which he did and that he was not bound to allow enhancement at the full rate provided in the contract. This disposes of the cross-objections which are to be dismissed with costs to be paid to the Appellants and of the appeals which are dismissed with costs, hearing-fee Rs. 16 in each case to the appearing Respondents.

GRAHAM, J.—The main point involved in these appeals is the construction to be placed upon certain dowl *kabuliyats*, and the question is what the parties thereto intended when they provided that excess lands found subsequently in possession of the tenants should be paid for “according to the *khod khasta nal* and rate of the Pergana.”

Ex. 26, which has been referred to as an example of those dowls, concludes with the following passage: “If on fresh measurement excess land be found, I shall pay separate rent for the same ac-

cording to the *khod khasta nal* and rate of the Pergana.”

The controversy centres round the meaning of these words. For the tenants Appellants it has been argued that they mean the *nal* of 16 cubits, which was used for measurement at the time when the tenures were created, while on behalf of the landlords Respondents it was urged that the words indicate a standard of measurement different from that referred to in the earlier part of the dowls, and that what they meant was the *raiyaṭi nal* of 14 cubits.

It is unfortunate that these documents should have been drawn up in such a way as to leave the matter in doubt, and the fact that different Courts have decided differently as regards the meaning of the words in question in similar dowl *kabuliyats*, shows that the matter is not free from difficulty. There is much to be said for both points of view. In favour of the tenants' contention the following arguments may be advanced:—

1. The *prima facie* probability that the same *nal* and rate, which were used at the creation of the tenures, would be used for the purpose of ascertaining and assessing excess area.

2. The improbability on the other hand that the parties could have contemplated the use of a different *nal* for measuring excess area, the effect of which would be to introduce complications, as held in the judgment of this Court in 1887 when the same question arose in connection with similar dowl *kabuliyats*. If the landlords' contention is accepted, it will involve first a measurement according to the taluki standard of measurement to ascertain whether the land held by the Defendants is in excess of the area covered by their leases, and then in respect of excess land so ascertained, a settlement of

(5) 21 C. W. N. 427 (1916).

(6) 7 C. W. N. 93 (1902).

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rent after ascertaining the excess area by a measurement upon entirely different principles. It is arguable that the parties could not have contemplated such a complicated mode of procedure.

3. The length of the taluki *nal* has been twice mentioned in the dowl as 16 cubits, and if the intention had been that excess lands should be measured with a different *nal* of 14 cubits, it might have been expected that this would be clearly stated.

On the other hand, there is a great deal of force in the view taken by the learned Special Judge that, if the intention had been that the same *nal* should be employed nothing would have been easier than to say that the *nal* to be used for excess land would be as afore-mentioned, the word "*atra*" or some similar word being employed for this purpose.

For the sake of judicial consistency it might be urged that we ought to adopt the same view that was held by this Court in 1887. But as my learned brother has pointed out, the decision on that occasion was based mainly on the finding arrived at in the Court of first appeal that the *khod khasta* or *raiya* *nal* came into existence under special circumstances at a period years later than the agreements entered into. The position is different here, as we have no such evidence before us.

On the whole therefore on a consideration of all the facts and circumstances I see no reason for holding that the conclusion arrived at by the Special Judge is erroneous and I agree that these appeals should be dismissed.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 338 of 1924.

NEWBOULD, J.	}	W. H. DA COSTA,
CHAKRAVARTI, J.		Accused, Petitioner,
1924,		v.
26, June.	*	J. P. DEEFHOLTS,
		Complainant, Opposite
		Party.

Indian Penal Code (Act XLV of 1860), sec. 417
—Cheating—Untrue praise of goods in advertisement, if criminal offence—Quashing of proceedings by High Court.

Where the allegation against the accused was that he advertised in the papers that he was willing to sell an almost new jazz set, and the complainant answered the advertisement and after some correspondence sent the price settled to the accused, and on receipt of the goods the complainant found that they were not of the quality he expected according to the advertisement and certain articles mentioned in the list were not sent, and the accused was summoned to answer a charge of cheating:

Held—That the allegations were insufficient to justify the prosecution of the accused for a criminal offence, and the proceedings against the accused were quashed.

The giving of untrue praise of articles by a seller does not amount to a criminal offence.

REGINA v. BRYAN (1) referred to.

This was a Rule granted on the 25th April 1924 against the proceedings taken against the Petitioner under sec. 417, I. P. C., and pending in the Court of the Sub-Divisional Magistrate at Suri.

The petition of complaint filed on the 15th March 1924 by Mr. Deefholts,

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Superintendent of Excise and Salt at Suri, was as follows:—

“That on seeing an advertisement in the ‘Statesman’ in the second week of January 1924 that an almost new jazz set was being sold your Petitioner (the complainant) applied for particulars. In a letter, dated the 17th January 1924 from the accused Da Costa, the Petitioner was sent particulars. On receipt of the particulars the Petitioner sent an offer from Suri of Rs. 300 and also requesting the accused to shew the set to this Petitioner’s friend M. De Souza before it was despatched. In his letter, dated 23rd January 1924, the accused agreed to the price and was sending the set per V. P. P. In the meantime the wife of the Petitioner was going to Calcutta and she was requested by the Petitioner to take delivery of the instruments by giving a cheque to the accused if those things were not already sent to Suri per V. P. P. That your humble Petitioner’s wife went to the accused and gave him a cheque of Rs. 300 and the package containing the instruments was sent to her residence in Calcutta and she brought the package to Suri. On opening the package for the first time at Suri the Petitioner saw those instruments; he found that those were rotten things and the price of those things would not exceed Rs. 100 and those things did not tally with the description the accused had given of his things in his letter. That your Petitioner had those instruments examined by experts who gave the same opinion as regards quality and price. That your humble Petitioner wrote several registered letters to the accused demanding money but those letters were refused and then the Petitioner himself went down to Calcutta and saw his (accused’s) mother and told her that unless they were returning his money

back he would institute a criminal case for cheating against her son but they did not pay any heed to me up till now. That the accused dishonestly put in a wrong description of instruments with the object of inducing the Petitioner to pay Rs. 300 knowing fully well that the articles were rotten and of value far less than the above amount and thereby fraudulently induced him to give a cheque for Rs. 300 and thereby the Petitioner sustained a loss to the extent of Rs. 200. That the accused with a dishonest intention and with the intention of causing wrongful loss to the Petitioner did not include in the package 4 cow bells valued at Rs. 40 and thereby committed an offence under sec. 417, I. P. C. So your humble Petitioner prays that your honour will be graciously pleased to summon the accused and to do justice to the complainant.”

The complainant, in his examination, stated, *inter alia*, as follows:—

“I received the packet here (at Suri) intact with the list shewing what articles had been sent. I opened the packet at Suri for the first time in the presence of Mrs. Parish. I then found that the articles were not in accordance with specifications. I found the drum warped, the Chinese clogs were without catches, the side drum and tom tom were both made up of old banji heads. No cow bells were sent though Da Costa had valued them at Rs. 40. The cymbal was not the Turkish clash and was also chipped. It was evidently house-made. He also sent me a small triangle instead of a large one.”

The Sub-Divisional Magistrate of Birbhum issued a warrant against the accused under sec. 417, I. P. C., on the 15th March 1924. The Petitioner thereupon moved the High Court and obtain-

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ed this Rule for quashing of the proceedings, or in the alternative, for transfer of the case to Calcutta.

Babu Bir Bhusan Dutt and *Mr. A. S. Aiyar* for the Petitioner.

Babus Narendra Kumar Bose and *Pashupati Ghose* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner in this case has been summoned to answer a charge under sec. 417, I. P. C. It appears from the petition of complaint which, for the purposes of this Rule, we must assume contains a true statement of the facts, that the Petitioner advertised in the Statesman that he was willing to sell an almost new jazz set. The complainant Opposite Party answered the advertisement and after some correspondence paid Rs. 300 by cheque to the Petitioner. On receipt of the goods the complainant found that they were not of the quality he expected and also that certain articles mentioned in the list had not been sent to him. We hold that the allegations in the petition are insufficient to justify the prosecution of the Petitioner for a criminal offence. The case seems to come within the principle laid down in the leading English case, *Regina v. Bryan* (1). In that case it was decided that the giving of untrue praise of article did not come within the English statute. What appears to have happened in the present case is that the Petitioner gave untrue praise of the goods which he was selling. The learned vakil for the complainant is unable to put his finger on any specific statement in the description of the goods and say that this statement is false. As an example of the

misleading statements we may refer to one to which special attention is drawn in the complaint, that the goods are almost new. What is the meaning of the expression "almost new" is a matter on which the seller and the buyer of second-hand goods will frequently be found to have very different ideas. As regards the omission to send certain goods it will be impossible for the complainant to prove that at the time the Petitioner made the promise to send the goods he did not intend to send all that was stated in the list. The Petitioner is greatly to blame for having refused to accept the letters of protest which were subsequently sent to him by the complainant. But we cannot on this ground hold that a criminal offence has been established.

The Rule is made absolute and the proceedings against the Petitioner are quashed.

H. C. S.

Rule made absolute.

(1) D. B. 265; s. c. 26 L. J. M. C. 35 (1887).

PRIVY COUNCIL.
[APPEAL FROM MADRAS.]

LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMER ALI.
SIR LAWRENCE JENKINS.
1924,
Heard, 25, 26, 28 and
29, February.
Judgment, 7, April.

KODOTH AMBU
NAIR, Appellant,
v.
THE SECRETARY
OF STATE FOR
INDIA IN COUNCIL,
represented by
the Collector of
South Kanara,
Respondent.

Forest tracts in South Kanara, Government's rights therein—kumri cultivation, nature of—Cultivator's possession permissive—Licensees, not tenants—Licensee, when acquires title by adverse possession—Knowledge and acquiescence of licensor to be proved—Sirur kumri and wargdar kumri, incidents of, if different Muliwarga, if hold kumri lands in ryotwari tenure—Suit to set aside order of Government granting rough potta for kumri cultivation excluding lands claimed—Limitation—Limitation Act (IX of 1908), Sch. I, Art 120.

Government had absolute title to all forest tracts in the District of South Kanara, which belonged absolutely to the Crown.

Kumri cultivation in these tracts described.

Wherever kumri cultivation was allowed in this District it was permissive.

Government's rights as regards the wargdar kumries were the same as in the case of Government kumries, and the possession of the cultivators, even when they were wargdars, was permissive.

The incidents which attached to wargdar kumries did not stand on the same footing as ryotwari holdings.

In 1903 Government officials granted to the Plaintiff a rough potta of lands which they would be allowed to cultivate in kumri, and excluded therefrom the lands in suit.

Held—That the Plaintiff's suit to set aside that order and to obtain a declaration of his right brought in 1913 was

barred by Art. 120 of Sch. I of the Limitation Act.

A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor to his knowledge and with his acquiescence.

This was an appeal from a decree, dated the 11th December 1919, of the High Court at Madras, affirming a decree, dated the 3rd August 1917, of the District Court of South Kanara which affirmed a decree, dated the 29th March 1916, of the Subordinate Court of South Kanara.

The present Appellant brought the suit against the Government for a declaration of his right to certain "kumri" lands and for an injunction and other relief.

In 1903 the survey and settlement of the District took place and in the register which was then drawn up, the lands in suit were recorded as Government kumries and were excluded from the pottas granted to the Appellant's tarwad. Objections were raised by the Karnavan of the tarwad and on the 20th February 1905 he presented a petition to the revenue authorities praying for the inclusion of the plaint kumries in his potta.

That petition was finally refused by orders, dated 3rd May 1911 and 30th June 1911.

On the 25th November 1913 the Appellant instituted this suit. In his plaint he alleged that the lands in suit were the ancient warg kumries of his tarwad, that the tarwad had been in exclusive possession and enjoyment of the kumries for over a century, and that the rights of the Government consisted merely in receiving the assessment thereon. The Respondent denied the allegations in the plaint, and pleaded that even if the Plaintiff's tarwad was in possession and enjoyment of the kumries, such enjoyment was not adverse to the Govern-

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ment and could not confer any proprietary right on the Plaintiff's *tarwad*, and that the suit was barred by limitation.

The Subordinate Judge held that the Plaintiff had not made out his title, that he could not acquire ownership by adverse possession and prescription and that the cause of action arose in 1903 when the Plaintiff's title was denied by Government in the Settlement Register and that since this denial was within the Plaintiff's knowledge more than 6 years before the suit the claim was barred by limitation. On appeal the decision of the subordinate Court was upheld by the District Court, and a second appeal was preferred to the High Court which remanded the case for revised findings. The findings were in favour of Government and the second appeal coming on for final hearing on the 11th December 1919, the findings were accepted by the High Court (Oldfield and Seshagiri Ayyar, JJ.), and the decree appealed against was affirmed.

Messrs. DeGruyther, K. C. and Narasimham for the Appellant.—The character of the cultivation of forest land in this suit is similar to that dealt with by the Privy Council in *Kuthali Moopathavar v. Peringati Kunharankutty* (3).

This was either a *ryotwari* tenure in origin, or else became such; where there is *kumri* cultivation the *ryot*, or cultivator acquires a proprietary right in the *kumri* lands, i.e., he acquires a right to remain in occupation of the land, which is heritable and transferable.

[Reference was made to *Vyakunta Bapuji v. Government of Bombay* (4), *Bhaskarappa v. The Collector of North*

Canara (1) and *Secretary of State for India in Council v. Manjeshwar Krishnayya* (2)].

Limitation did not commence to run against the Appellant until 1911 and the suit is not barred. It is true that the Appellant received a rough potta in 1905, but that rough potta was only an invitation to the Appellant to name any objections, it was not an assertion of title by Government nor a claim to the Appellant's lands.

It was not until 1911 that Government decided that the rough potta was correct in excluding the Appellant's lands.

Specific Relief Act, 1877, sec. 42.

Bajinath Sahai v. Ramgut Singh (5).

Manual of South Kanara, 1894, Vol. I, pp. 121, 123, 209.

Messrs. Dunne, K. C. and Kenworthy Brown for the Respondent.—The title to forest lands including *kumri* lands is in Government.

The *kumri* right is a purely permissive right in Government lands and entirely different to *ryotwari* tenure.

The acts done by the Appellant or his predecessors on the lands in suit do not amount to adverse possession.

In any event the Appellant's alleged title was denied by Government in the Settlement Register in 1903 and the suit is barred by limitation; Indian Limitation Act, 1908, Sch. I, Art. 120.

Mr. DeGruyther, K. C., in reply.—In South Kanara the cutting down of trees was performed by a resident population. They have a permanent heritable right just as much as any other *ryot* who reclaims waste for they have cleared the forest and brought it under cultivation.

(3) L. R. 49 I. A. 395: s. c. 26 O. W. N. 666 (1921).

(4) 12 Bom. H. C. R. (App.) 1, 23, 27, 30, 42 (1675).

(1) I. L. R. 3 Bom. 452, 456 (1879).

(2) I. L. R. 28 Mad. 257 (1905).

(5) L. R. 23 I. A. 45, 46: s. c. I. L. R. 23 Cal. 775 (1896).

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Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This appeal arises out of a suit brought by the Plaintiff in the Court of the Subordinate Judge of South Canara on the 25th November 1913, as the Karnavan, or Manager, of a Nair *tarwad* against the Secretary of State for India in Council for a declaration that certain lands situated in the forest tracts in the Kasargod Taluk belong exclusively to his *tarwad*, and for an injunction restraining the Defendant from dealing in any manner with the said lands to the prejudice of the rights and possession of the Plaintiff's *tarwad*.

Their Lordships will have to refer more specifically in the course of their judgment to the allegations in the plaint, but it is sufficient at this stage to indicate the scope of the suit. The Defendant denied the title which the Plaintiff put forward; and the Subordinate Judge found that the Plaintiff had totally failed to establish the grounds on which he based his claim, and accordingly dismissed the suit. The Plaintiff preferred an appeal to the District Judge who came to the same conclusion as the Court of first instance and accordingly affirmed the decree of the Subordinate Judge, dismissing the suit. There was a second appeal by the Plaintiff from the decree of the District Judge to the High Court of Judicature at Madras which, apparently being of opinion that the District Judge had not sufficiently considered the evidence of possession adduced on the Plaintiff's behalf, remanded the case for a fresh finding.

When the case came before the District Judge the second time he again examined the evidence thoroughly, almost meticulously, and came to the conclusion, as on the previous occasion, that the Plaintiff

had utterly failed to establish the three propositions on which he based his claim: firstly, long possession; secondly, prescription; and thirdly, recognition by the Defendant of the *tarwad's* title working as an estoppel. He also found in concurrence with the Court of first instance that the suit was barred under the Statute of Limitation. If the suit is barred by limitation the question of title would not arise. But it appears to their Lordships that it will be more satisfactory to the parties that they should express their opinion on the question of title, before dealing with the question of limitation.

The case then went back to the High Court and the learned Judges accepted, on the 29th January 1920, the findings of the District Judge and dismissed the suit. The present appeal is from this decree of the High Court.

In order to explain the nature of the present litigation and the contentions advanced on the Plaintiff's behalf before the Board, it is necessary to describe as concisely as possible the character of the lands in respect of which the claim is made and how these lands have been dealt with until now. The District of South Canara lies to the north of Malabar and to the west of Mysore and Coorg; in the north lies North Canara and on the west the Arabian Sea. The whole district at a short distance from the sea is covered with immemorial forests. Mr. Sturrock, who was Collector of South Canara in the 'eighties, describes the country thus in his Manual of the South Canara District:—

"South Canara is essentially a forest district. The slopes of the western ghats from north to south clothed with dense forests of magnificent timber and the forest growths, stimulated by the heavy rainfall, approaches within a few miles of the coast."*

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The lands in suit are situated south of the Chandragiri River, and, as already stated, in the Kasargod Taluk, formerly Bekal Taluk. In the lowlands below the forest ridges there lie the farms and holdings of the *ryots*, which are called "*wargs*." It appears from the record that the *wargs* the *ryots* hold in their own right are called "*muliwargs*." These *ryots* and farmers, it appears, are in the habit of going upon the forest lands, clearing a part of the jungle and raising a temporary crop on it. After the crop is reaped, this patch is abandoned and some other part is taken up. For this privilege they have been paying a small fee to the Government. These patches are called "*kumries*," and the lands so desultorily cultivated are designated in the proceedings relating to the subject as "*kumri* lands." The *wargs* do not constitute a farm or an estate of a compact character, the component parts often lying apart from each other. The Plaintiff's case is that he has a number of *kumri* lands in the forest, attached to the various plots or *wargs* which he holds and he claims that his *tarwad* has acquired an absolute title to these lands, partly by long possession, partly by adverse possession against the Defendant, and partly by purchase and usufructuary mortgages. He also claims that the Government recognised his title and are now estopped from denying it.

The first question, then that emerges from these allegations, is what is the nature of the forest tract, and secondly, what are the incidents of the *kumri* lands. It has been held in two cases, one decided by the Bombay High Court from North Canara under not dissimilar conditions—*Bhaskarappa v. The Collector of North Canara* (1), the other decided by the High Court of Madras from South Canara

[*Secretary of State for India in Council v. Manjeshwar Krishnayya* (2)], in both of which the identical question arising in the present appeal was involved, that the Government had an absolute title to all the forest tracts which belonged absolutely to the Crown. Their Lordships consider it would answer no useful purpose to travel, as they have been invited to do, in the regions of ancient history. Whatever may have been the custom in ancient India, or under Mohammedan rule, what they have to see is how these lands were treated since the British acquired this part of the country. Ever since 1800, when South Canara was conquered from Tippoo Sultan, the Mohammedan ruler of Mysore, the British Government—in a series of documents which have been carefully examined in the cases referred to above—asserted and exercised their right in the forests. Their Lordships desire to refer only to two of these documents. On the 23rd of May 1860, by a resolution of the Government of Madras (in the Revenue Department) it definitely pronounced in favour of checking the practice of *kumri* cultivation. Among the reports on which it rested its decision was a communication from the Conservator of Forests, dated 17th August 1859, in which he calls attention to what he describes as "the chief evils of this rude system of culture," viz. :—

"the destruction of valuable timber, at present urgently required for ship-building and railways, and rendering of land unfit for coffee cultivation."

This document also speaks of the method of cultivation in vogue on *kumri* lands. There were other proceedings which similarly show that the Government claimed to exercise an absolute right in respect of these immemorial forest

(1) I. L. R. 3 Bom. 452 (1879).

(2) I. L. R. 26 Mad. 257 (1905).

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and waste lands, and constantly asserted its title. But the matter was clinched in 1884 when the Governor in Council passed an order, dated 29th August 1883, finally stopping the right of the neighbouring farmers and *ryots* to go upon the forest lands for the purpose of clearing patches by destroying the trees, in order to cultivate crops on the clearings. The document is so important that it should be quoted in full.

After referring to the report with which it was concerned, it goes on as follows:—

"2. To survey and demarcate the lands in which *kumri* is now cut and to impose upon it an acreage rate of assessment—which under the Board's proposal is to confer complete rights of dealing with the land and with the wood growing thereon—would in the opinion of His Excellency in Council tend to compromise the right of Government to deal with the lands as may seem advisable hereafter and to create notions of proprietary right in the *warydars* which does not in fact exist. Forest settlement will probably not be undertaken for years in South Kanara and the forest officers cannot possibly indicate at present lands which will be wanted for reservation. Mr. Sturrock's proposed survey would doubtless cost more than he estimates and would probably be far from accurate when finished.

"3. His Excellency in Council accordingly directs that existing arrangements and restrictions (which are in fact those prescribed in G. O., 24th October 1861, No. 2032) in respect of the *kumri* cultivation in question, shall continue, with the exception of a charge of a rate of one rupee an acre on extent actually felled. In lieu of this the Collector is authorised to compound the demand at his discretion for an annual payment not exceeding seven times the *shist* and *shamil* in the case of a *warydar kumri*, and in the case of other permitted *kumri*, of such amount as may seem to him just with reference to past average charges. At the same time a register should be prepared recording as accurately as possible the boundaries and descriptive particulars of

the tracts within which each *warydar* is allowed to cut *kumri*; and during the felling season, the revenue and forest subordinates should be on the alert to prevent felling outside the authorised limits, in virgin forests and in jungles of twelve years' growth.

"4. Under the above arrangement no measurement need be made in the current season, and no orders are required on the second of the Proceedings above read."

Pursuant to this order rules were framed for the regulation of *kumri* cultivation, which also are important and should be set out in full:—

"1. The cultivation of *kumri* is strictly prohibited in—

(1). Virgin forests.

(2). Cardamom and pepper forests.

(3). Forests which have not been *kumri*d for 12 years or upwards.

(4). All forests outside the tracts recognised as *kumries* attached to *warys*.

"2. All parties contravening Rule 1 will be criminally prosecuted.

"3. A Register will be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each *warydar* is allowed to cut *kumri*. In the preparation of this Register care will be taken to exclude all tracts falling under Rule 1.

"4. Every Pottail in whose village there is *wary kumri* will report on the 1st April of each year whether the provisions of Rule 1, have been strictly observed in the annual fellings and all Revenue and Forest Officers will take every opportunity of checking the correctness of these reports, and otherwise assisting the prevention of felling outside the authorised limits.

"5. Assessment will be collected at a fixed annual amount, irrespective of the annual clearings which will be left to the discretion of the *warydar* concerned, subject to the provisions of Rule 1.

"6. Nothing in the above rules shall be held to preclude Government from taking up for reservation under the provisions of the Madras Forest Act, 1882, any land now occupied for *kumri*."

In accordance with the Rules, notices

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were issued by the tehsildar apparently on all the *wargdars* who were in the habit of entering the forest and making *kumri* cultivation. About the same time a register was opened (Ex. F) showing the details of the boundaries, etc., of the *kumri* lands with regard to which permits had been issued previous to the Government order. It shows to the *wargdars*, who had been in the habit of promiscuously entering the forests and making clearings, the exact limits which they were permitted to enter for raising temporary crops.

It is quite clear from these records that throughout, wherever *kumri* cultivation was allowed, it was permissive. The people who cultivated these patches of land had to pay a fee for the permits which they obtained for purposes of cultivation and nothing more than these fees were entered in the registers, but they do not indicate any right in the persons who paid fees for the permits.

The right of the Government has been carefully examined and precisely set forth in the two judgments to which reference has already been made. Their Lordships, therefore, do not think it necessary to discuss further the question, beyond expressing their general concurrence with the conclusions arrived at by the learned Judges of the two High Courts, namely, that there is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government.

Bearing this principle in mind their Lordships have to examine what evidence the Plaintiff has adduced in this case to establish the right he claims. The

grounds on which he bases the claim of his *tarwad* are set out in paras. 4, 5 and 6 of the plaint. In para. 4 he says as follows :—

“That the properties particularised in the annexed schedule are ancient *warg kumries* situated in the villages of Panathadi and Bedadka in Kasargod Taluk (formerly Bekal Taluk) and lying to the south of the Chandragiri River.”

Paras. 5 and 6 are in these terms :—

“That the plaint *kumries* belong to the Plaintiff's *tarwad*, some as portions of their ancient *muliwargs*, some on right of purchase from their original proprietors, some, though acquired in the first instance on mortgages from previous *wargdars*, now belong to the *tarwad* on *mul*i right acquired by prescription and a few on mortgage right.

“That the plaint *kumries* have been in the exclusive possession and enjoyment of the Plaintiff and his predecessors in interest for more than a century on their own proprietary or *warg* right.”

In other words he bases his title to the plots of land in respect of which the suit is brought on long enjoyment as parts of his *muliwargs*; secondly, on rights acquired by purchase and mortgage; and thirdly, on adverse and exclusive possession for more than a century in proprietary or *warg* right. In para. 9 of the plaint he puts forward a claim by estoppel against the Government: his statement is to the effect that the lands in suit have been acknowledged to be *warg kumries* and included as such in the register of Government *kumries*. The onus of establishing these allegations rests on him.

The last contention requires some explanation. It appears that the Government for the purposes of clearing the undergrowth in the forests, have been in the habit of allowing the forest tribes who sparsely inhabited the forest to make clearances and grow such cereals as they were capable of. These primitive tribes

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cultivated certain spots, reaped the crop and then moved off to some other patches of land. These apparently were called Government *kumries*. The Government also allowed some of the neighbouring *wargdars* to take the leaf manures from the forest and clear the undergrowth for the desultory cultivation, called *kumri*. These apparently are designated *warg kumries*. In all these cases, dealings with forest lands appear to have been by distinct permission of the Government. Has the Plaintiff been able to show either old possession of the *kumri* lands, which he says have become attached to his *wargs* by long enjoyment, or has he been able to show that he has acquired a right by adverse possession to the exclusion of the Government? Both the Subordinate Judge as well as the District Judge, whose judgments on appeal on questions of fact, properly and regularly arrived at, are conclusive, have held, upon a careful examination of the evidence, that the Plaintiff has failed to establish a continuous enjoyment beyond 35 or 40 years from the date of the suit. The period of limitation against the Government is 60 years. Assuming that a licensee can convert a permissive occupation into an absolute title by long possession, the period of possession proved by the *tarwad* falls short of the period of prescription. Their Lordships think that a licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. The Plaintiff produced no evidence to show that the Government either acquiesced in his exclusive possession or did, in fact, evince that consciously they acquiesced in the *tarwad's* adverse possession.

Apart from this, the Courts in India,

who were Judges of fact, have held that the boundaries which the Plaintiff has set up are unidentifiable. As regards title by transfer, they have found that in no case has the knowledge been brought home to the officers of Government that any of these lands were sold or mortgaged with their consent.

As regards a grant emanating from the Government, there is absolutely no evidence. No potta has been produced showing a grant by the Government. The inference is inevitable that the Plaintiff possessed no such potta.

The order of the 23rd May 1860, No. 830, made clear the position in which the people who were licensed to enter the forests for the purpose of desultory cultivation, stood in relation to the Government. Para. 8 of this order runs as follows :—

“The Board give their decided opinion against the validity of any claim to proprietary rights in forest, based on the entry of ‘*kumri sist*’ in the patta or the account of any estate. They regard it as simply a rent or farm of the privilege of cutting *kumri* in the tract in question, the continuance of which must depend on the pleasure of the Government. The facts detailed in their proceedings seem fully to bear out this view”

In the proceedings of the Board of Revenue dated 24th July 1860, the Government's rights as regards the *wargdar kumries* are placed on the same basis as the *Sirkar* or Government *kumries* :—

“The Board understand the Government proposal to raise the rate of assessment on the *kumri* cultivation of the Bekal Taluk, to apply to ‘*wargdar kumri*’ so called, as well as to *Sirkar kumri* as the Government do not admit that the rights of the former are in any way superior to those of the latter, or that the entry of that item, among others in the *warg*, originally denoted anything more than that the *wargdar* was also the temporary renter of certain jungle farms or privileges, which the *Sirkar* was com-

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petent to modify or discontinue at will; and it is solely as an act of grace that in the Bekal Taluk the *wargdar*, whose *warg* includes the item, is in consequence of the more systematic nature of the cultivation still to be recognised as the party with whom Government have to deal for the realization of the Assessment, which elsewhere will be made directly with the *kumri ryots*."

On behalf of the Appellant an argument was put forward before the Board which does not appear to have been advanced in any of the Courts in India. Their Lordships do not desire to rule out summarily on that ground the contention which has been so strongly urged before them. It is contended that the incidents attached to these *wargdar kumries* stand on the same footing as *ryotwari* holdings. The chief ground on which this analogy appears to be founded, as learned Counsel admitted, were two facts, namely, that the *wargdar* possessed in these *kumri* lands a heritable and transferable interest.

In order to prevent future confusion their Lordships desire to say that there is absolutely no relation or analogy between the nature of these *kumri* lands and *ryotwari* holdings. The latter belong to a totally different category of tenures. *Ryotwari* holdings relate to arable lands for fixed periods—ordinarily 30 years—and are subject to periodical surveys and assessments. No inference, therefore, can be derived from the fact that *kumri* lands, cultivated on the *kumri* system, were held by *wargdars* whose property is transferable and heritable.

Coming now to the question of limitation it appears that in 1903 the Government officials marked off the lands in suit and issued to the Plaintiff as the *Karnavan* of his *tarwad*, what is called a rough potta, showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The

Plaintiff preferred objections to the exclusion from the rough potta of the lands in suit. His objections were definitely rejected in 1905.

The present suit to set aside that order and to obtain a declaration of his right was not brought until 1913. Art. 120 of the first Schedule of the Limitation Act (IX of 1908) applies to this case. It provides that the period of limitation for a suit "for which no period of limitation is provided elsewhere in this Schedule" shall be six years. No period of limitation is specifically provided elsewhere for the assertion of a claim of this kind. Their Lordships think that the lower Courts rightly applied Art. 120 to this suit.

On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs and they will so humbly advise His Majesty.

Solicitor: Mr. Douglas Grant for the Appellant.

Solicitor: Solicitor, India Office, for the Respondent.

G. D. M.

(TESTAMENTARY AND INTESTATE JURISDICTION.)

C. C. GHOSH, J.	}	In the goods of
1925,		BHUBANESHWAR
2, February.		TRIGUNAIT, deceased.

Application for letters of administration to the estate of a deceased Hindu governed by the Mitakshara law, court-fee payable on.

The applicant for letters of administration to the estate of a deceased Hindu governed by the Mitakshara law must comply with sec. 19 (I) of the Court Fees Act and pay ad valorem duty.

The facts are as follows:—

Deceased who was governed by the Mitakshara, died intestate on 22nd August 1922, leaving (1) Mukteshwar, his

In the goods of BHUBANESHWAR TRIGUNAIT.

undivided younger brother, (2) and (3) his undivided two sons.

The petition for letters of administration stated that these persons comprised a joint Mitakshara Hindu family; that the deceased and Mukteswar received Rs. 2,33,333 from the Receiver in a Purulia suit representing bonus paid to the Receiver in respect of a joint ancestral colliery by cheque drawn by the Receiver on the Imperial Bank in favour of the deceased and Mukteswar; that the deceased opened a current account in the Allahabad Bank with that money in his name and operated thereon; that Rs. 39,261 were now standing to the credit thereof; that the Petitioners claimed that sum as the remaining co-parceners by rule of survivorship and contended that estate duty was not payable.

On 28th January 1925 the Registrar in Insolvency submitted the following note:—

“ This Court has held that no administration need be taken out to the estate of a Hindu governed by the Mitakshara law when the estate passed by right of survivorship to his co-parceners [*In the goods of Pokur Mull* (1)].

But where a grant is sought and the Court makes it, can it exempt the applicant from payment of the *ad valorem* duty? The provisions of sec. 19 (I) of Court Fees Act are imperative and the Court has no power to relax them [*Collector of Ahmedabad v. Savchand* (2)].

In this case the applicant has produced a certificate from Taxing Officer under sec. 19 (D) of the Court Fees Act. It is submitted that the certificate was issued by the Taxing Officer under a mis-conception. The *karta* of a joint Hindu family is not a mere ‘ trustee.’ He is also a bene-

ficial owner. He can transfer the whole estate for good cause and confer a good title. He can also demand a partition. If before his death the estate had been partitioned, the deceased would have got a moiety of the money at the Bank in his own right.

It is therefore submitted that no grant can be made without the provisions of sec. 19 (I) being first complied with.

In the second place it is to be noted that the applicants have not complied with the provisions of sec. 64 of Probate and Administration Act. They have not set out in the petition the family left by the deceased. We do not know who his heirs are. They must be cited in order to test the correctness of the allegation in the petition.

When the application was made to me, I pointed out to the attorney for the applicants the objections set out above. The applicants must comply with sec. 19 (I) unless they can bring the case under sec. 19 (D) of the Court Fees Act.”

The JUDGMENT OF THE COURT was as follows:—

C. C. GHOSE, J.—The application cannot be granted as there is no compliance with sec. 19 (I) of Court Fees Act.

Mr. J. N. Mitter, Solicitor for the Applicant.

S. C. M.

(TESTAMENTARY AND INTESTATE JURISDICTION.)

C. C. GHOSE, J.	}	In the goods of
1925,		GEORGE NASH,
3, February.		deceased.

Appointment of a member of a firm as executor—Application for probate, proper form of.

Where a member, not named, of a firm is appointed an executor under a Will the member who applies for probate must

(1) I. L. R. 23 Cal. 980 (1896).

(2) I. L. R. 27 Bom. 140 (1902).

In the goods of GEORGE NASH.

shew that he was a member of the firm at the date of the Will and at the date of the testator's death.

In the above matter an application was made by one E. R. Colman, a member of the firm of Williamson Magor & Co., for probate of the Will of the deceased.

The deceased died on the 13th October 1924 leaving a Will, dated the 28th October 1911, whereby he appointed his son Arthur Bryan Nash and "a member of the firm of Williamson Magor & Co.," as his executors.

On the 21st January 1925, when the application was made, the Registrar in Insolvency returned the papers to the Applicant's attorneys as there was no affidavit shewing that the Applicant was a member of the firm of Williamson Magor & Co., at the date of the Will, and also at the date of the testator's death, it being the practice of this Court to require such affidavit. The Registrar in Insolvency drew their attention to a passage in Tristram and Coote's Probate Practice, 15th Ed., p. 67, which runs thus:—

"If a solicitor's or a trading firm be appointed executors, the appointment only applies to the members of the firm at the date of the Will, unless a contrary intention is expressed in the Will." This was also the practice of this Court.

The Applicant's attorneys thereafter wrote to the Registrar in Insolvency contending that the passage in Tristram and Coote, to which their attention had been drawn, was not based on any reported case and was consequently not to be treated as authoritative and requested that the Will and the petition be laid before the senior Judge on the Original Side.

The papers were accordingly submitted to the Hon'ble Mr. Justice Ghose on the 2nd February 1925.

The JUDGMENT OF THE COURT was as follows:—

C. C. GHOSE, J.—I agree with the Registrar in Insolvency in the view he has taken.

Messrs. Orr, Dignam & Co., Attorneys for the Applicant.

S. C. M. *Application refused.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 125 OF 1923.

SANDERSON, C. J.

BUCKLAND, J.

1924, .

Heard, 20, 21, 24,
25 and 26, Nov-
ember.

Judgment,

8, December.

THE OFFICIAL ASSIGNEE
OF BENGAL

v.

THE YOKOHAMA SPECIE
BANK, LTD.

*Presidency Towns Insolvency Act (III of 1909).
sec. 55—Meaning of the phrase "in good faith"
—Transfer of all available property by an insolvent,
validity of—Appellate Court dealing with the
finding of fact of the trial Court on affidavits.*

On 14th July 1920, M & Co. executed an assignment for past advances, in favour of Y, of all their property available at the time without anything left for other creditors of M & Co. There was no contemporaneous advance nor was there any undertaking by Y to make any advances in future for assisting M & Co. to carry on their business. M & Co. were adjudicated insolvents on 10th February 1921:

Held—On the finding that Y had knowledge of the state of affairs of M & Co., at the time of the assignment, that the transfer was not in good faith within the meaning of sec. 55 of the Presidency Towns Insolvency Act, 1909.

Per BUCKLAND, J.—In considering the effect of a transaction of this nature, the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an in-

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solvent's property among his creditors. A transaction which may in other circumstances be free from all taint becomes an offence when it is established that it contravenes the law of bankruptcy.

KHOO KWAT SIEW v. WOOL TAIK HWAT (1), EX PARTE CHAPLIN (2) and TOMKINS v. SAFFERY (3) referred to.

Per SANDERSON, C. J.—Where the evidence is contained in affidavits, the Appellate Court is in as good a position to judge of the facts as the Court of first instance.

This was an appeal against the judgment of Mr. Justice Greaves, dated the 14th August 1923, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Messrs. S. R. Das and B. K. Ghose for the Respondents.

Messrs. Pugh, Langford James and B. Basu for the Official Assignee.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Official Assignee from the judgment of my learned brother Greaves, J., delivered on the 14th August 1923, whereby he dismissed an application by the Official Assignee for an order, that a deed, dated the 14th July 1920 executed by or on behalf of a firm of Mogi & Co., in favour of the Yokohama Specie Bank, Limited, might be declared void and inoperative.

The application further was for an account of the Bank's dealings with the assets of the insolvents under the said deed, for an order for the payment to the Official Assignee of the sum found due, for a declaration that the Bank was not entitled to retain a sum of Rs. 20,000 and

for an order for the payment of the said sum to the Official Assignee.

The material facts are as follows :—

Messrs. Mogi & Co. were a Japanese firm with a Head Office in Japan, carrying on business in Calcutta and Bombay, and in other parts of the world.

It appears from the evidence of the Sub-Manager of the Yokohama Specie Bank in Calcutta that in February and March 1920 there were strong rumours about the financial instability of Messrs. Mogi & Co., and in June 1920 the Calcutta Branch of Mogi & Co. was closed and the Manager of the Branch went to Japan. Mogi & Co. were at that time indebted to the Calcutta Branch of the Yokohama Specie Bank to the extent of about Rs. 1,38,000.

On the 28th June 1920, Messrs. Curlender & Co. instituted a suit against Mogi & Co., in this Court, claiming Rs. 1,84,000 as damages for alleged breaches of certain contracts made by Messrs. Mogi & Co.

An order was made by this Court at the instance of Messrs. Curlender & Co. for the attachment of Mogi & Co.'s assets at Bombay and on the 28th September 1920 certain assets belonging to Messrs. Mogi & Co. at Bombay were attached in accordance with the order.

In October 1920 the Yokohama Specie Bank made an application in the Bombay Small Cause Court to set aside the attachment on the ground that Messrs. Mogi & Co. had executed a deed, dated 14th July 1920, whereby they had hypothecated the assets, which had been attached, in favour of the Bank, in pursuance of which the Bank had entered into possession. The assets consequently were released from attachment.

On the 22nd November 1920 the Bombay office of Messrs. Mogi & Co. was closed.

On the 10th February 1921, Messrs.

(1) I. L. R. 19 Cal. 223 (F. C.) (1891).

(2) L. R. 26 Ch. Div. 319 (1854).

(3) L. R. 3 A. C. 218 (1877).

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Mogi & Co. were adjudicated insolvents upon the petition of Curlender & Co. At the date of the deed, *viz.*, 14th July 1920, Mogi & Co. were indebted to the Bombay Branch of the Yokohama Specie Bank to the extent of about Rs. 3,76,000 and at the date of the insolvency, *viz.*, 10th February 1921, to the extent of about Rs. 2,75,000. Notice of the application, which gave rise to these proceedings, was dated the 28th May 1923. This Court was informed by the Official Assignee that Messrs. Curlender & Co. had made a claim in the insolvency of Mogi & Co. for the amount of the damages claimed in respect of the alleged breaches of the above-mentioned contracts and one or two other creditors had sent in their claims.

The Official Assignee informed the Court that he had not up to the hearing of the appeal admitted any claim—in fact no steps had been taken beyond the above-mentioned application, as the Official Assignee could not ascertain that there were any assets in India except those which are the subject-matter of this application.

He, however, stated that he had examined the claim of Curlender & Co. and was prepared to admit it, and I understand that he in fact signed the claim as being admitted during the hearing of the appeal.

This application, which is now under consideration, was made under sec. 55 of the Presidency Towns Insolvency Act, 1909.

This section provides as follows:—

“ Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the Official Assignee.”

The learned Judge came to the conclusion that the Bank had shown that the transfer of property involved in the deed of 14th July 1920 was made in good faith and for valuable consideration and that it was not void against the Official Assignee. Consequently he dismissed the application.

In this Court it was argued on behalf of the Appellant that the transfer of property involved in the deed of 14th July 1920 constituted an act of insolvency and that the Bank were fully aware of the insolvency of Mogi & Co., at the time the deed was executed. Under these circumstances, it was urged that the transfer could not be considered as having been made in good faith and for valuable consideration within the meaning of sec. 55 of the Presidency Towns Insolvency Act. On the other hand, it was argued on behalf of the Respondents that the transaction was for valuable consideration by reason of the advances which had been made by the Bank to Mogi & Co., that it was made honestly inasmuch as the Bombay Branch of the Bank had no reason to think that Mogi & Co. were in financial straits at the time the deed was executed, that even if the transfer amounted to a preference of the Bank over the other creditors, it should not be deemed fraudulent inasmuch as Mogi & Co. were not adjudicated insolvent within three months after the date of the deed: and reference was made to the provisions of sec. 56 of the Presidency Towns Insolvency Act.

In my judgment the Bank must have known in July 1920 that Messrs. Mogi & Co. were insolvent.

I have already mentioned that there were rumours in Calcutta as to the financial instability of Mogi & Co. in February or March 1920. In June 1920 the Calcutta office of Mogi & Co. was closed and

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the Manager went to Japan, leaving a large overdraft at the Bank.

It would be unreasonable to assume that those in control of the Yokohama Specie Bank at Bombay were not made acquainted with this fact. In my opinion they must have known of it. In July 1920 the Bank at Bombay demanded payment of the overdraft which amounted to about Rs. 3,76,000. They were aware, as appears from the affidavit of Elizo Wakabayashi, the Accountant of the Bombay Bank, that Mogi & Co. could not meet this liability.

In my opinion, the evidence shows that the Bank succeeded in obtaining a pledge of all the available assets of Mogi & Co. at Bombay.

Apparently Mogi & Co. had two warehouses and an office at Bombay.

By the deed of the 14th July 1920 Mogi & Co. pledged to the Bank all the goods lying in the two warehouses and the goods which were lying in Port Trust Warehouse.

In addition to this security the Bank obtained a pledge of all the goods, furniture articles and things lying in the office shop and godown at 178 to 182, Jackeria Musjid Road. The Bank on the 14th July 1920 placed its representative in possession of these premises and a notice was put up that the Yokohama Specie Bank as mortgagee was in possession.

It is to be noted that the security was for Rs. 50,000 and for other moneys then due or which might thereafter become due, but there was no contemporaneous advance, nor was there any undertaking to make any advances in the future, with a view to assisting Mogi & Co. in the carrying on of their business.

The deed of 14th July 1920 provided that the Bank's representative should enter into possession and that Mogi & Co.

should obtain the previous permission of the Bank before they sold any of the goods and should pay the prices received from the purchasers to the Bank's representative.

What happened in fact after the deed of 14th July 1920 is clear from the account which has been exhibited and from the evidence in the case.

The goods were sold from time to time, the proceeds were paid to the Bank, and the amounts were credited to the account of Mogi & Co. Two sums of Rs. 3,500 and Rs. 3,700 were debited to the account of Mogi & Co. which appeared to have been on account of customs. It was not seriously disputed that these payments were made for the purpose of obtaining delivery of goods from the customs, in order that they might be sold, and the proceeds paid to the Bank.

There was another small sum, viz., Rs. 422-14 debited to the account which apparently was a payment to Haridas & Co., as to which no evidence appears, and a further sum of Rs. 3,950 in respect of an unpaid cheque, the amount of which appears on the credit side. It is obvious, therefore, that after 14th July 1920 Mogi & Co. were not carrying on their business in the ordinary way. It appears beyond doubt that after the Bank entered into possession, the goods were sold, and the proceeds were paid to the Bank with a view to paying off the Bank's debt: in effect the business was carried on merely for the purpose of realising the security, given to the Bank, and repaying the Bank as far as the proceeds of the sales would provide. In fact the Bank's debt appears to have been reduced by these means from about Rs. 3,76,000 in July 1920 to about Rs. 2,17,000 in June 1921.

It appears that Mogi & Co.'s Bank in Japan had suspended payment and that

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the firm in Japan was in difficulties, though it was stated in a letter sent to Messrs. Curlender & Co.'s solicitors in August 1920 by Mogi & Co.'s solicitors that it was hoped the difficulties were only temporary.

There is no evidence as to the exact position of the firm in Japan, though it appears that in 1922 a body called "The Re-Adjustment Committee of Mogi & Co." consisting of the representatives of certain Banks, had the affairs of Mogi & Co. in hand.

In view of the evidence I am of the opinion that the Bank must have known in July 1920 that Mogi & Co. were in serious financial straits, that they could not pay their debts as they became due, and that they were in fact insolvent.

The Bank therefore determined to obtain, and succeeded in obtaining, control over all the available assets in India of Mogi & Co. This was achieved by the deed of the 14th July 1920.

Those in control of Mogi & Co.'s business at Bombay must have known that they were insolvent. They pledged the whole of the assets which were available in India to the Bank; they obtained no further advances to enable them to carry on the business at Bombay; they obtained no undertaking from the Bank, express or implied, to make any further advances to enable them to carry on their business. They had nothing left with which they could carry on their business, and they had no prospect of carrying on their business further.

In point of fact the firm in Bombay was closed in November 1920: the debt due to the Bank at that time had been reduced by means of the realisations to about Rs. 3,13,000. In my opinion the Bank must have known that the assignment of July 1920 would defeat or delay the other

creditors in India of Mogi & Co. The Bank by that deed succeeded in obtaining control of substantially all the assets of Mogi & Co. in India; Mogi & Co. in Japan were in difficulties owing to the suspension of their Bank; what possible prospect was there of any creditor in India having his debt or any part thereof paid by Mogi & Co.?

Judging from the letter of 10th July 1920 from Mogi & Co., Bombay, to Curlender & Co., Calcutta, written only 4 days before the assignment to the Bank, it appears that a representative of Mogi & Co. had recently seen Messrs. Curlender & Co. with reference to their claim, which Curlender & Co. must have been pressing at that time. Their suit had been instituted on the 28th June 1920 and an order for substituted service was made on the 26th July 1920. The dates are significant: and, in my opinion, it is not unreasonable to assume that the Bank at Bombay as well as Mogi & Co. knew of the institution of Curlender & Co.'s suit in Calcutta as alleged by Curlender & Co.

If this be so, they must have realised that if they were going to obtain control of Mogi & Co.'s assets, it was time for them to do so.

There is no doubt that Mogi & Co. were adjudged insolvent within two years of the deed of 14th July 1920; and, the question therefore arises whether on the facts of the case the Court should hold that the transfer of property, created by the deed of 14th July 1920, was made in good faith and for valuable consideration within the meaning of sec. 55 of the Presidency Towns Insolvency Act.

It has not been disputed that the onus of proving that the transfer was in good faith and for valuable consideration was on the Bank.

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The learned Judge has found that the Bank discharged that onus.

With much respect to the learned Judge I do not hold the same opinion.

This is not a case in which the decision of the learned Judge depended upon oral evidence—the evidence is contained in affidavits, and therefore this Court is in as good a position to judge of the facts as the learned Judge was.

Indeed there is little dispute as to the facts: the question really depends upon the inference which should be drawn from the facts of the case.

In *Khoo Kwat Siew v. Woon Tai K Hwat* (1), Lord Hobhouse stated the well-known rule of law as follows at p. 231:—

“The well-known rule of law is that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment in future, that is an act of bankruptcy and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas if he receives substantial assistance, something is left to carry on the business.”

This statement of the law was made before the passing of the Presidency Towns Insolvency Act of 1909, but I have no doubt that the rule as stated by Lord Hobhouse prevails at the present time.

In this case Mogi & Co. assigned all the assets, which were available in India, to the Bank. They obtained no contemporaneous payment or any undertaking to make any payment in future to enable them to carry on their business, and, as already stated, I can arrive at no other conclusion except that the deed of 14th July 1920 was executed to enable the Bank to realise all the assets of Mogi &

Co. which were available, both parties knowing that there was nothing left with which the business of Mogi & Co. could be carried on and that there was no prospect of the other creditors of the firm being paid any part of their debts.

In considering whether the transfer involved in the deed of 14th July 1920 was made in good faith and for valuable consideration within the meaning of sec. 55 of the Presidency Towns Insolvency Act, 1909, it is not possible, in my judgment, to leave out of consideration the insolvency of Messrs. Mogi & Co. and the law which applies in an insolvency, and the question is whether the transaction is one which the law will allow.

If there were no question of insolvency involved, and the law relating to insolvency had not to be considered, it might be possible to hold that the transfer was made in good faith and for valuable consideration.

In this case, however, Messrs. Mogi & Co. were adjudicated insolvents in February 1921, about seven months after the deed of 14th July 1920 was executed, and, in my judgment, both the Bank and Messrs. Mogi & Co. must have known in July, 1920 that if any creditors were to take proceedings, the adjudication of Mogi & Co. as insolvents would be inevitable.

Having regard to these facts, in my judgment, the transaction is one which the law relating to insolvency does not permit and the Court ought not to hold that the transfer of property, created by the deed of 14th July 1920, was made in good faith and for valuable consideration within the meaning of sec. 55.

Consequently, in my opinion, the deed was void as against the Official Assignee.

The result is that, in my judgment, this appeal must be allowed, the decision

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of the learned Judge must be set aside, and a declaration must be made that the deed is void as against the Official Assignee.

There will be order as prayed in para. (b) of the petition.

This Court expresses no opinion as to the sum of Rs. 20,000 mentioned in para. (c) of the petition as we are not in possession of sufficient materials to deal with it.

This matter should be investigated in the taking of the accounts: liberty to apply to the learned Judge taking insolvency matters.

The Respondents must pay the Appellant's costs in respect of the appeal and in respect of the proceedings before the learned Judge on the Original Side.

BUCKLAND, J.—The question involved in this appeal concerns the right of the Official Assignee to certain assets in the hands of the Respondent Bank as assignee of Mogi & Co., insolvents.

Mogi & Co. were Japanese traders who carried on business among other places at Bombay and in Calcutta.

In the month of June 1920 they closed their business in Calcutta owing the local branch of the Respondent Bank the sum of Rs. 1,38,100.

On the 14th July they executed an assignment in favour of the Respondent Bank of goods and office furniture in Bombay as security for money due and for future advances and put the Bank in possession.

Subsequently the Bank realised various sums on the goods purporting so to have been hypothecated to them which they placed against the insolvents' overdraft.

On the 22nd November Mogi & Co. closed their office in Bombay owing the local branch of the Respondent Bank a sum of about three lakhs of rupees.

On the 10th February 1921 Mogi & Co.

were adjudicated insolvents in Calcutta on the petition of Curlender & Co. who claim to be creditors for the sum of Rs. 1,84,000. On that date they owed Rs. 2,75,427-6-6 to the Bank in Bombay.

The Official Assignee now claims that the monies realised by the Bank should be available to the creditors of the insolvents on the ground that the instrument of the 14th July 1920 is void under sec. 55 of the Presidency Towns Insolvency Act, 1909.

It is alleged that the goods hypothecated comprised in effect the whole of the insolvents' available assets, that there was neither any promise to make further advances nor were any further advances made in fact.

My learned brother Mr. Justice Greaves has held that the burden of showing that the transfer was made in good faith and for valuable consideration lay upon the Bank and that the Bank has discharged it. He observed that there was nothing to show that all the property of the insolvents was hypothecated.

These findings of fact have been challenged on appeal.

It will be convenient first to consider the evidence as to the allegation that all the property of the insolvents was hypothecated, for unless this is established it is conceded that the appeal must fail.

The instrument of the 14th July specifies:—

"The goods lying at this date in our warehouse in Building Nos. 361 to 369 situated in Jackeria Musjid otherwise known as Bhuj Moholla and also Port Trust Warehouse as per list herewith."

The goods lying at this date in our warehouse at Chinch Bunder Road on the ground floor of the house No. 18 as per list herewith.

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The goods, furniture, articles and things lying in our office shop and godown at Nos. 178 to 182, Jackeria Musjid Road, as per list herewith."

In order to appreciate how some of the evidence to which I shall refer is to be found on the record, it is necessary to state that Curlender & Co. instituted on the 28th June 1920 a suit in this Court to recover the sum which they allege to be due to them.

On the 27th August 1920 an order was made for attachment before judgment whereupon certain goods were attached by the Court of Small Causes in Bombay. The Respondent Bank applied to have the attachment removed on the ground that it was in the position of mortgagee in possession. In the course of such proceedings evidence was taken and has been imported as evidence into these proceedings.

In June 1922 Jumukichi Yamamoto, the Sub-Manager of the Bank in Calcutta, was examined before the Registrar in Insolvency. In the course of his deposition he said that in February or March 1920 there were rumours about Mogi & Co. and his Bank became cautious how it dealt with them.

As we know the insolvents left Calcutta in June leaving a considerable over-draft at the local branch of the Bank, it is incredible that the circumstances were not communicated to the Bombay branch.

The Accountant of the Bank in Bombay has made an affidavit in which he says, among other things, that in July Mogi & Co. were not in a position to pay their debt to the Bank and asked for time and offered to pledge the goods covered by the instrument impugned.

That the insolvents had only the goods contained in the warehouses specified appears from the evidence of Toyokachi Hasegawa in the Bombay Small Cause

Court where he said that on the 17th July the Bank sent their representative to take possession of goods in their office and shop, and in answer to a question by the Court particularised two godowns about 5 or 10 minutes' walk from the office.

There is no oral evidence that the insolvents had any property other than that comprised in the document, and so far as appears from the record no desire or attempt to produce any such evidence was expressed or made.

Turning to such documentary evidence as is available it appears that on the 20th August 1920 when Curlender & Co. were pressing Mogi & Co., the Manager of Mogi & Co. in Bombay instructed his solicitors to write to Curlender & Co.'s solicitors in the hope of inducing the latter to persuade their clients to stay their hands. The letter says that :—

" Mr. Okhura informs us he has had express instructions to carry on the business with a view to effecting a settlement of all claims as soon as finances have been arranged in Japan; the temporary difficulties in which the firm finds themselves being due to the suspension of their Bank in Japan."

This makes it clear that the Respondent Bank did not intend further to finance Mogi & Co. The letter adds that all these (silver and other goods) stocks are under lien to Banks, which excludes the existence of unhypothecated goods and there is no suggestion that any Bank other than the Respondent Bank was interested, were it material to enquire.

A subsequent letter dated the 23rd August, similarly addressed, emphasises though it does not add to the information. The statement that Mogi & Co. were not in a position to furnish security can only mean that they had no goods which they had not already hypothecated.

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After the Bank had entered into possession it made some advances to the insolvents which were debited to the latter's account, but these were only for the purpose of enabling them to clear and realise the goods in the Port Trust Warehouse. This appears from details given in the accounts and from a statement in the affidavit of the Sub-Manager of the Bank in Calcutta. There is no evidence whatever of any advance made for the purpose of enabling the insolvents to carry on their business, nor, indeed, is there any evidence that the Bank promised to make such advances, and the transfer contains no such stipulation.

Upon the evidence I think it is clear that Mogi & Co. purported to and did hypothecate all their available property to the Bank. The learned Judge seems to have been impressed by the subsequent advances, but as I read the evidence those were made solely for the purpose of enabling the Bank to realise so much of their security as without money could not be realised at all, and were not advances upon which the Bank can rely for the purpose of putting a favourable complexion upon the transaction and defeating the claim of the Official Assignee.

Had the learned Judge taken the same view of the facts it is possible that he would have decided in favour of the Appellant, for he appreciated that the case must depend upon sec. 55 of the Act. His observation that a good deal of confusion has arisen by seeking to import into the provisions of sec. 55 considerations which would arise were the application made under sec. 56 indicates that the case was argued before him, as here, that if once it could be shown that the facts established that which would have

been a preference within sec. 56, it necessarily followed that it was within sec. 55.

It may be that facts, which would justify an order under sec. 56, were the circumstances otherwise appropriate for such an order to be made, are facts which would bring a case within sec. 55, but this appeal must be decided upon the words of sec. 55. Over and over again has it been enunciated that all that Courts have to do is to construe or apply the words of the statute and all that we need do is to decide whether or not the transfer impugned was made in good faith for valuable consideration.

Though a considerable number of authorities were cited in the course of the argument I do not think that I need refer to more than a very limited number.

In *Khoo Kwat Siew v. Wooi Taik Hwat* (1), Lord Hobhouse stated the rule as follows:—

“The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment in future, that is an act of bankruptcy and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, where if he receives substantial assistance something is left to carry on the business.”

We have not to consider whether Mogi & Co. were guilty of an act of bankruptcy as such, but whether, as observed, the transfer was made in good faith and for valuable consideration. Had other circumstances, *e.g.*, the period which elapsed between the transfer and the order for adjudication, admitted of an application under sec. 56, there can be no question that, notwithstanding the pro-

(1) I. L. R. 19 C.J. 223 at p. 231 (P. C.) (1891).

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viso to the section, the transaction must have been held to have been within that section. The further question then arises whether such a transaction can be said to have been entered into in good faith and for valuable consideration so as not to offend against sec. 55.

In *Ex parte Chaplin* (2), Cotton, L. J. observed :—

“ Still, in my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors.”

This is more general in its application, and it carries the matter a stage further.

In *Tomkins v. Saffery* (3), Lord Blackburn had occasion to consider the meaning of the words “ in good faith and for valuable consideration,” used in the proviso to sec. 92 of the Bankruptcy Act, 1869 which deals with fraudulent preferences.

I will pause here to refer again to Lord Hobhouse's judgment in which in the paragraph immediately preceding that which I have already quoted he deals with the use of the word “ fraudulent ” in this connection. His Lordship said :—

“ It is better not to use the term ‘ fraudulent ’ in such a case, though that term has, by rather an unhappy use of language, been applied by Courts of equity to transactions which are not at all dis-

honest in their nature, but are only such as the law will not allow. In this case there is no suggestion from beginning to end of there being anything dishonest in the transaction. The sole question is as to its legal validity.”

From this and from a passage in Lord Blackburn's speech I infer the principle which is to be found running through all the authorities that in considering the effect of a transaction of this nature the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors. A transaction therefore which may in other circumstances be free from all taint becomes an offence when it is established that it contravenes the law of bankruptcy.

This is what I think Lord Blackburn had in mind when he said :—

“ It comes round to this, that I think (I am stating it in my own words, but it is very nearly what the Lord Chancellor has already said) that when they knew that the man was insolvent and unable to pay his debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it; they took their chance. If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was necessary for them to know, and I think they took their chance, and they must take the consequences.”

Applying this principle to the facts be-

(2) L. R. 26 Ch. Div. 819 (1884).

(3) L. R. 2 A. C. 213 (1877).

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for us the conclusion at which I have arrived is that the Bank was well aware of the financial difficulties in which Mogi & Co. were involved and that the Bank took the security in order to protect itself in the event of insolvency supervening. There can be no question on the evidence that the Bank desired to protect itself against Curlender & Co., and we have been informed by the Official Assignee that no other claims have been admitted.

I have already stated my reasons for the conclusion that the insolvents' entire property was hypothecated to the Bank. It is a fair inference that the Bank was aware that the insolvents had no other property—otherwise no doubt the Bank would have taken steps to include it in the instrument, seeing that after all the goods in the Port Trust Warehouse had been sold there was still a deficit of over 2 lakhs of rupees. In this it may also be presumed that Mogi & Co. would have assisted them had it been in their power to do so, for one may at all events credit them with a desire to continue their business if their financial difficulties could be surmounted.

Though the Bank may have acted honestly in the popular sense they cannot be deemed to have acted in good faith within the law of Insolvency however honestly they may have endeavoured and thought they were justified in endeavouring, to secure the property of the insolvents as security for their own debt.

As Lord Blackburn observed with regard to valuable consideration:—"Yes, we must, I suppose, take it that they are so (payees for valuable consideration) but 'in good faith.'" So should I answer the question here as regards valuable consideration, but in my judgment a transaction effected in circumstances surrounding the transaction assailed in

these proceedings cannot be deemed to have been effected in good faith and must be declared to be void against the Official Assignee.

I agree that the appeal should be allowed and concur in the order to be made.

Messrs. Leslie & Hinds, Solicitors for the Appellant.

Messrs. Fox & Mondol, Solicitors for the Respondents.

S. N. B.

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

MUKERJI, J.

1924,

12, May.

EMPEROR OF INDIA

v.

HORENDRA CHANDRA
CHAKRAVERTI.

Criminal Procedure Code (Act V of 1898), secs. 4 (1), 6, 7 (1), 9 (2), 29, 31, 193, 194, 206, 216, 217, 218, 219, 226, 227, 267, 275, 334, 335, 339A, 347, 443, 444, 446, 447, 448, 449, 469, 528A and 528B—Chaps. XXIII, XXXIII, XLIV—Criminal Procedure Amendment Act (XVIII of 1923)—Criminal Law Amendment Act (XII of 1923)—High Court exercising Original Criminal Jurisdiction, if a Court of Session—An accused committed by a Presidency Magistrate for trial in the High Court, if can claim benefit of sec. 275 of the Criminal Procedure Code, even though no claim to establish his status was made before the Committing Magistrate—Proper time for putting forward such claim—Difference in the effect of refusal by Presidency Magistrates and by the Magistrates in the mofussil to entertain the claim pointed out—Jurisdiction of the committing Court after commitment, if any—Principle of construction of a statutory enactment made for the benefit of the accused—Indian High Courts Act, 1865 (24 & 25 Vict., c. 104)—Government of India Act, 1915 (5 & 6 Geo. 5, ch. 61)—Clause 22 of the Letters Patent of 1865.

He was committed by a Presidency Magistrate for trial to the High Court. At the trial before the first juror was called, the Counsel on behalf of the accused claimed that a majority of the jury should be Indians as the accused was an Indian British subject. The application was

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opposed on behalf of the Crown on the ground that the claim was not entertainable in view of the fact that it was not put forward before the Committing Magistrate. It was argued on behalf of the accused that (i) the High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure; (ii) that being so, secs. 528A and 528B could not possibly apply to a case which was inquired into by a Presidency Magistrate and committed to the High Court; (iii) as there was no other provision in the Code of Criminal Procedure under which a claim to be dealt with as Indian British subject should be put forward, the claim made under sec. 275 of the Code of Criminal Procedure to be tried by a jury the majority of whom should be Indians should succeed:

Held—That the High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure.

Held also—That from a consideration of sec. 275 and Chap. XLIVA of the Code of Criminal Procedure, the following propositions may be deduced:—(a) An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of inquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mofussil. (b) If the Magistrate rejects the claim and tries him the decision shall form a ground of appeal from the sentence or order passed in such trial. This applies to Presidency Magistrates. (c) If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not in the High Court exercising Original Crimi-

nal Jurisdiction. (d) If the Court of Session rejects the claim and tries him the decision shall form a ground of appeal from the sentence or order passed in such trial. (e) If a claim is made before a Presidency Magistrate and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court and the accused will not be entitled to put in, under sec. 275 of the Code of Criminal Procedure, before the High Court a further claim for being tried by a jury the majority of whom should be Indians. (f) Where no such claim was put forward before the Magistrate and there being no provision for repetition of the claim before the High Court, sec. 528B of the Code of Criminal Procedure is a bar to the assertion of the same in any subsequent stage of the case.

Held—That the accused is not entitled to claim to be tried by a jury the majority of whom should be Indians.

Semle—The claim on the ground of status may be put forward at any time before commitment is made.

This matter was raised before Mr. Justice Mukerji presiding over the Third Criminal Sessions of the High Court.

The facts of the case as well as the arguments advanced by the respective Counsel will appear from the judgment.

Mr. A. K. Basu for the Crown.

Mr. H. M. Bose for the Accused.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—In the present trial before the first juror was called, Mr. H. M. Bose appearing on behalf of the prisoner claimed that a majority of the jury should be Indians on the ground that the prisoner is an Indian British subject

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and based his claim upon the mandatory provisions of sec. 275 of the Code of Criminal Procedure. Mr. A. K. Basu appearing on behalf of the Crown opposed the application on the ground that the claim was not entertainable in view of the fact that it was not put forward before the Committing Magistrate. A similar application made on behalf of the prisoner at the commencement of the trial which has just now proved abortive was refused by me; but as on that occasion I did not give my reasons for the order that I then passed I have allowed the prisoner to raise the point again and have considered the matter further; but I do not find any reason to alter the opinion which I then formed.

At the outset I may say at once that I quite agree with the contention put forward by Mr. H. M. Bose that the High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure. Under sec. 6 of the Criminal Procedure Code, Courts of Session belong to a class of Courts different from the High Courts. Under sec. 9 the Local Government has powers to establish a Court of Session for every Sessions division as defined in sec. 7, sub-sec. (1); and under sub-sec. (2) of sec. 9 the Local Government may by general or special order in the official gazette direct at what place or places the Court of Session so established shall hold its sittings. The expression Court of Session wherever it is used in the Code of Criminal Procedure means a Court established as aforesaid. High Court has been defined in the Code of Criminal Procedure, sec. 4 (j), as meaning, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judi-

cature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon and the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sindh and in other cases as meaning the highest Court of Criminal appeal or revision in any local area, or where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in that behalf. In sec. 266 of the Criminal Procedure Code, it is provided that the expression High Court in Chap. XVIII and in Chap. XXII of the Code except in secs. 276 and 307 means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915 and includes the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sindh and the Chief Courts of Lower Burma and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of the said two chapters.

Where in the Code of Criminal Procedure the expression High Court is used it bears the one or the other of the aforesaid meanings. The Original Criminal Jurisdiction which the High Court of Judicature at Fort William in Bengal, established under the Indian High Courts Act, 1861, exercises, it does by virtue of cl. 22 of the Letters Patent of 28th December 1865. Sec. 267 of the Criminal Procedure Code provides that all trials under Chap. XXIII of the Code before a High Court shall be by a jury and it further provides that notwithstanding anything contained in the said Code, in all criminal cases transferred to a High Court under the Criminal Procedure Code or under the Letters Patent of any

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High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, the trial may if the High Court so directs be by jury. The time and place of holding sittings of the High Court for the exercise of its Original Criminal Jurisdiction are regulated according to the provisions of secs. 334 and 335 of the Criminal Procedure Code.

An examination of the provisions of the Code discloses that its scheme recognises and is based upon a distinction between the High Court and Courts of Session and the said distinction is maintained throughout. It is necessary for this purpose to refer only to such provisions as relate to the powers vested in the Courts of Session or High Courts for the exercise of their Original Criminal Jurisdiction, and the provisions dealing with the Appellate or Revisional powers need not be taken into account; secs. 29, 31, 193, 194 and 206, cls. (1) and (2), and more particularly the latter clause, secs. 217, 218, 226 and 227, the very heading of Chap. XXIII, and many of the sections to be found in that chapter and the special provisions mentioned in Part L of that chapter, as also secs. 339A, 347, 448, 449 and 469 and other sections which need not be specifically referred to show beyond doubt that the scheme of the Code is to regard the High Courts exercising Original Criminal Jurisdiction as being a Court of an entirely different class and character from that of a Court of Session, and the two expressions as used in the Code are not interchangeable. To that extent therefore I agree with Mr. Bose's contention.

* Mr. Bose has next contended that as this is so, sec. 528A or sec. 528B cannot possibly apply to a case which is inquired into by a Presidency Magistrate and

committed to the High Court. In support of this argument he has relied upon the expression Court of Session as used in sub-sec. (2) of sec. 528A and his contention is to the effect that as that sub-section clearly cannot apply to such a case and as sub-sec. (3) also cannot apply to the High Court inasmuch as no appeal lies from a sentence or order passed on such trial by the High Court, except of course in cases dealt with in sec. 449, sub-sec. (1) of sec. 528A will not also apply: and if that is so, it will follow that sec. 528B will also have no application. Once it is held that these two sections do not apply to such a case, it should be held that there is no other provision of the Code under which a claim need be put forward to be dealt with as an Indian British subject. Consequently there being no bar to the claim made under sec. 275 of the Criminal Procedure Code to be tried by a jury the majority of whom should be Indians, the claim must succeed.

I confess that at first sight, Mr. Bose's contention seems plausible. Some confusion arises from the grouping and numbering of the sections and from the fact that the relevant provisions are scattered over several, at least, three, chapters of the Code, I mean Chaps. XXIII, XXXIII and XLIVA, which again are to be found in different parts of the Code. The difficulty perhaps could not be avoided by reason of the piecemeal amendments that were made. On a close examination of the relevant provisions, however, I am convinced that Mr. Bose's argument though specious, is not sound. It is unnecessary to refer to the Code of 1898 for the amendments effected by Act XII of 1923 and Act XVIII of 1923 have been far too large and are based upon principles which were wholly foreign to the

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former Code. The avowed intention of the legislature in making the amendments was to secure equal rights for European British subjects and Indian British subjects, not forgetting the rights of Europeans who are not European British subjects and of Americans. How far this equality has been secured is not a matter for me to discuss. I propose only to examine the relevant provisions in order to decide the questions which arise, and the answers, in my opinion, emerge with sufficient clearness from such examination.

Chap. XXXIII deals with special provisions relating to cases in which European British subjects and Indian British subjects are concerned. By sec. 443 to which secs. 444 and 446 refer the provisions are applicable to a trial outside a Presidency Town. Sec. 447 enjoins on a Magistrate to forthwith inform the accused of his rights under this chapter whenever it may appear to him that the case is or might be held to be one which ought to be tried under the provisions of the chapter. Sec. 448 relates to references made in a trial in Rangoon and sec. 449 makes certain special provisions relating to appeals. The special procedure laid down in this chapter will be available to the accused if the trial is held outside a Presidency Town in respect of offences punishable with imprisonment, and if the condition mentioned in cl. (a) or cl. (b) of sec. 443 (1) is satisfied and a claim to be tried under the provisions of the chapter is put forward by the accused, either at his own instance or on being apprised of his rights by the Magistrate as aforesaid. If this claim is rejected by the Magistrate, the person making the claim may appeal to the Sessions Judge and the decision of the Sessions Judge thereupon shall be final

and shall not be questioned in any Court in appeal or revision. The stage at which this claim is to be preferred is specifically mentioned in sub-sec. (1) of sec. 443 where it is put forward by the accused on his own initiative, but there does not appear to be any restriction in this behalf in a case where the Magistrate informs him about it, which the law enjoins, the Magistrate shall forthwith do at any stage of the enquiry or trial at which the case appears to him of such a nature. This claim to be tried under the provisions of this chapter, it should be observed, is wholly different from a claim to be tried as a European British subject or an Indian British subject or a European not being a European British subject or an American. So far as the former claim is concerned the question of the status of the claimant does not always arise and it is not a *sine qua non* that one should establish that he is a European British subject or an Indian British subject, for under sec. 443 (1) (b) it would be enough if one can show the connection of his case with a case in which both a European British subject and an Indian British subject are parties.

The latter claim is dealt with in Chap. XLIVA of the Code. Sub-sec. (1) of sec. 528A of that chapter expressly takes cases, to which Chap. XXXIII applies, out of its scope. It provides that such a claim must be put forward by the claimant stating the grounds of such claim to the Magistrate before whom he is brought for the purpose of the enquiry or trial, and also lays down that such Magistrate shall hold an enquiry and decide whether the claimant has established his status and shall deal with him accordingly. There is nothing in the wording of this sub-section to show that it

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should not apply to enquiries or trials before Presidency Magistrates. Broadly stated, this sub-section is applicable to all cases before all Magistrates either in Presidency Towns or in the mofussil, to which the special provisions of Chap. XXXIII do not apply. Sub-sec. (2) contemplates such cases only in which the Magistrate commits the claimant to trial to the Court of Session after rejection of the claim, in which cases the claimant whose claim has been rejected by the Magistrate and who has thereafter been committed to the Court of Session may repeat his claim there, and the said Court shall after such further enquiry, if any, as it thinks fit, decide the claim and shall deal with such persons accordingly. Sub-sec. (3) applies to all Courts in which trials (not enquiries) are held of the claimant after rejection of his claim and it states that the decision on such claim shall form a ground of appeal from the sentence or order passed in such trial. Sec. 528B by its very terms relates to "any such case," which expression must mean any case to which sec. 528A (1) is applicable. There is no difficulty on this score, for the word "case" does not even occur in sub-sec. (2) or (3) of sec. 528A. It therefore applies to all cases to which the provisions of Chap. XXXIII do not apply, that is to say, to all cases before all Magistrates either in Presidency Towns or in the mofussil in which the special provisions of that chapter are not applicable. So far as committing Courts are concerned, if the claim is not made before that Court or if it is made and rejected by that Court and not repeated before the Court to which he is committed (and here it should be remarked that the law has made a provision for such repetition only before the Court of Session and not be-

fore the High Court in the exercise of its Original Criminal Jurisdiction on a commitment made to it), it shall be held that the claimant has relinquished his right and the claimant shall not assert his right in any subsequent stage of the case.

It must be remembered that the claim to be tried as an Indian British subject is again a different and distinct one from the claim to be tried by a majority of Indian jury as mentioned in sec. 275, though it can only be put forward by a person who has, in the language of that section, been found under the provisions of the Code to be an Indian British subject, and the section further requires that such a claim has to be expressly put forward before the first juror is called and accepted, before it can be listened to.

So far, therefore, we find three distinct kinds of claim dealt with in these chapters. *Firstly*, a claim to be dealt with according to the provisions of Chap. XXXIII; we shall not refer to it again, as the present case is not one to which that chapter has been applied or can be held to be applicable. *Secondly*, a claim to be dealt with as an Indian British subject to which sec. 528A and sec. 528B apply; and *thirdly*, a further claim to be tried by a majority of Indian jury such as is referred to in sec. 275.

From a consideration of the afore-mentioned provisions and leaving out of account cases to which Chap. XXXIII applies the following propositions amongst others may be deduced:—(a) An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of enquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mofussil. (b) If the Magistrate rejects the claim and tries him

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the decision shall form a ground of appeal from the sentence or order passed in such trial. This applies to Presidency Magistrates as well as Magistrates in the mofussil. (c) If the Magistrate rejects the claim and commits him to the Court of Session he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not the High Court exercising Original Criminal Jurisdiction. (d) If the Court of Session rejects the claim and tries him the decision shall form a ground of appeal from the sentence or order passed in such trial. (e) It necessarily follows that if a claim is made before a Presidency Magistrate and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in under sec. 275 before the High Court a further claim for being tried by a jury the majority of whom should be Indians. It may be asked, is the decision of a Presidency Magistrate thus final when the decision of a Magistrate in the mofussil is open to reversal on a reconsideration of the claim by a Court of Session when the same is repeated before that Court? The answer is that not only in this matter but in matters of sentences too, there is a wide difference between the powers of the two classes of Magistrates. No provision, however, has been made for curtailing the revisional powers of the High Court over such a decision of the Presidency Magistrate, such as is found in sec. 443, sub-sec. (2) with regard to a claim to be dealt with under the special procedure prescribed in Chap. XXXIII. (f) Where, as in the present case, no such claim was put forward before a Magistrate and there being no provision for repetition of the claim before the High Court, sec. 528B is a bar to the assertion

of the same in any subsequent stage of the case.

In my judgment, therefore, the prisoner is not entitled to claim to be tried by a jury the majority of whom should be Indians.

There remains a further question, viz., as to the stage at which the claim on the ground of status has to be put forward before a Committing Magistrate. The question has been raised by Mr. Bose but it really does not arise in the present case as in the present case no such claim was put forward before the Committing Magistrate at any stage. The law undoubtedly is not clear in this respect. Speaking for myself I am not prepared to read into the words of sec. 528A the provisions made in sec. 433 (1). From the wording of sub-sec. (1) of sec. 528A, it would appear that the privilege has to be claimed before the Magistrate before whom the accused is brought for the purpose of enquiry or trial, while sub-sec. (2) which evidently deals with such a claim put forward in a particular class of cases suggests that it may be made at any time and in fact makes provision for a repetition, and sec. 528B again speaks generally of the claim being put forward without mentioning any particular point of time or restricting the stage of such claim in any way. Acting on the principle of interpretation that in the case of a statutory enactment made for the benefit of an accused a construction favourable to him has always got to be accepted, I am disposed to take the view that the claim may be made at any time in a case of this nature, up till the time when the commitment is made. The committing Court becomes *functus officio* and loses all jurisdiction over the case after the commitment and special provisions have been made in secs. 216 to 219 to enable the

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Court to retain jurisdiction only in respect of some matters. Such a beneficial construction will not on the one hand strain the language so as to include cases plainly omitted from the natural meaning of the words, and will, on the other hand, give effect to the presumption that the legislature never intends what is inconvenient or unreasonable.

The Government Solicitor, Solicitor for the Crown.

Messrs. K. K. Dutt & Co., Solicitors for the Accused.

D. N. S. Application refused.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

1923,
Heard, 20, June.
1924,
Judgment, 10, July.]

LACHMI NARAIN
MARWARY and ors.,
Appellants,
v.
BALMAKUND MAR-
WARY and anr.,
Respondents.

Civil Procedure Code (Act V of 1908), Or. 17, r. 2—Or. 9, r. 8—Sec. 115—Suit if may be dismissed, after decree, for default—Partition suit, preliminary decree—Date fixed for proceeding with enquiries ordered in decree—Default by Plaintiff—Proper order to make in the case.

A preliminary decree in a partition suit ordered partition of certain properties in definite shares and certain other enquiries. The trial Court thereafter fixed a day for hearing the parties with reference to further proceedings, when the Defendants or some of them were represented though they took no steps, but neither the Plaintiff nor his pleader appeared. The Court thereupon dismissed the suit for want of further prosecution purporting to act under Or. 17, r. 2 read with Or. 9, r. 8 of the Civil Procedure Code.

* Held—That the order did not come

under Or. 17, r. 2 of the Code and was without jurisdiction. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal.

After decree, it is open to any party to a suit, to whose interest it is that further proceedings be taken to initiate the supplementary proceedings in order to have the decree enforced, though in the ordinary case it is the Plaintiff who moves.

The proper order for the Court in the circumstances was to make an order adjourning the proceedings sine die with liberty to the Plaintiff to restore the suit to the list on payment of all costs and court-fees (if any) thrown away.

The order was properly set aside by the High Court under sec. 115 of the Civil Procedure Code.

This was an appeal from a judgment and order, dated the 8th June 1920, of the High Court at Patna, which reversed an order, dated the 5th November 1919, of the Subordinate Judge of Ranchi.

The suit was instituted by the Plaintiff Balmakund to recover a one-third share of the properties specified in the plaint by partition.

At the instance of the Defendants their eldest brother Sheo Narain who professed to be separate was added as a party.

The Subordinate Judge decreed the suit and dismissed Sheo Narain from the proceedings.

On appeal a compromise was entered into on the terms that a partition should take place, Sheo Narain's share being brought into hotchpot. A consent decree was passed accordingly and the record was returned to the Subordinate Court which directed the parties to appear and take any further steps that were necessary on 5th November 1919.

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The Plaintiff failed to appear on that date and the Subordinate Judge passed an order that the suit be "dismissed for want of prosecution."

The Plaintiff's application for a review of that order was dismissed on the 4th February 1920. From the order of dismissal the Plaintiff appealed to the High Court treating the order as having been passed under Or. 17, r. 3 of the Code of Civil Procedure. The appeal was dismissed on the ground that no appeal lay as the order in question did not come under Or. 17, r. 3, but they allowed the appeal to be treated as an application for revision and ordered notices to be served on the Appellant on that footing.

The High Court subsequently heard the application and on the 8th June 1920 allowed it and set aside the order of the 5th November 1919.

In their judgment they stated that Or. 17, rr. 2 and 3 had no application to the circumstances of the case, and only applied to cases where the actual hearing of the suit had been adjourned; and not to a hearing as in the present case where only some interlocutory matter could have been decided as to the future conduct of the suit. They accordingly directed the case to be restored to the file of the Subordinate Judge for hearing.

From that order the Appellants appealed to His Majesty in Council.

Mr. E. B. Raikes for the Appellants contended that the High Court had no power to interfere with the decision of the Subordinate Judge unless the latter had acted *ultra vires* or with material irregularity. Those elements were absent in the present case, *Rajah Amir Hassan Khan v. Sheo Baksh Singh* (1).

Mr. B. Dubé for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This is a suit for partition brought in 1913 by the youngest of a family of brothers against two of his brothers and the children of a third brother.

The eldest brother of all was omitted from the suit because it was suggested that he was already separate in estate. The original Defendants, however, disputed this; and he was at their instance made a Defendant party.

At the hearing the Subordinate Judge took the view that he was separate and dismissed him from the suit.

Appeal was thereupon taken to the High Court at Patna, and ultimately the following consent decree was made:—

"It is agreed by all the parties that if the property which is now in possession of Shew Narayan Marwari is brought into the hotch-pot, they will accept a partition on any terms that the Court shall direct.

These appeals are accordingly dismissed in terms of the following Order:—

The whole property will be divided into four equal shares, of which the Plaintiff will get one. Shew Narayan Marwari, however, will be entitled to retain the property which is now in his possession on payment in cash of any amount by which his share will be found by the lower Court to exceed the value of one-fourth share of the whole property. In the event of the property now in possession of Shew Narayan being found to be less than the value of one-fourth share of the whole property, he will be entitled to receive an amount by which this property is found less than the value of one-fourth share

Each party will bear its own costs throughout.

Patna, 26th June, 1919."

The suit was thereupon remitted to the Subordinate Judge in order that the necessary steps for effecting the partition of the undivided property into fourths and that

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the valuation of the eldest brother's share might be taken.

After decree it is open to any party to a suit, to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings; but in the ordinary case it is the Plaintiff who moves.

The Subordinate Judge accordingly fixed a day for hearing the parties and gave them notice. But when the day came neither the Plaintiff nor his pleader appeared. The Defendants, or some of them, were represented, but took no steps; and the Judge, after waiting all day, made the following order:—

" 5.11.19. I have been waiting for Plaintiff and his pleaders till 4.20 p.m., but no one appeared on repeated calls. Defendant is present. The suit is dismissed for want of further prosecutions."

This was an unfortunate order.

It appears from a subsequent judgment delivered by the learned Judge that it was rather made *in terrorem*, and in the expectation that the Plaintiff after this sharp reminder would put himself in order by applying within the prescribed period of thirty days to have the order set aside, submitting to the necessary consequence of having to pay the costs thrown away by reason of his neglect.

The Plaintiff, however, was again dilatory, and his pleader does not seem to have been well-versed in the procedure, with the result that no such application was made in time, and recourse had to be had to the High Court; and even then the first application was irregular.

The High Court was, however, fortunately in the interests of business and of justice, able to mould the application into one for the exercise of its powers of revision under sec. 115 of the Code of Civil Procedure, 1908. Thereupon the High Court decided that the case came

both under para. (a) and under para. (c) of that section; and that the Subordinate Judge had exercised a jurisdiction not vested in him by law and had acted in the exercise of his jurisdiction with material irregularity; and they set aside the order of the Subordinate Judge and ordered the case to be restored to his file; but they made the Plaintiff pay the Defendants' costs.

It is from this order that the present appeal is brought by the Defendants other than the eldest brother.

Their Lordships must express their surprise that there should be any such appeal. The parties had agreed that there should be partition, and would naturally wish that the partition should be completed, and that any obstacle which the dilatoriness or neglect of one of them had interposed should be removed. It was nearly seven years since the suit had been begun. The erring brothers had been chastened and made to pay their costs; and it is difficult to discover that they had any grievance.

But as the matter has been presented to their Lordships, it must be decided. And their Lordships think that the decision of the High Court should be affirmed.

Their Lordships do not think it necessary to determine that the case came under para. (c) of sec. 115. But they think that the order which he made was one which he had not jurisdiction to make.

It was based, as he subsequently explained, upon Or. 17, r. 2. The Order is one headed: "Adjournments," and r. 2 is as follows:—

"Where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Or. IX or make such other Order as it thinks fit."

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R. 3 of Or. 9 enables the Court to dismiss the suit when neither party appears; and r. 8 of Or. 9 directs the Court, when the Defendant appears and the Plaintiff does not appear, to dismiss the suit, unless the Defendant admits the Plaintiff's claim or some part of it.

In the opinion of the Judges of the High Court, Or. 17, r. 2 did not apply, because in this case it was "never intended that there should be a hearing of the suit in the ordinary sense of the word, but merely some interlocutory matter decided between the parties as to the future conduct of the suit."

In their view the "hearing" mentioned in this rule only occurs when the Judge is taking the evidence or hearing arguments or otherwise coming to the final adjudication of the suit, with perhaps one extension to the occasion when issues are to be settled; and was not meant to extend to occasions when interlocutory orders were being sought.

Their Lordships do not think it necessary to determine whether the word "hearing" should or should not have this particular limitation; because they think that the decision can be supported on another ground. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can (as already stated) apply to have it enforced.

The Subordinate Judge seems to have felt this, for he observed:—

"This Court has no jurisdiction to nullify the consent decree passed by the Honourable High Court, and the object of dismissal was not to discharge or vacate appellate decree. The decree is certainly

in existence, but the Plaintiff is not entitled to further relief in the present litigation."

In the first part of these observations the learned Judge seems to be qualifying his order as useless. By the second part he puts the Plaintiff into an intolerable position, not able to go on with his suit, and yet not in a position to bring a fresh suit. Their Lordships are fully sensible of the necessity of leaving the Judges in India with ample power of discipline, and means to check neglect and delay. If, for instance, the Subordinate Judge had made an order adjourning the proceedings *sine die*, with liberty to the Plaintiff to restore the suit to the list on payment of all costs and court-fees (if any) thrown away, it would have been a perfectly proper order.

But, for the reasons which have been given, the case did not come under Or. 17, r. 2, and the order made was made without jurisdiction, and was rightly set aside by the High Court, and this appeal should be dismissed with costs.

Their Lordships will humbly recommend His Majesty accordingly.

Solicitors: *Messrs. Watkins & Hunter* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF
THE PUNJAB.]

LORD SHAW.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1923,

Heard, 16, November.

Judgment,

16, November.

KAJU MAL and
ors., Appellants,

v.

SALIG RAM,
Respondent.

Punjab Pre-emption Act (II Punj of 1905), sec. 3 (1)—Punjab Alienation of Land Act (XIII of 1900), sec. 2 (3)—Tea garden and factories, sale of—Lands, if pre-emptible.

Held (affirming the High Court)—*That a tea garden is agricultural land and pre-emptible as such within the meaning of sec. 3 of the Pre-emption Act (Punj. II of 1905) read with sec. 2 (3) of the Punjab Alienation of Land Act, 1900, but the factory buildings at which tea grown in the fields is prepared for the market are not lands occupied for purposes subservient to agriculture and pre-emptible under the Act.*

These were cross-appeals from a decree, dated the 30th January 1919, of the Chief Court of the Punjab, modifying a decree of the Subordinate Judge of Kangra, dated the 26th February 1915.

The suit was instituted by Salig Ram for possession by pre-emption of a portion of the Gopalpur Tea Estate. The Defendants contended, *inter alia*, that the property in suit was not liable to pre-emption, (1) because the Plaintiff had excluded from his claim the working machinery of the factory which must be regarded as a fixture, and (2) on the ground that a tea garden was not agricultural land.

The Subordinate Judge passed a decree ordering delivery of possession to the Plaintiff of the portion of the estate

claimed by him and also of the machinery, engines and fixtures not so claimed upon the Plaintiff depositing into Court the total sum of Rs. 75,000. He held that all the properties claimed by the Plaintiff were liable to pre-emption under secs. 3 and 12 of the Punjab Pre-emption Act (Act II of 1905), and he held that the fixtures in the factory buildings though not specifically claimed were omitted by inadvertence and should be included in the Plaintiff's claim. He also held that the question as to whether the Plaintiff was a *bonâ fide* pre-emptor or not was immaterial and he refused to admit evidence on the point.

On appeal that decree was modified by the Chief Court (La. Rossignol and Wilberforce, JJ.), who ordered delivery of possession to the Plaintiff of the portion of the estate decreed by the Subordinate Judge less the factory buildings and the forest of Ban Jia. They held that the factory buildings and forests were not pre-emptible but that the tea gardens were. From this judgment and the ensuing decree cross-appeals were brought to His Majesty in Council.

The following extract from the judgment of the Chief Court set out their findings and the reasons therefor:—

"We should deal first with the argument that the property in suit is not liable to pre-emption and in this connection it must be borne in mind that the law applicable to the case is not the present Pre-emption Act of 1913 but the Punjab Act, II of 1905, which was the law in force at the time of the sale to the vendee-Defendant. Prior to 1905 the law of pre-emption was contained in Act IV of 1872 and under that Act the right of pre-emption extended, if the property concerned lay within a village, to the village site, to the houses built upon the village site and all lands within the village boundary. In the Act of 1905, it

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was laid down that the right of pre-emption should mean the right to acquire agricultural land or village immoveable property in cases affecting sales in a village and definitions were given in the Act of the terms 'agricultural land' and 'village immoveable property.' Agricultural land was defined to be 'land' as defined in the Punjab Alienation of Land Act, 1900, whilst village immoveable property was defined as immoveable property within the limits of the village site other than agricultural land. Now, the definition of land in the Punjab Alienation of Land Act, 1900, is as follows:—'Land' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes the sites of buildings and other structures on such land.' The framers of the Act of 1905 appear to have been under the impression that the categories 'agricultural land' and 'village immoveable property' exhausted all possible forms of property in a village, i.e., that there could be in a village only village immoveable property and agricultural land, but they failed apparently to perceive that buildings erected outside the limits of a village site on land not occupied for agricultural purposes would not fall within either definition. Consequently on behalf of the Appellant it has been urged that the factory buildings are admittedly not within the village site. They are not erected on agricultural land or on land occupied for purposes subservient to agriculture or for pasture and therefore they are not liable to be pre-empted. For the Respondent-Plaintiff it has been argued that the meaning of 'village site' in the Pre-emption Act of 1905 is not the village *abadi* but the superficial area of the whole village

including its lands. In other words, the contention is that in sec. 3, sub-sec. (2) of the Punjab Pre-emption Act of 1905 the expression 'within the limits of village site' has been employed as synonymous with 'within the village boundary.' If that were true it would be strange that the legislature in 1905 should have used the term 'the village site' in a sense different from that in which it is used in the Act of 1872 which was at that time under revision and that they should have discarded the term 'village boundary' which already existed in the Punjab Laws Act of 1872 and was ready to their hands. The term 'village site' in the Punjab is a very well-known expression of frequent occurrence denoting that portion of the village area which is not used for agricultural purposes but on which the habitations of the villagers are placed. In the Punjab there are no homesteads as in European countries, but from time immemorial, no doubt for purposes of protection, villagers have congregated on one central spot within the village boundary and have there constructed a compact village generally of a rectangular or roughly circular shape, the doors of the houses of which rarely, if ever, open upon the outside wall. The legislature in 1905 in defining the property in a village which was pre-emptible may have made a mistake, but with the intention of the legislature we are not concerned. We have to administer the law as we find it and in the present case we hold that the factory whether it constitutes a *casus omissus* or whether such property was deliberately excepted from the operations of the Act is not liable to pre-emption as village immoveable property.

The next point is whether the land under the factory can be said to be employed for purposes subservient to agri-

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culture. Although fields planted with tea bushes are, we have no doubt, fields used for agricultural purposes, we cannot hold that a factory in which the produce of those fields is subjected to certain processes which fit it for human consumption and the markets of the world can be said to be subservient to agriculture. The building or land can be correctly said to be subservient to agriculture when it directly promotes agriculture, *e.g.*, a building in which agricultural cattle or agricultural implements or stores are sheltered is directly subservient to agriculture because the property it shelters is used in the actual operations of agriculture; but a tea factory merely deals with the product of agriculture and is no more subservient to the production of tea than a whisky distillery in Aberdeen is subservient to agriculture, say, in Canada which produces the barley from which the whisky is distilled. From this it follows that the factory we are now dealing with is not pre-emptible either as agricultural land or as village immoveable property. It is true that intermingled with the other factory buildings there must be some huts used by the labourers who actually work in the tea fields or garden: but the point has not been urged before us, nor is there anything on the record to indicate which of the buildings included in the suit are factory buildings proper and which are the buildings inhabited by the workers on the land, and we are unable to discriminate between the two categories.

Included in the area in suit is a stretch of natural forest land known as Ban Jia. That area also we hold to be exempt from pre-emption, for it does not lie within the village site and it is not agricultural land, nor land used for purposes subservient to agriculture or for pasture. It is forest land and the wood derived from it, it is

admitted before us, has been used by the factory for fuel and for the manufacture of tea chests, whilst a small portion of its area consists of a state quarry. With regard to the fields in suit in which tea is grown, it has been argued on behalf of the Appellants that they are not agricultural land inasmuch as tea is grown not in fields but in a garden, but we do not think that because in general parlance a tea plantation is generally spoken of as a tea garden, it is not therefore agricultural land. A tea garden is, strictly speaking, not a garden, for a garden is a plot of land devoted to the production of herbs, flowers, fruits and vegetables, and tea falls under none of these heads. The term 'agricultural land' is used in the Act of 1905 in its widest sense to denote all land which is tilled. Consequently if the Plaintiff is to succeed, from his decree we must excise the factory buildings and the land under them and also the Ban Jia forest."

Messrs. Dunne, K. C. and Hyam for the Appellant.—The land in suit is not agricultural land and therefore not liable to pre-emption. The claim by the pre-emptor must be for all that he is entitled to, pre-empt, otherwise no right of pre-emption arises.

Here the Plaintiff cannot claim to pre-empt as he has omitted any claim for the machinery which is a fixture and part of the property. Having severed a portion he loses his right to pre-empt.

Sir G. Lowndes, K. C. and Mr. W. Wallach for the Respondent were not called on.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—These are two appeals from a decree of the Chief Court of the Punjab.

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The suit is for possession by pre-emption of a portion of an estate known as the Gopalpur Tea Estate. The issue in the case, upon which argument was presented to the Board, is in the following terms: "Is the property in suit definable as agricultural land ' . . . within the meaning of sec. 3 of the Pre-emption Act? " The reference is to Act II of 1905 and particularly to sec. 3, sub-sec. (1).

Under that definition " agricultural land " is declared to mean " ' land ' as defined in the Punjab Alienation of Land Act, 1900."

The reference is to the Act Number XIII of 1900 and to sec. 2, sub-sec. (3) thereof. The relevant portions of the definition there given are as follows: " The expression ' land ' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture."

The issue was accordingly properly framed and the argument was confined, as stated, to the simple question whether this land, which extended to about fifteen or sixteen hundred acres, came within the definition of land which is agricultural land. Upon that subject both Courts have pronounced judgment clearly affirming that this tea garden in Punjab falls within the definition of " agricultural land." They have given sound and sensible reasons, if reasons were required, for the affirmation of that proposition: and this Board does not think it necessary to cover the ground any further, and merely contents itself with affirming in all particulars the decree appealed from.

Their Lordships will accordingly humbly advise His Majesty that the appeal fails.

There is a cross-appeal. That cross-appeal is partly covered, no doubt, by the judgment already delivered and it is suffi-

cient to say that their Lordships will humbly advise His Majesty that this cross-appeal should also be dismissed.

The parties will bear their own costs of these appeals.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellant Kaju Mal.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Respondent Salig Ram.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 1 of 1924.

CHATTERJEA, J.,

GREAVES, J.

PANTON, J.

1924,

Heard, 1 and

2, December.

Judgment,

2, December.

PROBHAT CHANDRA
BARMA, Assessee,
Appellant,

v.

THE KING-EMPEROR,
Respondent.

Income Tax Act (XI of 1922), sec 66 (2)— Judgment of High Court on reference under section, if appealable under sec 15 of the Letters Patent of the High Court.

The judgment of the High Court given on a reference under sec. 66 (2) of the Income Tax Act made by the Commissioner of Income Tax is not a judgment within the meaning of sec. 15 of the Letters Patent and is not appealable under the provisions of that section. Such a judgment is merely advisory and made by the Court in exercise of its consultative jurisdiction.

This was an appeal under sec. 15 of the Letters Patent preferred on the 4th February 1924 against the decision of Mr. Justice Rankin, differing in opinion from Mr. Justice Page, dated the 4th and 8th of January 1924, in Civil Reference No. 5 of 1923, under sec. 66 (2) of the Indian Income Tax Act (XI of 1922).

The facts of the case will appear from the judgment.

PROBHAT CHANDRA BARMA v. THE KING-EMPEROR.

Mr. H. D. Bose and Babu Mohini Mohan Chakravarti for the Appellant.

Babu Surendra Nath Guha and Moulvie Nuruddin Ahmed for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA, J.—This appeal is preferred under sec. 15 of the Letters Patent against a decision of Mr. Justice Rankin. There was a reference under sec. 66 (2) of the Indian Income Tax Act (Act XI of 1922) made by the Commissioner of Income Tax to the High Court. It was heard by a Bench consisting of Mr. Justice Rankin and Mr. Justice Page. The learned Judges differed in opinion and under sec. 36 of the Letters Patent the opinion of the senior Judge Mr. Justice Rankin prevailed. As against that judgment the present appeal has been preferred.

A preliminary objection has been raised on behalf of the Respondent that no appeal lies in this case under sec. 15 of the Letters Patent, and reliance has been placed upon the decision of the Judicial Committee in the case of *Tata Iron and Steel Co., Ltd. v. Chief Revenue Authority, Bombay* (1). The question in that case was whether an appeal lay to the Privy Council under cl. 39 of the Letters Patent of the Bombay High Court from a decision of the High Court upon a case stated and referred to the Court by the Chief Revenue Authority under sec. 51 of the Indian Income Tax, 1918, which corresponds to sec. 66 of the present Income Tax Act of 1922. Sec. 39 of the Letters Patent of the Bombay High Court (which is similar to the Letters Patent of the Calcutta High Court) provides for an appeal to His Majesty in Council from

a "final judgment, decree or order" of the High Court. Their Lordships in that case held that the judgment given by the High Court upon a case stated and referred to the Court under sec. 51 of Act VII of 1918 was not a "final judgment, decree or order" within the meaning of cl. 39 of the Letters Patent. The expression "final judgment" does not occur in cl. 15 of the Letters Patent. The word "judgment" only appears there. But so far as the present question is concerned there is no difference between a "final judgment" and a "judgment." The question is whether the word "judgment" is to be taken in the strict legal sense or as merely advisory. In the case quoted above their Lordships observed :—

"One must therefore ask oneself what is the nature and character of the acts which sec. 51 of the Income Tax Act authorises and empowers the High Court to do. It provides that if in the course of any assessment under this Act, or in any proceedings in connection therewith (save an immaterial exception) a question arises with reference to the interpretation of any provision of the Act or any rule thereunder, the Chief Revenue Authority may, either on his own motion or on reference from any officer of subordinate authority, draw up a statement of the case and refer it with his own opinion thereon to the High Court, and shall so refer any such question on the application of the assessee unless he be satisfied that the application is frivolous. The opinion of the Revenue Authority thus dominates and conditions the right of the assessee." Then it is pointed out that "sub-sec. (3) provides that on the hearing of this case the High Court shall decide the questions raised thereby, and shall deliver judgment thereon containing the grounds on which the decision is founded and shall

(1) L. R. 50 I. A. 212 : s. c. 28 C. W. N. 307 (1923).

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send to the Revenue Authority a copy of this judgment under the seal of the Court and the signature of the Registrar, and the Revenue Authority shall dispose of the case accordingly." Their Lordships further point out that "the amount of the tax-payer's liability is that definitely fixed but nothing more is done. The decision of the High Court does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal and proper sense. It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the Judges who heard the case, together with a statement of the grounds upon which those opinions are based." And finally their Lordships observe as follows:—"It would appear to their Lordships that having regard to the authorities cited, and for the reasons already stated, the decision, judgment or order made by the Court under sec. 51 of the Income Tax Act in this case, was merely advisory, and not in the proper and legal sense of the term final, and thus so far as these considerations are concerned that the appeal is incompetent." All these observations apply to the present case and the judgment given upon the case stated is merely advisory made by the Court in exercise of its consultative jurisdiction, and is not a judgment within the meaning of cl. 15 of the Letters Patent. That being so, we think there is no appeal under that section.

A question has been raised by the learned Counsel for the Appellant that the decision of Mr. Justice Rankin who was the senior Judge which was held to have prevailed was without jurisdiction. But that is a matter upon which both the learned Judges were agreed and this

Bench constituted to hear the appeal under sec. 15, cl. (3) of the Letters Patent is not competent to consider the question as to whether the decision of the Division Bench upon a matter upon which both the learned Judges were agreed is or is not right.

The appeal is accordingly dismissed on the preliminary point. We make no order as to costs of this appeal.

GREAVES, J.—I agree.

PANTON, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 596 OF 1922.

GREAVES, J. CHAKRAVARTI, J. 1924, 30, April.	LAL MAHAMMED SARKAR, Plaintiff, Appellant, v. HUSAIN MAHAMMAD SAHA and ors., Defendants, Respondents.
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Mahomedan Law—Pre-emption—Mowasibat (immediate assertion of the claim of pre-emption), observance of—Delay, if and when fatal.

In a suit for pre-emption by the pre-emptor (shafee) against the vendees and the vendors (the latter being Plaintiff's co-sharers) in which the parties were all governed by the Mahomedan law of pre-emption the final Court of fact found that the pre-emptor believed the information he received about the sale to be correct and that the information he received required no corroboration:

Held—That the suit was liable to dismissal in consequence of the very short delay which the pre-emptor made in his observance of the ceremony of talab-i-mowasibat (demand of purchase immediately on hearing of the sale), by running to the house of his co-sharer instead of performing it at once and imme-

LAL MAHAMMED SARKAR v. HUSAIN MAHAMMAD SAHA.

diately on the spot where he got the information about the sale, which he did not doubt nor disbelieve at all.

JADU LAL SAHU v. JANKI KOER (2) and LALJA PROSAD v. DEBI PROSAD (3) referred to. •

This was an appeal against the decree of J. Roxburgh, Esq., Additional District Judge of Zillah Dinajpore, dated the 21st of November 1921, reversing the decree of Babu Sasi Kumar Ghose, Munsif, 2nd Court at that place, dated the 21st of June 1920.

The facts and arguments will appear from the judgment.

Babu Atul Chandra Gupta for the Appellant.

Babu Gopendra Nath Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This is a second appeal by the Plaintiff and, so far as the present appeal is concerned, is limited to a question as to whether the Plaintiff was entitled to recover the land in suit on the basis of a right of pre-emption. The parties are both Mahomedans and according to the Mahomedan law, the law of pre-emption is binding between them. The Plaintiff's case so far as this question was concerned was that he and Defendants Nos. 3 and 4 were co-sharers of certain *jote* of 24 bighas in equal shares and that the Plaintiff sought to purchase the 8 as. share of Defendants Nos. 3 and 4 but before the negotiations between himself and the Defendants were concluded Defendants Nos. 3 and 4 sold the 8 annas share of the *jote* belonging to themselves to Defendants Nos. 1 and 2 by a conveyance and that the Plaintiff on hearing of

that sale from one Abdulla Kaviraj, his brother-in-law, performed the necessary formalities of the Mahomedan law and he now brings the suit to get possession of the land by enforcing his legal right of pre-emption against Defendants Nos. 3 and 4 and their vendees Defendants Nos. 1 and 2. The learned Munsif who originally tried the suit believed that the Plaintiff had performed the necessary formalities and preliminaries necessary for enforcing the right of pre-emption under the Mahomedan law and therefore he gave a decree to the Plaintiff. There was an appeal against the decree by the Defendants to the District Judge who reversed the judgment and decree of the first Court and dismissed the Plaintiff's suit mainly on the ground that one of the formalities required by the Mahomedan law was not properly performed. The learned vakil who appears for the Appellant contended on the authority of the case of *Amjud Hossein v. Khurug Sim* (1) that the learned District Judge was not right in the view that he took upon the facts found by him that the formality which is technically called *talab-i-mowasibat* was not properly performed. The Mahomedan law upon this point as the learned Judge points out is laid down in the case of *Jadu Lal Sahu v. Janki Koer* (2) and in the case of *Lalja Prosad v. Debi Prosad* (3) which was approved in the Calcutta case just cited. It seems that the Mahomedan law requires that on the receipt of an information as to the sale the Plaintiff must perform the ceremony of *talab-i-mowasibat* immediately without any loss of time. It has been pointed out by the learned District Judge and correctly that the Mahomedan law upon this point

(2) I. L. R. 35 Cal. 575 (1908).

(3) I. L. R. 3 All. 236 (1880).

(1) 13 W. R. 299 (1870).

(2) I. L. R. 35 Cal. 575 (1908).

(3) I. L. R. 3 All. 236 (1880).

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is very strict. It may appear to be somewhat unreasonable to our mind that the short delay which occurred in the present case should be inexcusable but the law is clear and must be followed. The law has gone so far, in refusing to condone any delay, as to hold that, if a person on receipt of an information of a sale conveyed in a letter instead of performing the necessary formalities required by the Mahomedan law at once, delays to do so until he has finished the perusal of the letter the right is lost. The question therefore turns upon this fact, namely, whether the information which was received by the Plaintiff was one which he believed to be correct and then whether he delayed in making the demand. It is not denied that if a Plaintiff in a suit for pre-emption receives an information as to the sale which he doubts or has reason to doubt, any delay that takes place before he gets an authentic information would be no delay within the meaning of the law. The question which arises in this case is whether the information which the Plaintiff received as to the sale by Defendants Nos. 3 and 4 to Defendants Nos. 1 and 2 was true information or was such an information as required corroboration by a further enquiry. It is true in the present case that the Plaintiff's conduct shows that on receipt of the information he went to the vendors who lived close by for either definite information or for confirmation of the information which he had received. The learned District Judge has taken that fact into consideration and after quoting the law as laid down in the case of *Jadu Lal Sahu v. Janki Koer* (2) and bearing in mind the real question in the case the learned Judge says as follows: "It is not possible to credit that the Plaintiff did not believe

that the sale had taken place when he was told by Abdulla Kaviraj. His statement that he asked Defendant No. 3 for confirmation is not supported by any other testimony." Whether the learned Judge's finding is justified on the evidence or not is a matter which is beyond our jurisdiction to decide. There is no doubt that after considering all the real questions that arose in the case he came to this clear finding, the result of which is that he believed that although the Plaintiff had received the definite and reliable information as to the sale there was a delay before he complied with the necessary formality of *talab-i-mowasibat*. Consequently it is not disputed by the learned vakil for the Appellant that on this finding the Plaintiff's claim for pre-emption will become untenable on account of the omission of this formality. The case cited, *Amjud Hossein v. Khurug Sim* (1) does not help us in this case because the question that arises here is as to the effect of the finding of the learned District Judge and what that finding is. We have already indicated that that finding is one which destroyed the efficacy, on the ground of delay, of the ceremony of *talab-i-mowasibat*.

The result is that we confirm the decree of the learned District Judge and dismiss this appeal with costs.

GREAVES, J.—I agree.

H. D. C.

(1) 18 W. R. 299 (1870).

[CIVIL REVISIONAL JURISDICTION.]

ORDER No. 1091 of 1924.

SUHRAWARDY, J.

CUMING, J.

1924,

Heard,

18, December.

Judgment,

22, December.

THE MOHINI MILLS,

Ld., Petitioner,

v.

SUSOMA DEBI and ors.,

Opposite Party.

Companies Act (VII of 1913), sec. 12—Application for alteration of Memorandum of Association, if lies in the Appellate Side of the High Court.

An application under sec. 12 of the Companies Act for the alteration of the Memorandum of Association of a Company must be made in the Original Side of the High Court.

This was an application under sec. 12 of the Indian Companies Act (VII of 1913) by the Mohini Mills, Ld., for alteration of the Articles of Association.

The facts of the case will appear from the judgment.

Babu Ambicapada Chowdhury for the Petitioner.

Mr. Langford James for the Incorporated Law Society.

Dr. Dwarka Nath Mitter and *Babu Dinesh Ch. Roy* for the Vakils' Association.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This is an application under sec. 12 of the Companies Act (Act VII of 1913) on behalf of the Mohini Mills, Ltd., to alter the Memorandum of Association of the Company. On the application being called on for hearing, Mr. Langford James on behalf of the Incorporated Law Society raised a preliminary objection that the application should have been made on the Original Side of this Court.

Mr. James's contention is as follows :—

Sec. 3 (1) of the Act provides that the

Court having jurisdiction under this Act is the High Court having jurisdiction in the place at which the registered office of the Company is. The High Court is the Court which has jurisdiction all over Bengal within which Province, Kustea, the place where the registered office of the Company is, is. Mr. James contends that the expression High Court means the Court as a whole and that the particular Department of the Court which deals with such matters is the Original Side. Hence the application should have been made to a Judge on the Original Side. Dr. Mitter on behalf of the Vakils' Association contends that Kustea is outside the Original Jurisdiction of the High Court and that the Appellate Side of the Court alone has jurisdiction over the District in which the town of Kustea is situated. I am of opinion that the view taken by Mr. James is correct. An examination of the Act will show that in certain matters an appeal is allowed on a question of law. See sec. 38 (3) and sec. 202 of the Act. If Dr. Mitter's contention was correct, in the case of Companies in the Mofussil a first appeal would lie to the Privy Council while so far as Companies within the Original Jurisdiction of this Court are concerned the appeal would lie to a Bench of this Court.

Dr. Mitter would try to meet this argument by contending that possibly matters in which an appeal lay would be dealt with by a Judge on the Original Side even though they came from the Mofussil whilst matters in which no appeal lay would be dealt with by the Appellate Side.

The inconvenience of such a course is obvious.

A Court may be divided into three classes :

- (1) Of Original Jurisdiction.
- (2) Of Appellate Jurisdiction.
- (3) Of Revisional Jurisdiction.

Every matter must be dealt with in the

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first instance by a Court of Original Jurisdiction until it has been so dealt with, an Appellate Court can have no jurisdiction. This application which is an original matter cannot be dealt with therefore by the Appeal Court.

Reference in this connection may be made to r. 2 of the Rules of the High Court under the Indian Companies Act which provides that all applications under the Act are to be made to the Judge in Chambers in the Original Side and to r. 3 which makes the rules and practice and procedure of the Original Side applicable to all proceedings under the Act.

Our attention has been drawn to the case of *Birendra Kishore Manikya v. Secretary of State for India* (1). This was a reference under sec. 51 of the Income Tax Act. That matter was heard by a Bench of this Court and it was held that when a Court hears such a reference it really performs the function of a Court of Appeal. That case is different from the present one because in that case there had already been a decision and the Court dealt with the decision on a reference made to it. The Court then in that matter acted in its Appellate Jurisdiction. But in the present case there has been no decision. The matter is therefore an original one and could not be dealt with by an Appellate Court. It therefore cannot be dealt with by the Bench which deals only with appeals or revisional matters.

No doubt the Original Side of this Court has ordinarily no jurisdiction to deal with matters outside the limit of the town of Calcutta. In the present case the jurisdiction is conferred by the Statute itself.

The present application to this Court is incompetent and must be returned to be presented to the proper Court.

(1) I. L. R. 48 Cal. 766: s. c. 25 C. W. N. 80 (1920).

SUHRWARDY, J.—I agree.

S. C. M.

(CIVIL REVISIONAL JURISDICTION.)

RULE No. 1465 OF 1924.

SUHRWARDY, J.	}	THE JAGADISHPORE
CUMING, J.		TEA Co., LD.,
1924,		Petitioner,
Heard,		v.
2, February.		MESSRS. McLEOD & Co.
Judgment,		and ors., Opposite
3, February.		Party.

Indian Companies Act (VII of 1913)—Application under Act relating to Companies doing business in the mofussil to be made in the Original Side of the High Court.

Applications under the Indian Companies Act relating to Companies doing business in the mofussil are to be made in the Original Side of the High Court.

This was a Rule granted on the 17th December 1924, to show cause why the Memorandum and Articles of Association should not be amended as prayed.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and Babu Ramani Mohan Chatterjee for the Petitioner.

Babu Surendra Nath Guha and M. Nuruddin Ahmed for the Joint Stock Company.

The JUDGMENT OF THE COURT was as follows:—

SUHRWARDY, J.—This case raises the same question which came up before us for consideration in Order No. 1091 of 1924.* There we held that applications under the Indian Companies Act relating to Companies doing business in the mofussil should be made in the Original Side of this Court. After we had pronounced our judgment this matter came

* Reported 29 C. W. N., p. 403.

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up before another Bench of this Court which issued notices to the Incorporated Law Society and the Vakils' Association probably with the view that the question should be re-argued. This case has come up before us for hearing and the Incorporated Law Society and the Vakils' Association are represented before us. Since on the previous occasion we fully heard the argument on behalf of the Incorporated Law Society and the Vakils' Association we do not think that we should allow them to argue the point over again. But as the Petitioner has expressed a desire to have the questions re-argued we have allowed Dr. Basak to place before us further materials so that he might induce us to change our view. We have heard Dr. Basak fully and I have given my best considerations to the matter, but I am unable to change the view that I formed on the previous occasion. On the previous occasion Dr. Mitter appearing on behalf of the Vakils' Association made submissions which we considered in our judgment delivered in that case. Dr. Basak has supplemented the arguments advanced by Dr. Mitter on the former occasion.

The first point raised by Dr. Basak is that the alteration in the law as enacted in the Indian Companies Act, VI of 1882, by the present Act of 1913 indicates the change of mind of the legislature and invests the High Court in its Appellate Jurisdiction with power to deal with matters relating to Companies working in the mofussil. By sec. 3 of the Act of 1882 the word "Court" was defined as follows:—"Court means the principal Civil Court of Original Jurisdiction in a district, and includes the High Court in the exercise of its Ordinary Original Civil Jurisdiction." In the present Indian Companies Act, VII of 1913, this definition has been omitted and "Court" is thus

defined in sec. 2. "The Court" means the Court having jurisdiction under this "Act," and in sec. 3 it is said that the Court having jurisdiction under this Act shall be "the High Court having jurisdiction in the place at which the registered office of the Company is situate." Dr. Basak argues from this alteration in the definition of the word "Court" that though under the Act of 1882 the High Court in its Original Jurisdiction was vested with power to deal with matters relating to all Companies the change in the definition in the present Act has empowered the Appellate Side of the High Court to deal with these matters; and that by the words "the High Court" in sec. 3 of Act VII of 1913 the High Court in its Appellate Jurisdiction is meant. I do not think that this interpretation of the law is correct. According to Dr. Basak's reading of the law, this Court in its Appellate Side should have jurisdiction also over Companies carrying on business in Calcutta and not in its Original Side, a position hardly tenable. If the alteration in the law gives any indication of the intention of the legislature it does in my opinion support the contrary view. It is conceded that before the Act of 1913 all matters relating to Companies whether situated in the Presidency Towns or outside them were dealt with by the High Court in its Original Jurisdiction. Now it may be interesting to find out why this alteration in the law has been made in the Act of 1913. To my mind the alteration was made in order to include within the definition of the word "Court" such Courts of highest Civil Jurisdiction in a province which are not High Courts and such High Courts which have no Original Civil Jurisdiction. It was not intended by the legislature to take away the jurisdiction of the Original Side of the High

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Court and to vest it in the Appellate Side. The alteration in the law therefore does not support the contention of the learned Advocate.

It is next argued that the jurisdiction of the Original Side of the High Court is circumscribed by the provisions of the Letters Patent and it cannot be extended. Cl. 11 of the Letters Patent and sec. 109 of the Government of India Act vest the Governor-General in Council with wide powers to extend the limit of the Ordinary Original Civil Jurisdiction of the High Court. The Act of 1913, as the Act of 1882, may be taken to be a legislative enactment by which the Original Civil Jurisdiction of the High Court has been extended to embrace questions relating to Companies situated outside the Presidency Towns. For the view that we held on the last occasion and to which I still adhere, we relied on the meaning of the word "High Court" in the Act of 1913. By the word "High Court" is meant the High Court as a whole including its Appellate and Original Jurisdiction. There is no justification for the view that "High Court" means only the High Court in its Appellate Jurisdiction. If that were the intention of the legislature in altering the definition of the term "Court," it should have expressed clearly that the Court dealing with Companies is the High Court in its Appellate Jurisdiction. I do not wish to repeat the arguments which we adopted on the previous occasion; but it is clear that the expression "High Court" in the Act of 1913 is intended to include all the Sides of the High Court and is as equally applicable to High Courts having Original Civil Jurisdiction as to High Courts which have no Original Side.

Our attention was next drawn to sec. 165 of the present Indian Companies Act. It is argued that under this section matters

relating to winding-up may be transferred by the High Court to the District Court and the High Court may transfer any such matter from one District Court to another District Court. It is contended that these powers can only be exercised by the High Court in its Appellate Side as the Original Side has no jurisdiction over District Courts. In the view that I take, namely, that High Court includes both Sides of the Court, this argument fails. If the High Court as a whole has been invested with powers under the Act, including powers under secs. 164 and 165, they do not bar the Judge sitting in the Original Side exercising the powers under these sections.

As one of the grounds for holding on the last occasion that these matters should be dealt with by the Original Side we referred to sec. 2 of the rules framed by this Court which lays down that all applications relating to Companies should be presented to the High Court in its Original Side. Dr. Basak contends that the rule-making power is given to the High Court under sec. 246 of the Indian Companies Act of 1913 and it deals only with cases of winding-up of Companies, reduction of capital and subdivision of shares of a Company. That r. 2 of the Rules of this Court must therefore be taken to apply to those cases though it is expressed in general terms. But the learned Advocate is not content with this argument and he further contends that that Rule even if so limited is *ultra vires* of this Court as under the Indian Companies Act 1913 it is the High Court in its Appellate Side alone which has jurisdiction to deal with all matters relating to Companies and therefore r. 2, which makes such matters cognizable by the Original Side of the Court must be taken to be *ultra vires*. In the view that I have already expressed, namely, that the expression "High Court" as used in the

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Indian Companies Act is the High Court as a whole including the Appellate and Original Sides, no further argument is necessary on this point.

I may mention that in the present case the application relates to two points—reduction of capital and enlargement of the local area of the operation of the Company. Under the rules framed by this Court under sec. 246 the question relating to reduction of capital must be tried in the Original Side of this Court. If we are to hold that the other question, namely, the enlarging the field of operation of the Company is to be tried only by the Appellate Side it would create an undesirable anomaly.

In our previous judgment we have already shown the conveniences and inconveniences arising from the Appellate Side taking up these matters. I do not wish to express any opinion as to the proper interpretation of the Act with reference to High Courts which have no Original Jurisdiction. In their case, the situation is met by a single Judge dealing with matters relating to Companies, rendering his orders appealable under the Letters Patent. But we are concerned with our High Court which has both the Appellate and Original Jurisdiction and I think that this Court has the power to rule that matters relating to Companies, though carrying on business outside Calcutta, should be within the Original Jurisdiction of this Court. I am not to be understood to lay down (for it is beyond my present purposes) that the Appellate Side of this Court can have no jurisdiction in the matter.

On the above consideration I hold that this application should have been presented in the Original Side of this Court and in this view this Rule should be discharged. Liberty is reserved to the Petitioner to renew his application in the proper Court.

We think that the Registrar of Joint Stock Companies who has appeared before us in this proceeding is entitled to his costs which we assess at two gold mohurs.

CUMING, J.—This question of jurisdiction was fully argued before us in the former application heard by myself and my learned brother and I see no reason whatever to alter the opinion that I then expressed. On that occasion the matter was argued by the Incorporated Law Society on one side and the Vakils' Association on the other; and when this matter was called on for hearing we expressed an opinion that we were not prepared to hear these parties on the present occasion. On this the Advocate for the Petitioner stated that he wished to argue this question of jurisdiction before us. Why the Petitioner should raise the question of jurisdiction is not easy to understand. As far as can be seen, it must be a matter of indifference to the Petitioner whether this matter is heard on the Original Side of this Court or on its Appellate Side. In fact a little consideration will show that it is obviously to the Petitioner's advantage that the matter should be heard not in the Appellate Side where the first appeal would lie to the Privy Council but on the Original Side where, if dissatisfied with the decision, he would have a first appeal to a Bench of this Court; and the impression that the argument of the learned Advocate left on my mind, rightly or wrongly, is that the Petitioner is arguing not on his own behalf but on behalf of the Vakils' Association. If my impression is correct I can only say that it is a procedure that does not commend itself to me.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 581 OF 1924.

NEWBOULD, J.	}	KEDAR NATH CHAKRA-
MUKERJI, J.		VARTI and ors.,
1924,		Petitioners,
Heard, 10 and		v,
11, December.		THE KING-EMPEROR,
Judgment,		Opposite Party.
17, December.		

Criminal Procedure Code (Act V of 1898), secs. 221, 225—Necessity of charge being sufficiently explicit to give notice of accusation to accused—Indian Penal Code (Act XLV of 1860), sec 420—Cheating—Manner of cheating vaguely set out in charge—Material defect.

Where in a charge of cheating the manner of the cheating was set out to be "by deceiving with false representations and promises as well as by conduct":

Held—That the expression used was too vague and indefinite to give the accused proper notice of the manner of the cheating and was so dangerously wide as might include almost anything.

An accused person is entitled to know with certainty and accuracy the exact value of the accusation brought against him. The omission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice.

This was a Rule granted on the 15th July 1924 against an order of the Deputy Magistrate of Jamalpur (D. N. Saha, Esq.), dated the 29th October 1923, convicting the Petitioners of an offence under secs. 420/120B, I. P. C. and sentencing them to imprisonment and fine. an appeal from the said order having been dismissed by the Sessions Judge of Mymensingh (K. N. Chaudhuri, Esq.), on the 20th May 1924.

The Rule was issued on the following amongst other grounds :—

Ground No. 8.

That the learned Judge should have held the charges to be bad in law in that they failed to give the Petitioners sufficient particulars or proper intimation regarding the nature of the accusation preferred against them.

No. 9. That the findings arrived at by the learned Sessions Judge are not sufficient to justify the convictions of the Petitioners.

No. 10. That the learned Judge has failed to appreciate the nature and meaning of the offence constituted by sec. 420, I. P. C.

Mr. B. C. Chatterjee, Counsel, and Babu Probodh Chandra Chatterji, Vakil, for the Petitioners.

Mr. S. R. Das, Advocate-General, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This Rule has been issued to show cause why the convictions of the Petitioners and the sentences passed on them should not be set aside on three of the grounds stated in the petition, namely, grounds Nos. 8, 9 and 10.

The Petitioners who are four in number were tried with three other persons—of whom two were acquitted and one was convicted and has since died—on a charge under secs. 420/120B, I. P. C., and the first Petitioner was also tried on a charge under sec. 420, I. P. C., and the Petitioners were all convicted on those charges.

The first of the grounds relates to the sufficiency of the charges. The Judicial Committee in the case of *Subramaniya Ayyar v. King-Emperor* (1) observed that "the necessity of a system of written accusation specifying a definite crimi-

(1) I. L. R. 25 Mad. 61 : s. c. 5 O. W. N. 806 (P. C.) (1901).

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nal offence is of the essence of criminal procedure." An accused person is entitled to know with certainty and accuracy the exact value of the accusation brought against him. This cardinal principle runs through the provisions contained in secs. 221 to 223, Cr. P. C. In a case of cheating the charge must set out the manner in which the offence was committed [sec. 223 (iii) (b), Cr. P. C.], whether the orders of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet depends upon the circumstances of each particular case. The omission to state the manner of the cheating is regarded as material or not accordingly as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice [sec. 225 (iii) (b) and (c), Cr. P. C.].

In the charges framed in the present case the manner of the cheating was set out as follows:—"By deceiving with false representations and promises as well as by conduct." The expression used is too vague and indefinite to give the accused proper notice of the manner of the deceit and is so dangerously wide as might include almost anything. The learned Advocate-General, towards the conclusion of his arguments, felt the force of this contention and with his usual candour conceded that upon the particular facts of the case, a conviction based on such charges cannot be supported. He, however, pressed us strongly to order a retrial.

In view of the fact that the convictions must be set aside for the aforesaid reason, it is not necessary to discuss the other two grounds of the Rule which relate to the sufficiency of the findings. The findings, however, have got to be taken

into consideration in order to decide whether a retrial should be ordered. I have examined those findings and have also perused the records with some degree of care. It appears that of the witnesses examined in the case no two witnesses agree as to what the misrepresentation was that acted on their minds and in consequence of which they made the payments. What has been found may be summed up thus: That it was represented that the Petitioner No. 1 was the President of the Sanatan Hindu Sanity and the Petitioner No. 2 was its Secretary, that they had been deputed to take up the cause of the Hodis and were prepared to honestly aid the communal consciousness of the Hodi Community and assist them to ameliorate their social status, that they would invest them with sacred thread on the footing of their being Kshatriyas, that such investitures would be performed by five Brahmins brought from different parts of India, and when so invested the Hodis would become "touchables." Money was realised, much in excess of what was originally agreed upon, for writing a book called "Jatitwa." Scripts of "Bansa Parichay" were given containing the supposed "Gotra," "Prabar" and "Kaulik Upadhi" of the Hodis on receipt of fees. Notices were issued and manifestos circulated with high-sounding appellations attached to the signatories, and hyperbolic epithets were used extolling the virtue of the Petitioner No. 1 to which he could claim no pretensions and which had the effect of creating an impression in the minds of the Hodis that he was a great man capable of raising the Hodis higher in status and ready to do so out of purely philanthropic motives. The costs that were realised for the performance of the sacred thread ceremonies

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were much in excess of what were really necessary and the arrangements that were made were imperfect and ridiculously inadequate. In some cases receipts were given for amounts less than what were actually realised, the balance being pretended to be deducted for "pronami" or other charges. The nett result of the findings is to hold that the promise that was made by the Petitioners was not altogether disinterested, that the Petitioners made a living out of the affair, that the Sanatan Hindu Samity had no recognised social status consisting as it did of the Petitioners Nos. 1 and 2 and some others who are mainly Hodis, that the main object of the Petitioners was to take advantage of the credulity of the Hodis and make them believe that it was possible to make them touchables and thus to enrich themselves, that if the Petitioners had succeeded in carrying out their object they would have amassed a considerable fortune, and that the Petitioners never intended to keep their promise or to keep it to the extent promised.

As against the above we have the fact that the idea of being made touchables on investiture of the sacred thread as Kshatriyas did not originate with the Petitioners. The Hodis themselves believe that they are entitled to be classed as such and for years past they have themselves been agitating for this reform and have petitioned the authorities for the purpose, and that the first step in this direction is to wear the sacred thread as Kshatriyas for which the Petitioners had made arrangements though not necessarily on a scale which might have satisfied the Hodis. We have also the fact that the arrangements made by the Petitioners were interfered with: and the fact that there was opposition does not necessarily

indicate that the Petitioners would not have carried out what they had promised.

The learned Sessions Judge felt the difficulty that underlies the case and he found it necessary to come to a finding on the question* as to whether the Hodis can legitimately claim to be Kshatriyas. In my opinion, upon the facts of the case as presented on behalf of the Crown it is absolutely necessary to come to a finding in the negative on this question before the Petitioners can be held to be guilty. It is not within our purview to arrive at a finding on this question.

Leaving out of account the finding last mentioned, and accepting as correct the other findings arrived at by the learned Sessions Judge the case is one of swindling and perhaps swindling on a large scale. Swindling, however, does not necessarily amount to an offence of cheating within the meaning of the Indian Penal Code. For this reason, as also for the reasons that it will not be right to allow the prosecution to shape its case afresh after the whole matter has been thrashed out and the defects brought to light, in the course of proceedings extending over well nigh two years, I do not think it proper or necessary to order a retrial.

The Rule, in my opinion, should be made absolute and the convictions of and the sentences passed on the Petitioners set aside and they should be discharged from their bail. The fines, if paid, will be refunded.

NEWBOULD, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1028 of 1924.

NEWBOULD, J.
MUKERJI, J.
1924,
5, December.

ASHUTOSE ROY and ors.,
1st party, Petitioners,
v.
HARISH CHANDRA
CHAITOPADHYA and ors.,
2nd party, Opposite
Party.

Criminal Procedure Code (Act V of 1898), sec. 144, cls. (3) and (6)—Rival hâts—Injunction—Order under sec 144, extension of, by Magistrate beyond 2 months, if legal—Form of order—Order directing the public in general to abstain from attending a hât, if bad.

Where an injunction was issued by a Sub-Divisional Magistrate on the 22nd September 1924 against a number of persons of the 2nd party enjoining them from holding or attending a hât on certain days on which another hât was held, and on the 20th November 1924 the injunction was made absolute; and on the same date on the basis of a fresh Police report the order was also directed against the public generally, whereby a fresh injunction was issued on the public generally on the same terms:

Held—That the order of the 20th November 1924 which virtually extended the period of two months so far as the 2nd party were concerned was bad. To draw up the same order merely adding to the parties affected is an attempt to evade the provisions of cl. (6) of sec. 144, Cr. P. C.:

Held, further—That the order in so far as it directed the public in general to abstain from attending the hât was bad since it was not until the public attended the hât that the order could be binding on them.

This was a Rule granted on the 24th November 1924 against an order of the Sub-Divisional Magistrate of Satkhira

(S. C. Upadhyas, Esq.), dated the 21st November 1924.

The case arose out of a serious dispute between two hâts, namely, Hingulganj hât and Basantapur hât, situated on opposite sides of the same river and about 500 ft. off from each other. The proprietors of the Hingulganj hât are the Satkhira Zamindars and those of the Basantapur hât are Sm. Golap Sundari Debi and another of Calcutta. Both parties are influential and have people at their back. The Hingulganj hât was a source of considerable income to the Satkhira Zemindars and the proprietors of Basantapur were expecting that their hât at Basantapur would be a source of considerable income to them if they could succeed in establishing it.

It would appear that a report was submitted by the Kaliganj Police on 18th September 1924 mentioning that "an imminent apprehension of a serious breach of the peace" between the men of the two rival hâts, was likely and praying for an immediate action. Injunction was accordingly issued on the men of Basantapur hât which was within the local limits of the Magistrate's jurisdiction directing them to abstain from holding or allowing the hât at or near Basantapur on Sundays and Thursdays, the dates on which Hingulganj hât was held.

The following portion of the order of the Sub-Divisional Magistrate, dated the 20th November 1924, is material.

"Thus I find that the likelihood of breach of the peace was imminent and the injunction was properly issued and I did not act without jurisdiction. From all these findings I come to the conclusion that the injunction already issued must be made absolute and that it must also be directed against the public generally."

The other facts will appear from the judgment of the High Court.

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Mr. Khoda Buksh and Babu Satindra Nath Mukerji for the Petitioners.

Mr. Narendra Kumar Bose and Babu Pashupati Ghosh for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against an order passed by the Sub-Divisional Magistrate of Satkhira under the provision of sec. 144, Cr. P. C. It appears that there is a dispute existing between the first and the second parties in respect of two rival *hâts*. The Magistrate has found that the first party are the proprietors of the older *hât* the Hingulganj *hât* and that the second party's *hât* at Basantapur has been recently opened, and he further held that this dispute is likely to cause a breach of the peace. On these findings he issued an injunction on the 22nd September 1924 against 13 persons of the second party directing them to abstain from holding or attending the *hât* at or near Basantapur, on Sundays and Thursdays and not to do any unlawful acts by taking dealers' boats to Basantapur *hât* by force or by committing violence to the people so as to dissuade them from attending Hingulganj *hât* and not to commit any breach of the peace or disturb the public tranquillity. On the 28th October the Police submitted further reports and on the basis of one of these a fresh injunction under sec. 144, Cr. P. C., was drawn up. This is the order against which the present Rule is directed. Although the Magistrate was called on to submit the record of this case the record which has been submitted does not contain the order of the 21st November. A copy of this order has been supplied to us from the Bar and it is in the following terms :—“Whereas I am satisfied from the report of the Sub-Inspector of Kaliganj, dated the 23rd October 1924,

and from the evidence adduced before me by both sides that a rival *hât* is being held at Basantapur, Police Station Kaliganj, within the local limits of my jurisdiction at a distance of about 500' ft. from the old and long established *hât* at Hingulganj, Police Station Hasnabad, on Sundays and Thursdays (the dates on which the Hingulganj *hât* is held), whereby the public tranquillity is being disturbed and for which breach of the peace, dangers to the public safety, riot and affray are imminent, and whereas immediate prevention or speedy remedy of such disturbance is desirable, I do hereby under sec. 144, Cr. P. C., direct the public in general from the date of the promulgation of this order to abstain from holding or attending the *hât* at or near Basantapur on Sundays and Thursdays and not to do any unlawful acts by taking dealers' boats to Basantapur *hât* by force or by committing violence to the people so as to dissuade them from attending Hingulganj *hât* and not to commit any breach of the peace and disturb the public tranquillity.”

This Rule was issued on the ground that the said order of the 20th November 1924 virtually extended the period of two months so far as the second party are concerned. On a comparison of the two orders there can be no doubt that this ground has been substantiated. The only substantial difference between the two orders is that one is directed against 13 persons and the other against the public generally. The period during which an order under sec. 144, Cr. P. C., remains in force is two months only and it cannot be extended beyond that period by the Magistrate. In the second order the directions are the same but a larger number of persons are affected by it. To draw up the same order merely adding to the

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parties affected is an attempt to evade the provisions of cl. (6) of sec. 144, Cr. P. C.

We may further point out that the order is bad in form. Although cl. (8) of sec. 144 provides that an order under this section may be directed to particular individuals or to the public generally when frequenting or visiting a particular place, it does not provide for the issue of an order to the public generally except as qualified by the last line of the clause. The order can only be issued to the public generally when frequenting or visiting a particular place. This order in so far as it directs the public in general to abstain from attending the *hāt* is bad, since it is not until the public attend the *hāt* that the order can be binding on them. They cannot be forbidden by the order to do an act, when the order cannot be addressed to them until after they have done that act.

For these reasons we make the Rule absolute and set aside the order of the Sub-Divisional Magistrate of Satkhira, dated the 21st November 1924, in these proceedings. To prevent any confusion we may point out that though there is an order for the issue of injunction on the 20th November 1924 in the order-sheet, the actual formal proceedings which were drawn up are dated the 21st November 1924.

H. C. S.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SHAW.

LORD BLANESBURGH.

MR. AMEER ALI.

1923,

Heard, 12, 13, 15

and 16, May.

1924,

Judgment,

26, June.

MAHARAJADHIRAJ SIR
RAMESHWAR SINGH
BAHADUR, Appellant,
v.
HITENDRA SINGH and
ors., Respondents.

Res judicata—Application of the principle where proceeding is taken in continuation of previous proceeding in which order was made by consent—Consent order appointing Receiver for purposes of execution—Construction of order—Binding character of order, limits of—Mal-administration or proved futility of scheme of administration, if releases consentor.

Where, decrees having been obtained upon mortgages by a decree-holder against the judgment-debtor who also owed other debts to other creditors, the latter applied for the appointment of a Receiver with a view that "all the debts which will be considered as legally due may be paid up gradually," and to this the decree-holder consented, and a Receiver was appointed with all powers *inter alia* of "realisation, management, protection," etc., of the properties of the judgment-debtor:

Held—That the order did not bind the Receiver to pay off the mortgage-debts out of the income alone and he had authority, if occasion required, to realise, by sale of the properties or any of them; but it did not give the decree-holder a right to compel the Receiver to sell any such property contrary to the Receiver's own ideas of prudence or advantage, the decree-holder having clearly agreed by the consent order to a scheme of administration which he knew would take years to complete.

That the consent order operated as res

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judicata in all proceedings which were continuations of the proceeding in which the order was made, not under sec. 11 of the Civil Procedure Code, but upon general principles of law.

RAM KIRPUL SHUKUL v. MUSSUMAT RUP KUARI (1) and HOOK v. ADMINISTRATOR-GENERAL OF BENGAL (2) referred to and applied.

That the decree-holder would be released from the consent order upon establishing either that the administration thereunder was such as to amount to a malfeasance or that it had been proved by experience to be in substance so protracted and imperfect as to be futile.

These were consolidated appeals (No. 71 of 1923) from two decrees of the High Court at Patna, dated the 31st March 1921, which modified a decree, dated the 4th August 1919, of the Subordinate Judge at Darbhanga.

The Appellant was the grantor of certain *babuana* properties of which the Respondents were the grantees. The properties became heavily encumbered and a Receiver was appointed with the consent of the Appellant who was one of the mortgagees.

Subsequently the Appellant applied repeatedly and unsuccessfully to have the Receiver discharged and certain of the properties brought to sale.

The present application was in furtherance of the same object.

The Respondents alleged that the matter was *res judicata*.

The trial Judge held that the Appellant might bring the property, the subject-matter of his decree, to a sale despite the appointment of the Receiver, but on ap-

peal the High Court upheld the plea of *res judicata* and decided that the consent order of 7th June 1911 under which the Receiver's powers were laid down, operated as an estoppel against the Appellant.

The facts are fully set out in the judgment of the Privy Council.

Messrs. DeGruyther, K. C. and A. Majid for the Appellant.

Sir Geo. Lowndes, K. C. and Mr. B. Dubé for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—These are two consolidated appeals from one judgment and two decrees of the High Court of Judicature at Patna, dated the 31st March 1921. They partly affirmed and partly reversed a judgment and decree, dated 4th August 1919, of the Subordinate Judge at Darbhanga.

The Appellant is the Raja of Darbhanga. The Respondents are members of the junior branch of the Raja's family. As such they are in possession and enjoyment of certain *babuana* immoveable properties, which were the subject of a *babuana* grant made by the head of the family many years ago. Certain mortgages were granted to the Appellant as well as to certain persons outside of the family, and there were mortgage and money decrees existing against the Respondents to such an amount that it was thought expedient that a Receiver of the mortgaged properties should be appointed.

Upon the 2nd February 1910, the judgment-debtors accordingly filed a petition for the appointment of a Receiver. On the 12th of the same month the Appellant, the Raja, by his application consented to the appointment. Following upon these proceedings, the Subordinate Judge of Darbhanga, on the 9th April

(1) L. R. 11 I. A. 37; s. c. I. L. R. 4 All. 369 (1883).

(2) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 915 (1921).

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1910, made an order appointing a Receiver, and, on the 14th of the month, a Receiver was appointed on six months' probation.

The terms of the appointment and its scope, together with the terms of the consent of the Raja Appellant, will be presently referred to, but it is convenient to note certain subsequent dates of the proceedings. It appears from these sufficiently evident that, upon various important occasions in the history of these transactions, the Raja, having first consented to the appointment and administration by a Receiver, endeavoured to resile therefrom by various applications to the Court.

The appointment of the Receiver having been made in April 1910, the Raja, so early as September following, applied for the discharge of the Receiver. In February 1911, his application, having been considered, was dismissed. He appealed in April, made an affidavit in May, and upon the 7th June 1911, the High Court made the consent decree, the purport and scope of which are now in issue.

The Appellant, notwithstanding the consent decree of the 7th June 1911, still continued to make applications to the Court substantially to destroy the administrationship of the Receiver, one of his objects being to compel sales of certain property after-mentioned. On the 25th July 1914, he applied for the discharge of the Receiver to the Subordinate Judge. The whole case was considered, and the Subordinate Judge dismissed the application on the 6th July 1915. No appeal was lodged against this dismissal, and the judgment became final.

On the 26th January 1917, the Raja made a further application to the Sub-

ordinate Judge in the same sense to discharge the Receiver and generally for the same objects as before. In April the Subordinate Judge dismissed his application, and on the 20th June 1918, the High Court dismissed his appeal.

The ink was hardly dry on this decision of the High Court till the Raja made his present application of the 23rd July 1918 again for the same purpose and on the same grounds. On the 4th August 1919, the Subordinate Judge made a decree partly allowing the Raja's claim, but upon the 31st March 1921, the claim was dismissed by the High Court. It is this claim which has been strenuously argued at their Lordships' Bar.

Their Lordships are happy to record that, notwithstanding this protracted period of litigation at the instance of the Maharaja, for the purpose of destroying the receivership, the administration of the Receiver has proceeded steadily and to the satisfaction of the Court below, and with apparently great advantage to the interests of this family estate. The Board does not enter upon details, but, speaking generally, may observe that there is no suggestion made, or apparently possible, of any kind of mal-administration; that a scheme approved by the Court under which the accounts of the estate have been regularly submitted to and approved by the Court, has been worked out most capably, and this with, in the opinion of their Lordships, satisfactory and notable success.

In the course of the proceedings of the Court below, a view was expressed on the topic of *res judicata*, which, it was argued, was too absolute in its terms and would, it was urged, exclude the Appellant too completely from all remedy open to him as a judgment-creditor. Consequently—and this appeared to their Lordships to

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be the substance of the complaint of the Appellant—the previous pronouncements were, it was argued, really to the effect that the Receiver, in his administration, was precluded from all power of selling, even if good occasion or opportunity arose, any part of the estate under mortgage, and was tied up to freeing the properties from mortgage debt out of annual income alone. If these reasons be the true reasons for the appeal, then the appeal may be at least intelligible. They will be presently dealt with. But they did not affect the substance of the difference between the parties, nor did they, in the judgment of the Board, enter into the substance of the determination of the rights of parties contained in the decree of the High Court under appeal.

It is now important to determine the point and scope of the consent given by the Raja to the receivership. On the 12th February 1910, it was in these terms:—

“That your Petitioner has no objection to the appointment of a Receiver as prayed for by the applicants, and submits that a proper and representative man be nominated for the purpose.”

The Receiver was appointed accordingly. It is noticeable that the petition for the appointment after setting out that several decrees of the Maharaja Bahadur have been executed and some of the properties attached and advertised for sale, and objections lodged, goes on to state that “if some kind of arrangement be made the amount due under all the decrees which will be considered as legally due may be made up gradually;” and the prayer of the petition is “that a Receiver may be appointed by the Court for the entire estate of your Petitioners and the legal debts may be paid gradually through the Receiver.”

It was to this appointment “as prayed for by the applicants” that the Appellant consented, and administration by a Receiver was accordingly begun.

It is now necessary, however, to record with precision the actual terms of the appointment, in so far as the Receiver's powers are concerned, as contained in the order of the Subordinate Judge of Darbhanga on the 14th April 1910. These terms are as follows:—

“1. He shall have all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvements of the property, the collection of the rents and profits thereof, the application and disposal of such suits and property, and the execution of documents as the owners themselves have.

“2. He shall get 2 per cent. upon his collection as his remuneration, which shall not exceed Rs 300 per month

“3. He shall furnish security to the extent of Rs. 10,000 and shall duly account for what he shall receive in respect of the property.

“4. He shall submit his accounts in Court every month.

“5. He shall pay Rs 10 per cent. on the collection, but it will not exceed Rs. 1,200, for the maintenance of the Babu; Rs. 250 to each of the four brothers; Rs. 50 to each of the sons of Amarendra Babu, and Rs. 100 to the widow of Jibendra per month.

“6. He shall be responsible for any loss occasioned to the property by his wilful default or gross negligence.”

No objection has been suggested to the effect that the Receiver has acted in any respect improperly in regard to accounts, security of payments, etc. The administration has been correct.

The real question is as to the ambit of the Receiver's powers. On the 7th June 1911, this order was varied in these terms, and a consent order was pronounced in these terms:—

“By consent of parties the order of the

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Court below is varied in the manner following, namely, the Government Revenue and Cesses and other outgoings, as per scheme framed by Court and the budget of the Receiver, are to be paid first, and then the decrees which do not carry any interest, and then the decrees which carry interest. This order is made subject to the payment of allowances to the judgment-debtor. There will be no order as to the costs of this Court. The Receiver will continue as before."

Having heard full argument, the Board is of opinion that this consent order of 7th June 1911 did not abolish or abrogate the powers contained in the decree of 14th April 1910. These two orders must be read together. In particular, under the terms "realisation, management, protection," etc., of the properties, a power of sale is not taken away from but is still vested in the Receiver. And if, for instance, such a power of sale had been exercised in good faith and in the interests of the estate, with the sanction of the Court, such a transaction could not have been challenged as *ultra vires*.

But the proposition of the Appellant is a very different one. It is not that the power to sell may be exercised, but that, although even contrary to the Receiver's own ideas of prudence or advantage, it *must* be exercised; and that, if it is not exercised at once or promptly, then the basis of the receivership has gone and it ought to be declared at an end. It is further suggested that it was only upon such a footing that the Appellant consented to the receivership being set up.

This last contention may be disposed of at once. Fortunately, in the course of the proceedings, which culminated in the consent order in June 1911, the Raja filed an affidavit. The Raja's understanding of the circumstances is made

fairly clear by a petition for revision presented by him on 3rd April 1911. His understanding of the position is thus narrated:—

"3. That on the 2nd February 1910, the debtors applied to the Subordinate Judge that a Receiver might be appointed over their attached properties and that such Receiver, instead of selling the properties, might manage them and from the rents and profits after deduction of management expenses and after payment of some small allowances to the debtors for their maintenance, might pay up the decree debts according to the decrees"

It seems in these circumstances vain to deny that, in consenting to the Receivership, and being a party to the consent order as to administration, the scheme of the latter, a scheme which has throughout received the sanction and approval of the Court, was substantially this: (1) The property under the *babuana* grant was, if possible, to be held together; (2) allowances were to be made from the revenue year by year to the *babuana* holders; (3) the outside creditors should, from the revenue, be paid off and their decrees extinguished; and (4) lastly, with regard to the Appellant's decrees, which amounted to very large sums and which were of two kinds, namely, decrees not bearing interest (amounting to between 8 and 9 lakhs of rupees), and decrees bearing interest, the balance and revenue should be applied first to the extinction of the former, and that thereafter the interest-bearing decrees were to be extinguished. It is, in the opinion of the Board, quite clear that this scheme of administration would take a good many years to complete, that this was perfectly well-known to the Maharaja, and that the throwing of large blocks of property on to the market was not the mode of administration which was desired, but that the gradual extinction of debt out

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of revenue was, if it proved feasible, to be preferred.

This scheme has worked well: (1) Allowances of considerable amounts suitable to the station of the members of this important family have been made; (2) the debts of all the mortgage holders other than the Appellant—that is, to say, of all the outside creditors, have been entirely wiped off; (3) with regard to the debts due to the Appellant, the Receiver has addressed himself with vigour to the extinction of these in priority to the interest-bearing debts. (4) It appears also to be an admitted fact that, when the suit was brought on the 26th January 1917, the management of the Receiver from his appointment in 1910 till the end of 1916 had been so successful as to pay off over 4 lakhs of rupees; while (5) from one of the statements lodged in the case, it is further apparent that in the next two years a sum of nearly 1½ lakhs has been paid off. This statement, without entering upon details, appears to represent the financial results with general accuracy.

The Board express no surprise at the reluctance of the High Court to interfere with an administration of this character: and, apart from the law of the case, which will be presently referred to, at their having arrived at a conclusion that to abolish the receivership and to permit the Appellant to bring the properties to sale under execution, would probably accomplish the destruction of the *babuana* grants as such and the defeat of the object for which the consent order was obtained. The Board, further, see no reason to throw doubt upon the opinion of the Receiver that acceleration in freeing the properties from debts will progressively be made.

Enough has been said to indicate that,

in the view of their Lordships, no case has been made out for either permitting the Appellant as execution-creditor to proceed with the sale of the *babuana* properties under his decrees, nor for imposing the duty of immediate realisation of these properties upon the Receiver.

It may seem, accordingly, unnecessary to deal with the protracted argument that was presented on the doctrine of *res judicata*. Their Lordships are in substantial agreement with the following passage in the opinion of Das, J., when delivering the judgment of the High Court of 31st March 1921:—

“The present application is an application by the decree-holder for an order that he may be allowed to proceed with the sale of the properties mortgaged in execution of his mortgage decree and with the execution of his decrees generally’ and for the discharge of the Receiver. That was identically his application which resulted in the consent order on the 7th June 1911. That, again, was his application which resulted in the order passed on the 6th July 1916 (?). I do not for a moment doubt that the consent order or the order passed by the Court on the 6th July 1916, will not stand in the way of the decree-holder, if the judgment-debtors depart from the terms of the consent order; but there is no suggestion that the terms of the consent order are not scrupulously adhered to. The only suggestion is that it will take many years, under the present scheme, to satisfy the decree held by the decree-holder. That argument, in my view, is not admissible, since the decree-holder must presumably have taken that argument into consideration when he first consented to the appointment of the Receiver, and then to the order passed on the 7th June 1911.”

It was strongly urged that a rigorous construction must be given to the provisions of the Civil Procedure Code and that the language of sec. 11 of the Code of 1908 could not be applied to the present suit as it did not fall within the

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statutory words: "Any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and has been heard and finally decided by such Court." It seems extremely doubtful whether there is any distinction whatsoever between the present and the former suits. But, in the construction of this section, as was the case also in the construction of sec. 13 of the Code of Civil Procedure of 1877, it has been long recognised that the principle laid down by Sir Barnes Peacock in *Ram Kirpul Shukul v. Mussumat Rup Kuari* (1) is correct, when the learned Judge said:—

"The question, if the term '*res judicata*' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon sec. 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation."

And recently before this Board in *Hook v. Administrator-General of Bengal* (2) that rule was re-affirmed.

There can be no real doubt that, in the course of the judgment in this case, two radical issues were definitely settled.

First, that extinction of debt was part of the scheme which was to be gradually operative, and, secondly, that the Appellant, under the consent order, was bound to this gradual procedure. Their Lordships accordingly assent to the judgment of the High Court in the passage above cited. That pronouncement, in their Lordships' opinion, was not made nor must it be taken in a sense which absolutely precludes, should proper occasion arise, a sale of the mortgaged properties by the Receiver. If the pronouncement has such a meaning or effect, then, in the opinion of the Board, it is erroneous.

Upon the topic of consent orders their Lordships think that the principle to be applied is as follows:—

Where a consent order is obtained it always remains open to challenge administration thereunder which is of such a character as either amounts to malfeasance, and accordingly releases the consenter, or, secondly, has been proved by experience to be in substance so protracted and imperfect as to be futile.

In the view of the Board both malfeasance and futility are negatived in the present case. It is unhappily true that, notwithstanding the sensible rule laid down by Sir Barnes Peacock as to interlocutory orders, there has not, in this case, been the end of litigation such as he might have forecast. Probably, however, that end may now be in view and the Receiver may be left to work out the salvation of the property.

Their Lordships, however, take the opportunity of again referring to the subject of realisation by sale in the present case of any of the properties under mortgage. Such a realisation is not, in the opinion of the Board, *ultra vires*, but *intra vires* of the Receiver. He may decline, as he has done in the past, to put

(1) L. R. 11 I. A. 37: s. c. I. L. R. 6 All. 269 (1883).

(2) L. R. 48 I. A. 187: s. c. I. L. R. 48 Cal. 499, 25 C. W. N. 915 (1921).

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the properties to sale, and it is for him to consider carefully the result of putting blocks of property on the market. But if, in his view, a sale would be, in certain conjunctures of circumstances, of advantage, then he might, with the necessary sanction, well exercise his power of sale accordingly.

Their Lordships will humbly advise His Majesty that the appeals should be disallowed with costs.

Solicitors: *Messrs. Sandersons & Orr, Dignams* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SHAW.

LORD BLANFSBURGH.

MR. AMEER ALI.

1923,

Heard, 12, 13, 15

and 16, May.

1924,

Judgment, 26, June.

MAHARAJADHIRAJ SIR
RAMESHWAR SINGH
BAHADUR, Appellant,
v.

HITENDRA SINGH and
ors., Respondents.

Receiver, appointment of, by consent, in execution proceedings—Supersession of previous arrangement regarding liquidation of decretal debt payable under a mortgage decree—Suit by Receiver against decree-holder for possession.

The decree-holder, having obtained a mortgage decree as contemplated by Or. 34, r. 4 of the Civil Procedure Code, came to an arrangement with the judgment-debtor under which the decree-holder was given possession of the mortgaged properties in lieu whereof he was to be debited with a given sum annually:

Held—That a subsequent consent order under which a Receiver was appointed to take over all the properties of the judgment-debtor including the mortgaged property and administer them under a

scheme which would enable the debts due by the judgment-debtors to be paid off gradually superseded the arrangement and entitled the Receiver to sue the decree-holder for recovery of possession of the mortgaged property.

This was an appeal (No. 5 of 1923) from a decree, dated the 19th November 1920, of the High Court at Patna which reversed an order, dated the 16th June 1919, of the Subordinate Judge of Darbhanga.

The Appellant is the decree-holder in respect of a property known as Jai Nagar, the Respondents are the judgment-debtors. By a consent order Jai Nagar and other properties of the Respondents are being administered by a Receiver.

The Appellant remained in possession of Jai Nagar and the petition, the subject-matter of the present appeal, was brought by the Receiver under Or. 40, r. 1 of the Civil Procedure Code, 1908, for an order that possession of Jai Nagar should be delivered over to him.

The Subordinate Judge held that it would be inequitable to upset the arrangement that existed from before the passing of the decree by which the decree-holder was in possession of the village and he dismissed the Receiver's petition.

The High Court were of opinion that that order was erroneous and they directed that the Receiver do take possession of the property.

Messrs. L. DeGruyther, K. C. and A. Majid for the Appellant.

Sir G. Lowndes, K. C. and B. Dubé for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 19th November 1920. It reversed a judgment

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and order of the Subordinate Judge of Darbhanga, dated 16th June 1919. Their Lordships refer to the judgment of the Board just announced in the case between the same parties, namely, the Maharaja as judgment-creditor, and the Receiver of the property and the judgment-debtors (1).

A Receiver was appointed in 1910 as a Receiver upon the entire estate of the judgment-debtors. It is not disputed that this estate included, and still includes, the mortgaged property of Jai Nagar which is in question in this case. Jai Nagar was expressly and by name included in the scheduled properties falling within the order for receivership. Under transactions, upon which it is not necessary to enter, the Appellant possessed the property, under an arrangement that he should be debited with the sum of 1,600 rupees per annum in respect thereof. The arrangement appears for a period of years to have been not to the disadvantage of the estate. Of late years, however, the rental of the property has exceeded the 1,600 rupees and, in or about the year 1918-1919, amounted to over 2,700 rupees per annum.

In these circumstances the Receiver brought his suit before the Subordinate Judge of Darbhanga, claiming :—

"1. That the decree-holder may be directed to render an account of all his collections of the said mauza from the date of the decree to the present date.

"2. That the decree-holder may be directed to give up and make over possession of the said mauza to the Receiver with such amount as the decree-holder may be liable to pay to the judgment-debtors with interest at 12 per cent. per annum."

The question of accounts will be afterwards dealt with. The immediate question is whether the Appellant "do make

over to the Receiver *khas* possession of the judgment-debtor's share of Mauza Jai Nagore." The case has been carefully considered by the High Court and their Lordships see no reason to differ from these paragraphs of the judgment :—

"The decree which he (i.e., Appellant decree-holder) got was the usual mortgage decree contemplated by Or. XXXIV, r. 4, and whatever rights he may have had under the transaction he must be deemed to have given up these rights, once he asked for and obtained a decree for sale in respect of the property in question. That being so, have the judgment-debtors a present right to remove the decree-holder from the possession of the property in question? In my view they have, because there is a prior order passed by a Court of competent jurisdiction appointing a Receiver and asking the Receiver to take charge of all the properties comprised in the mortgage. That order was final between the parties, and it was not open to the learned Subordinate Judge to ignore or disregard that order. . .

"No doubt there was an arrangement by which the decree-holder remained in possession of the properties and applied the income towards part satisfaction of the debt due to him. Subsequently a Receiver was appointed, who is a person to guard the interest of all the parties concerned, and that Receiver was specifically directed to take charge of all the properties. In my view there cannot be any doubt whatever that the Receiver ought to be directed to take charge of the property in question, especially as it is suggested by Mr. K. B. Dutt, on behalf of the judgment-debtors, that property has an income of Rs. 2,711-15-0."

The result will be that the Receiver will in future administer and manage this mauza as part of the estate under his charge. And it may be that, looking *inter alia* to the prolonged difficulty with the Appellant the Respondent may in the circumstances exercise his power of sale of this mauza—such a power resting with him in accordance with the judgment just pronounced in the other appeal.

(1) *Maharajadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh*, 29 C. W. N. 413.

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With regard to the accounting, in respect of the returns from the mauza, the learned Counsel for the Receiver stated to the Board on behalf of the Receiver that he was willing that the years prior to the institution of the suit during which the Appellant was in possession under an arrangement for an annual debit of 1,600 rupees—those years should not be gone back upon. It was further explained that a statement made by the Appellant in his petition of objection of 14th December 1918 was correct:—"4. Although previously orders for the deduction of 1,600 rupees from the decretal money were passed by this Court in Suit No. 62 of 1911, and No. 67 of 1914, it was due to an oversight as the decision of the Subordinate Judge of Muzaffarpur was lost sight of. The Petitioners cannot take advantage of that mistake and this Petitioner, the Opposite Party (that is to say, the present Appellant) has no objection to the deduction of Rs. 1,471-3-5. It is, therefore, prayed that the petition filed by the Petitioners for an annual deduction of 1,600 rupees be disallowed and that Rs. 1,471-3-5 only be ordered to be set off annually (against the decretal money)." In their Lordships' view it is proper that this correction should be given effect to.

In the matter of accounting it may be sufficient to satisfy the justice of the case that accounts be ordered upon the footing, first that the Receiver do obtain *khas* possession of the mauza from the Appellant, and in the accounts he be credited by the Appellant with Rs. 1,471-3-5 per annum as due for the Appellant's possession up to 19th November 1920, being the date of the decree of the High Court. Thereafter the accounts will embrace the entire receipts.

With this variation their Lordships will

humbly advise His Majesty that that decree be affirmed with costs.

Solicitors: *Messrs. Sandersons & Orr, Dignams* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 45 OF 1924.

SANDERSON, C. J.	}	DAYTON PRICE & Co.,
RANKIN, J.		LTD., Plaintiffs,
1925,		Appellants,
Heard, 21, 22		v.
and 26, January.		S. ROHOMOTOLLAH &
Judgment,		Co., Defendants,
3, February.		Respondents.

Contract, "F. O. B. New York"—Stipulation, whether a term or a condition—Breach of such term, whether entitles other party to repudiate contract—Commission agency—Indemnity.

The Defendants-Respondents S. Rohomotollah & Co., a firm in Calcutta, placed an order on 25th November 1919 with the Plaintiffs-Appellants Dayton Price & Co., Ltd., of New York through their agents, Messrs. Muller and Phipps, to ship 100 gross Paris garters manufactured by Messrs. A Stein & Co. of Chicago "at the best prevailing price, shipment soonest" "F. O. B. New York." S. Rohomotollah & Co. agreed to pay the draft of the Plaintiffs for the amount due in respect of the said goods. There was a great deal of difficulty in getting the goods shipped at that time as there was an embargo upon export shipments from New York. The goods were despatched by rail on 21st July 1920 to Montreal and were shipped from Montreal on 20th September 1920. On arrival of goods, the Defendant Company refused to pay the draft, the exchange and the market having gone against him. The Plain-

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tiff Company sued for the loss, being the difference between the contract price and the market rate on the due date. The Defendant Company denied liability:

Held—That the congestion at the New York port was not such as would justify the Plaintiffs acting contrary to the Defendants' instruction. They had agents in Calcutta and there was nothing to prevent their cabling to them or otherwise communicating with the Defendants for instruction. The Plaintiffs were bound to perform the condition "F. O. B. New York" before they could claim any indemnity. The clause was a condition going to the root of contract.

That the fact that the Plaintiffs were commission merchants who were executing the Defendants' orders as their agents did not entitle them to indemnity from the Defendants, the Plaintiffs having failed in respect of a term which was a condition precedent to the Defendants' liability under the contract.

IRELAND v. LEVINGSTONE (1) referred to and discussed.

This was an appeal against the judgment of Pearson, J., by the Plaintiffs-Appellants.

The material facts will appear from the judgment below.

Mr. L. P. E. Pugh (with Mr. C. T. Moore) appeared for the Plaintiffs-Appellants.

Mr. J. Langford James (with Mr. F. S. R. Surita) appeared for the Defendants-Respondents.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by the Plaintiffs against the judgment of my learned brother Mr. Justice Pearson.

(1) L. R. 5 H. & L. A. C. 305 (1871).

The learned Judge disposed of several of the Defendants' contentions in favour of the Plaintiffs, but he decided that the clause in the contract "F. O. B. New York" was a condition and inasmuch as it had not been performed, he dismissed the Plaintiffs' suits.

The material facts are as follows:—The Defendants carried on business in Calcutta, the Plaintiffs in New York and Messrs. A Stein & Co., in Chicago. The Defendants placed an order with the Plaintiffs through their agents in Calcutta, Messrs. Muller and Phipps.

The order is as follows:—

"Please ship the following goods on our account and risk drawing on us against the invoice amount at '60 days' sight: documents on payment. We agree to accept and pay your draft on or before maturity interest as usual. Buying Commission 2½."

"Ship to 58/1, Canning Street, Calcutta, Invoice to Messrs. S. Rohomotollah & Co.

"Draw on Messrs. S. Rohomotollah & Co.

"Through any Bank.

"Shipment soonest.

"Insurance at 10 per cent. over invoice amount W. P. A., with risk of Pilferage and Breakage, War risk extra.

"All orders subject to confirmation by New York shippers.

"Two copies of documents to Calcutta Office."

There is a clause on the face of the document as follows:—"This order is given subject to war conditions and to such regulations governing purchase and shipment as may be established by the United States or other Governments, and you are free of responsibility if unable to export the goods."

Then the documents proceed as fol-

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lows:—"Messrs. A. Stein & Co., 1143 W. Congress Street, Chicago Ill. 100 gross Paris Garters Style No. 1500.

"Assorted colours but white to be omitted.

"10 gross Dandy Pad Garters with Satin pad. Assorted colours but white to be omitted. Fill at manufacturers' best prevailing prices. F. O. B. New York."

The Plaintiffs acknowledged the order by a letter, dated the 12th December 1919, addressed to the Defendants as follows:—

"Dear Sirs,

"We thank you for this indent and give herewith copy of our order as placed with the manufacturers for acceptance. If there is any delay in shipping we will promptly advise you.

"Manufacturers acknowledge under date of December 20th, for shipment from five to six months at price of \$37 dollars 20 cents per gross Paris.

"100 gross Paris Garters 1500."

"This confirms Muller and Phipps' (India) Ltd., Calcutta, Cable order."

"NOTE.—We are not to be liable for loss or damage resulting from any delay or failure to deliver the goods ordered, caused by any action of the supplier, or by delay in transportation, strikes, car-shortage, freight blockages, accidents, transfers by Rail roads or Steamship Companies or other conditions over which we have no control."

And, the document contains a copy of the order as follows for consignee from Messrs. A. Stein & Co.

"Ship to Messrs. Sheikh Rohomotollah & Co., address 58-61, Canning Street, Calcutta, India.

"Indent No. Cable 37, dated 9th December 1919.

"Manufacturers Deliver F. O. B. New York.

"Ship *via* direct steamer."

The goods were ready and packed for shipment on the 23rd June 1920. There was at that time much difficulty in getting the goods in New York. There appears to have been great congestion of goods for export at New York and the Railway Companies of Chicago would not accept deliveries of goods for conveyance to New York.

Messrs. A. Stein & Co. were complaining to the Plaintiffs of the congestion in their shipping department and explaining that they could not hold up orders indefinitely awaiting shipping instructions.

The Plaintiffs gave instructions to Messrs. Stein & Co. to ship *via* Montreal and the Canadian Pac. Railway. These instructions were received by Messrs. Stein & Co. on the 17th of July 1920, and the goods were landed to the Railway on the 21st of July 1920.

Payment for the goods was made by the Plaintiffs to Messrs. Stein & Co. on the 14th and 17th of August 1920. The goods were shipped at Montreal on 20th September 1920. In due course they arrived in Calcutta and the Plaintiffs or their agents presented a draft to the Defendants.

The Defendants refused to accept the draft or the goods. The Plaintiffs sold the goods, and, as the market price had fallen, the result was a loss of Rs. 8,063.

This sum the Plaintiffs claimed in the suit, alleging that the Defendants were bound to indemnify the Plaintiffs against the loss, which they had incurred.

The Plaintiffs in the alternative based their case on a breach of the contract and claimed the said sum as the difference between the contract price and the market price.

Several defences were raised: but, as already stated, the one, which succeeded, was that the clause "F. O. B. New

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York " was a condition of the contract, that it had not been performed and that the Defendants were entitled to refuse to accept the draft and the goods.

This was the only point argued in the Court of Appeal.

The first ground, on which the learned Counsel for the Plaintiffs relied, was that there was no express direction to the Plaintiffs to ship from New York. The argument was that the phrase " F. O. B. New York " referred to the price only : that the Plaintiffs had to obtain the best prevailing price, which was to be an inclusive price F. O. B. New York, and that the Plaintiffs carried out the Defendants' instructions in this respect.

I am unable to accept this argument. It is contrary to the natural meaning of the clauses in the document, which contained the Defendants' instructions and which has been called the " indent."

The instructions were to ship the goods on account of the Defendants and at their risk.

The phrase " F. O. B. New York " is the only direction as to the place or mode of shipment.

The phrase follows immediately after the clause " Fill at Manufacturers' best prevailing prices," but " F. O. B. New York " is printed in a separate line and as a separate sentence.

In my judgment the indent did contain express instructions to ship at New York.

The second point urged by the learned Counsel for the Plaintiffs was that there was a doubt as to the meaning of the instructions contained in the " indent," that the instructions were susceptible of two different meanings, that the Plaintiffs had *bonâ fide* adopted one of them and had acted upon it, and consequently the Defendants could not repudiate the Plaintiffs' act as unauthorised.

Reliance was placed upon the judgment of Lord Chelmsford in the House of Lords in *Ireland v. Livingstone* (1).

It was argued that the Plaintiffs were directed to ship the goods " soonest," which means as soon as possible, and that as they could not ship them at New York without great delay, the Plaintiffs were entitled to ship the goods at Montreal with a view to exporting the goods as soon as possible.

Again I am unable to accept this argument. In my judgment the clause " F. O. B. New York " contains the directions as to shipment, and the instructions were that the Plaintiffs were to ship the goods as soon as possible at New York. In my opinion the language used in the indent is not susceptible of the meaning which the Plaintiffs seek to place upon it.

The third point urged by the learned Counsel for the Plaintiffs was that as the Plaintiffs were prevented from shipping at New York by the congestion at New York and the embargo placed by the Railway Companies on consignments from Chicago to New York, the Plaintiffs were bound to do the best they could and ship the goods as soon as possible at another port : and that they adopted the best possible course by arranging for the goods to be sent *viâ* Montreal.

It was argued that an emergency had arisen within the meaning of sec. 189 of the Indian Contract Act, and that the Plaintiffs had authority to ship the goods at Montreal, as it was an act which a man of ordinary prudence would have done in his own case under similar circumstances.

This argument cannot succeed ; for, in my opinion, it cannot reasonably be said that such an emergency had arisen as

(1) L. R. 5 E. & I. A. C. 395 at pp. 416 and 417 (1871).

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authorised the Plaintiffs to act contrary to the express instructions of the Defendants.

It was not suggested that the Plaintiffs were unable to communicate with the Defendants and obtain their instructions as to the course to be adopted in view of the difficulty which had arisen with regard to the shipment of the goods at New York. The Plaintiffs had agents in Calcutta: there was nothing to prevent the Plaintiffs cabling or communicating otherwise with their agents or with the Defendants and obtaining the instructions of the Defendants.

It was not as if a sudden emergency had arisen, the evidence shows that the congestion at New York extended over some months and it must have been well-known to the Plaintiffs that there would be a difficulty in shipping at New York when the consignment was ready.

Even when the consignment was ready for shipment and when Messrs. Stein & Co. were asking for shipping instructions, the Plaintiffs could have communicated with the Defendants and obtained their instructions.

In my judgment it was obviously the duty of the Plaintiffs, having regard to the difficulty as to the shipment at New York, to communicate either directly, or through their agents in Calcutta, with the Defendants and obtain their instructions.

This they did not do, but they acted without instructions and thereby took the risk of the goods being rejected by the Defendants.

The fourth point urged on behalf of the Plaintiffs was, in my opinion, the most important one.

It was argued that the contract was one between principals and agents, that the clause "F. O. B. New York" was not a condition which went to the root of the

contract, that the Plaintiffs had substantially carried out the instructions contained in the indent, and that the failure to ship the goods at New York was merely a breach of the contract which sounded in damages and did not entitle the Defendants to refuse to accept the documents or the goods.

It was not disputed that if the contract were treated as a contract between the Plaintiffs as vendors and the Defendants as vendees, the breach of the provision to ship at New York would entitle the Defendants to reject the goods.

It was argued on behalf of the Defendants that the contract in this case was one between vendor and purchaser and reliance was placed upon the opinion of Blackburn, J., in *Ireland v. Livingstone* (1).

The learned Judge pointed out that although the legal effect of the transaction between a commission merchant, such as the Plaintiffs, and the consignee who has given him the order, is a contract of sale passing the property from one to the other, there was also a contract of agency between the parties.

This being the nature of the contract, the question which arises is whether the parties intended that shipment at New York should be a condition precedent to the Defendants' liability under the contract to indemnify the Plaintiffs, or whether it was a stipulation, the breach of which would merely give rise to a claim for damages or compensations for any loss sustained by the Defendants by reason of such breach.

The contract was a mercantile contract, and it must be assumed that the parties, being mercantile men, did not insert the stipulation as to shipment at New York,

(1) L. R. 5 E. & I. A. C. 395 at pp. 408 and 409 (1871).

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unless some value or importance was attached thereto, and having regard to the nature of the contract and the specific instructions contained therein that the shipment was to be at New York, in my judgment this stipulation must be regarded as one which went to the root of the contract and which must be performed before the Plaintiffs could claim indemnity from the Defendants.

No information was forthcoming as to whether the shipment at Montreal instead of at New York would have involved the Defendants in the payment of a higher freight or a higher rate of insurance, if they had accepted the goods.

But in my judgment it would not be right for the Court to reject the Defendants' contention by reason of the absence of such evidence: in my opinion it is immaterial to enquire into such a question, when once the conclusion is arrived at that the stipulation that the shipment should be at New York was of the essence of the contract and was one which the Plaintiffs were bound to perform before they could claim indemnity from the Defendants.

No doubt the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him.

As I have come to the conclusion that the shipment of the goods at Montreal instead of at New York was not in the exercise of any authority conferred upon the Plaintiffs by the Defendants, and, as the stipulation as to the shipment was in my opinion of the essence of the contract, it follows that the Plaintiffs were not entitled to be indemnified by the Defendants.

The Plaintiffs' claim for damages based upon the difference between the contract

price and the market price fails for the same reasons.

The result, therefore, is that this appeal must be dismissed with costs.

RANKIN, J.—I agree.

I think that the stipulation "F. O. B. New York" was an essential part of the order. It has been contended before us that even if that be so and even if there be no sufficient excuse on the part of the agent for varying the port of shipment, nevertheless the agent has partly performed the duties which he undertook by the contract of agency, and, therefore, the stipulation as to port of shipment cannot be regarded as something which disentitles him altogether to his indemnity, but must be regarded as something which at the worst entitles the principal to make some deduction corresponding to the amount of damage which he has suffered. I desire to point out that as I read the case of *Ireland v. Livingstone* (1), it is a conclusive authority against such a contention. The contract there as here had to be regarded, particularly in its early stages, as a contract of agency. The contract in that case was ambiguous and much difference of opinion took place as to whether the instructions required that there should be not less than 450 tons, that there should be one ship, one port and one bulk. On that question the learned Judges differed, but I do not understand that any learned Judge took the view that if the Defendants' view was right as to the meaning of his order he could possibly be held bound to accept a cargo by two ships if he had really stipulated for one, to accept a cargo of less than 450 tons if he had really stipulated in such a way as to require 450 tons in any event, or if there was any other material discrepancy between the order and the perform-

(1) L. R. 5 E. & I. A. C. 395 (1871).

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ance in an essential particular. It appears to me that these contracts have to be looked at not merely as contracts involving the general principle of indemnity but as contracts with respect to which there is a particular arrangement between the parties as to the time when and the conditions upon which the agent shall get both his indemnity and his commission. I cannot help feeling that men of business would never employ the services of a commission merchant abroad if they were told that so long as the commission merchant did his best for them, they were obliged to take goods even if they were contrary to the conditions of the contract. For these reasons it does not seem to me that the result in this case is different, even when the agency feature of the contract is considered, from what it would have been if it had been a mere contract of sale between the parties.

I agree, therefore, that the appeal should fail.

Messrs. Kesteven Gooding & Co., Solicitors for the Plaintiffs-Appellants.

Mr. P. L. De, Solicitor for the Defendants-Respondents.

P. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2431 OF 1921.

WALMSLEY, J.	} SAFAR ALI MRA, Defendant, Appellant, v. ABDUL RASHID KHAN & ors., Plaintiffs, Respondents.
MUKHERJI, J.	
1921,	
Heard,	
3, April.	
Judgment,	
11, April.	

Permanent tenancy, under the law as it stood before the passing of the Transfer of Property Act (IV of 1882), if transferable and when—Custom—Standing by.

A permanent tenancy created before the

passing of the Transfer of Property Act, for the purpose of habitation, is not transferable, except by custom or express contract to that effect or unless pucca buildings have been allowed to be erected thereon by the landlord.

BANEE MADHAB BANERJEE v. JOY KRISHNA MUKHERJI (1) *explained.*

NABU MANDAL v. CHOLIM MULLICK (2) and HANUMAN PROSAD SINGH v. DEO CHARAN SINGH (3) *followed.*

AMBIKA PROSAD SINGH v. BALDEO LAL (4), SULIN MOHAN BANERJI v. RAJ KRISHNA GHOSE (5), HARINATH KARMAKAR v. RAJ CHANDRA KARMAKAR (7) and MADHAB CHANDRA PAL v. BEJOY CHAND MAHTAB (8) *referred to.*

MADHUSUDAN SEN v. KAMINI KANTA SEN (9) and RAM CHARAN v. HARI CHARAN (10) *distinguished.*

This was an appeal preferred on the 11th of November 1921 against the decree of the Subordinate Judge of Zillah Noakhali (Moulavi Abdul Khaleque), dated the 25th of June 1921, affirming the decree of the Munsif, 3rd Court at Sudharam (Babu Dwijendra Nath Pal), dated the 14th of March 1919.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and Babu Bepin Chandra Bose and M. Nural Huq for the Appellant.

Dr. Dwarkanath Mitter and Babu Narayan Chandra Kar for the Respondents.

- (1) 12 W. R. 495; 7 B. L. R. 152 (1869).
- (2) I. L. R. 25 Cal. 896; s. c. 2 C. W. N. 405 (F. B.) (1898).
- (3) 7 C. L. J. 309 (1903).
- (4) 20 C. W. N. 1113 (1916).
- (5) 25 C. W. N. 420 (1920).
- (7) 2 C. W. N. 122 (1897).
- (8) 4 C. W. N. 574 (1900).
- (9) I. L. R. 32 Cal. 1028; s. c. 9 C. W. N. 895 (1905).
- (10) 7 C. L. J. 107 (1903).

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The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by the principal Defendant No. 1. It arises from a suit instituted for the purpose of recovering possession of a piece of land within the Municipal limits of Noakhali.

The Plaintiff's case is that his predecessor-in-interest Mahomed Israil, as owner of the superior interest, described as raiyati interest, created an osat raiyati in respect of the land in favour of Ramjan Ali and Asraf Ali in the year 1287, that Defendants Nos. 2-6 are the descendants of Ramjan, and Defendant No. 7 of Asraf Ali, that Defendant No. 1 bought the rights of Ramjan's heirs and Defendant No. 8 the rights of Asraf's heir, that Defendants Nos. 2 to 8 have abandoned and that the first Defendant, now the Appellant, the purchaser from Ramjan's descendants is in possession. The Plaintiff further alleges that the osat raiyati was created for the purpose of habitation, and that the *kabuliyat* executed by the original lessees Ramjan Ali and Asraf Ali contained a stipulation to the effect that the lessees should not have the right of transfer. He also says that there is no local custom sanctioning the transferability of such interests. On the double ground that the original lease forbade transfers, and that there is no local custom in Defendant's favour, he seeks to recover *khas* possession. Both the Courts below have decreed the Plaintiff's suit.

Their finding in regard to the Plaintiff's interest has not been challenged before us. The only question for decision is whether the interest created in favour of Ramjan Ali and Asraf could be transferred by sale.

It is conceded that the *kabuliyat* executed by Ramjan Ali and Asraf Ali was executed before either the Transfer of Pro-

perty Act or the Bengal Tenancy Act came into force.

So far as the stipulation against transfer is concerned defective drafting makes it impossible for the landlord to succeed merely on the basis of that stipulation because the document did not go on to give the landlord the right of re-entry in the event of a transfer.

The position then is this : By the terms of the *kabuliyat* the tenancy was meant to be heritable, and it has in fact passed from father to son. It was also created for the purpose of habitation, and has, apparently, been used for that purpose. There is no suggestion, however, that any *pucca* buildings have been erected on the land. The document creating the tenancy did not confer upon the lessees the right of transfer, and the Defendant has not proved any local custom in favour of the right to transfer. On the contrary such evidence, as there is, is against the Defendant, for a judgment of this Court in Second Appeal No. 2192 of 1917 has been put in to show that a custom against transfer has been recognised in regard to a tenancy just outside the Municipal limits.

The question for our decision therefore is whether a permanent tenancy created before the passing of the Transfer of Property Act, for the purpose of habitation, can be transferred, when *pucca* buildings have not been erected on the land leased, when the document creating the tenancy does not confer upon the lessee the right to transfer and when there is no evidence of a local custom in favour of such a transfer.

The Courts below have answered the question in the negative and I think rightly.

It is true that there is a far reaching remark by Sir Barnes Peacock, C. J., in the case of *Banee Madhab Banerjee v. Joy*

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Krishna Mukherji (1), but it was really an *obiter dictum*, for the *ratio decidendi* of that case was the existence of a local custom in favour of transfer and there was the further fact that the landlord had allowed *nucca* buildings to be erected. In the abortive reference to a Full Bench made by Rampini, J., in the case of *Nabu Mandal v. Cholim Mullick* (2), the learned Judge gave a lengthy review of the authorities on the subject. The same Judge was a member of the Bench which decided the case of *Hanuman Prosad Singh v. Deo Charan Singh* (3) and the finding was that tenancies created before the passing of the Transfer of Property Act for the purpose of habitation were not ordinarily transferable. The same view was taken by Maclean, C. J., and Mitra, J., in S. A. Nos. 339, 448, 449, 450 of 1903 decided on 3rd April 1905. This view has also been taken by the Patna High Court in the case of *Ambika Prosad Singh v. Baldeo Lal* (4) and it has been expressed still more recently by a Bench of this Court in the case of *Sulin Mohan Bauerji v. Raj Krishna Ghose* (5). It appears to me therefore that the principle to which the Courts below have given effect is well established.

Accordingly I hold that this appeal must be dismissed with costs.

MUKERJI, J.—There is unquestionably a certain amount of conflict of judicial opinion as to whether tenancies of non-agricultural or homestead lands created before the Transfer of Property Act are transferable or not, but this diversity is attributable to the differing circumstances of the particular cases in which such opinion has been pronounced. Cases in which the

land was used for agricultural purposes, or in which the tenancy, though for residential purposes, was a yearly one, or in which the tenant was a tenant-at-will afford us little help. The question, however, being as to what was the law as to transferability or otherwise of a tenancy in respect of homestead land as it stood before the Transfer of Property Act came into existence, the statement of the said law as contained in the decisions of learned Judges would help us in the investigation. An examination of the authorities would show that the tendency of these decisions has been to establish that with regard to tenancies of homestead land created before the Transfer of Property Act, in the absence of a custom to the contrary, these tenancies were non-transferable.

The correctness of the dictum of Sir Barnes Peacock, C. J., in the case of *Bance Madhab v. Joy Krishna* (1), a dictum which was quoted with approval by Ainslie, J., in the case of *Durga Proshad Missir v. Brindaban Sukul* (6), has been doubted in later decisions. See the reference and judgment of Rampini, J., in *Nabu Mandal v. Cholim Mullick* (2), where the previous authorities were fully reviewed. That learned Judge at p. 907 of the report observed as follows :—“ Anyhow, there was no law before the passing of the Transfer of Property Act which made a lease of homestead land transferable otherwise than by custom.” In the case of *Harinath Karmakar v. Raj Chandra Karmakar* (7), Rampini, J., observed, in spite of the broad proposition of Sir Barnes Peacock, C. J., referred to above, that the effect of the decision in the case

(1) 12 W. R. 495; 7 B. L. R. 152 (1869).

(2) I. L. R. 25 Cal. 896; s. c. 2 C. W. N. 405 (F. B.) (1898).

(3) 7 C. L. J. 309 (1903).

(4) 20 C. W. N. 1113 (1916).

(5) 25 C. W. N. 420 (1920).

(1) 12 W. R. 495; 7 B. L. R. 152 (1869).

(2) I. L. R. 25 Cal. 896; s. c. 2 C. W. N. 405 (F. B.) (1898).

(6) 15 W. R. 274; 7 B. L. R. 159 (1871).

(7) 2 C. W. N. 122 (1897).

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of *Banee Madhab v. Joy Krishna* (1) was to lay down that previous to the passing of the Transfer of Property Act non-agricultural lands might or might not have been assignable. In the case of *Madhab Chandra Pal v. Bejoy Chand Mahtab* (8) in which the tenancy was in respect of a tank and a small piece of *bastu* land, Rampini and Wilkins, JJ., observed as follows :—" On the contrary we think that before the Transfer of Property Act was passed there was no distinction between agricultural and non-agricultural tenancies." The cases of *Madhusudan Sen v. Kamini Kanta Sen* (9) and *Ram Charan v. Hari Charan* (10) need not be discussed as they related to yearly tenancies, nor the case of *Heramoti v. Annoda Prosad Ghose* (11) in which the finding of fact was that the tenancy was of a non-permanent character. In the case of *Hanuman Prosad v. Deo Charan Singh* (3), Rampini and Pargiter, JJ., observed at p. 311 of the report as follows :—" As for the second plea, the learned pleader for the Respondent relies upon the cases of *Banee Madhab Banerjee v. Joy Krishna Mukherji* (1) and *Durga Proshad Missir v. Brindaban Sukul* (6). It is unnecessary to say much with regard to those cases because they have been considered and discussed and distinguished in the case of *Nabu Mandal v. Cholim Mullick* (2). It is pointed out in this case that the *ratio decidendi* of the two former cases was that in them there was proof of a custom of

transferability. This case of *Nabu Mandal v. Cholim Mullick* (2) has been followed in another case, namely, that of *Harinath Karmakar v. Raj Chandra Karmakar* (7), and the learned pleader for the Respondent has not shown us any reason why we should not follow it as has frequently been done." In S. A. Nos. 339, 448, 449 and 450 of 1903 decided on the 3rd April 1905, Mitra, J., observed : " It is well-known that in this country before that Act (meaning the Transfer of Property Act) came into operation, no tenancy, whether of homestead or agricultural lands, was transferable except by custom or usage." In *Ambika Prosad Singh v. Baldeo Lal* (4), Mullick and Kingsford, JJ., held that " with regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of judicial decision has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies are non-transferable, and that the only exception to the above rule is when there has been 'an erection of *pucca* buildings or a standing by on the part of the landlord while the tenant spends a large sum of money upon the land.' " The same view is emphasised in the case of *Sulin Mohan Banerji v. Raj Krishna Ghose* (5) and a distinction is made between tenancies of homestead land and those for the purpose of residence, in the sense of living upon the land—tenancies for which purpose may be assignable if there is evidence of *pucca* buildings or substantial structures having been erected or large sums of money having been spent with the landlord

(1) 12 W. R. 495; 7 B. L. R. 152 (1869).

(2) I. L. R. 25 Cal. 896; s. c. 2 C. W. N. 405 (F. B.) (1898).

(3) 7 C. L. J. 309 (1903).

(6) 15 W. R. 274; 7 B. L. R. 159 (1871).

(8) 4 C. W. N. 574 (1900).

(9) I. L. R. 32 Cal. 1023; s. c. 9 C. W. N. 895 (1905).

(10) 7 C. L. J. 107 (1906).

(11) 7 C. L. J. 553 (1908).

(2) I. L. R. 25 Cal. 896; s. c. 2 C. W. N. 405 (F. B.) (1898).

(4) 20 C. W. N. 1113 (1916).

(5) 25 C. W. N. 420 (1920).

(7) 2 C. W. N. 122 (1897).

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standing by as was the case in some of the cases referred to above.

In the present case none of the exceptional circumstances having been found or proved the view taken by the learned Subordinate Judge seems to be right and I therefore agree that the appeal must be dismissed with costs.

S. N. B.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 585 OF 1924

SUBHAWARDY, J.	}	GUNANANDA DHONE,
MUKERJI, J.		Petitioner,
1924,		
Heard,		
4, September.		
Judgment,		LALA SANTI PROKASH
25, October.		NANLEY, Opposite
		Party.

Criminal Procedure Code (Act V of 1898), sec. 181, sub-sec. 2), secs 179-177—Indian Penal Code (Act XLV of 1860), sec 405—Criminal breach of trust—Venue for trial where accused liable to render accounts at a particular place but fails to do so—Loss how far an ingredient of the offence—Offence of criminal breach of trust, when may be said to be committed—Necessity of proof of overt act of accused showing dishonesty—Scope of sec 181, sub-sec. 2, Cr. P. C.

The case for the prosecution was that the complainant entrusted certain articles to the accused in Calcutta giving him instructions to sell them if he obtained fair price for them and to remit the amount to Madhupur where the complainant had gone and also to adjust the account at Burdwan on complainant's return to that place, that the accused sold the articles in Calcutta, remitted a part of the sale proceeds to Madhupur and when the time came for adjusting the accounts submitted a false account instead of paying in the balance of the sale proceeds. The accused was prosecuted on a charge of criminal breach of trust in the Court of the Magistrate at Burdwan and was discharg-

ed on the ground that the Court there had no jurisdiction to try the case:

Held—That the Magistrate at Burdwan had jurisdiction to try the case.

Criminal breach of trust is not an offence which counts as one of its factors the loss, that is, the consequence of the act. It is the act itself which in law amounts to the offence. The jurisdiction of a Court to try an offence of criminal misappropriation or breach of trust is governed by sec. 181, sub-sec. (2) and not sec. 179 of the Criminal Procedure Code.

Under sub-sec. (2), sec. 181, Cr. P. C., an offence of criminal breach of trust may be enquired into or tried in a Court within the local limits of whose jurisdiction (a) any part of the property which forms the subject of the offence was received or (b) retained by the accused person or (c) the offence was committed. If the property which forms the subject-matter of the offence or any part of it was received by the accused at a particular place, the Court having local jurisdiction over the place will have jurisdiction to deal with the offence; so also as to the place where the property or any part of it was retained by the accused. The Court within the local limits of whose jurisdiction the offence was committed will also have jurisdiction.

The place where the offence is committed is where there has been misappropriation or conversion or user or disposal of the property or where the accused willfully suffers any other person to use or dispose of the property.

In cases where by reason of the secrecy observed by the accused, the manner, point of time and place where the misappropriation, conversion, user, disposal or sufferance takes place is a matter within the special knowledge

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of the accused himself, the overt act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence, and till the time arrives when that act is done it cannot be said with certainty that the offence was committed.

Where the accused is under liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate may inquire into and try the offence under the provisions of sec. 181, sub-sec. (2), Cr. P. C.

This was a Rule granted on the 15th July 1924 against the order of the Sessions Judge of Burdwan (A. Ahmed, Esq.), directing a further inquiry, dated the 8th July 1924, passed on an application for revision of an order of the Deputy Magistrate of Burdwan (Babu Subodh Kumar Ghose), dated the 23rd May 1924, discharging the accused under sec. 253, Cr. P. C., on the question of jurisdiction.

The facts of the case will sufficiently appear from the judgment of the Sessions Judge which is set out below :—

“ The complainant brought this case under sec. 406, I. P. C., against the accused on the allegation that he had entrusted him with all the moveables of his rented house in Calcutta with instructions to sell them if he obtained fair price for them as he had to leave Calcutta all on a sudden and to remit the sale proceeds to Madhurpur and that for all the monies received the accused was to account for at Burdwan on complainant's return. The accused sold away all the properties at Calcutta and it is alleged that the accused committed criminal breach of trust with respect to a portion of the sale proceeds of

the said property which was detected after the submissions of the accounts at Burdwan.

The question is whether the accused can be tried in the Burdwan Court. . . . It has been held by the learned lower Court that the Courts in Burdwan have no jurisdiction to try the case as the entrustment was made at Calcutta and the subject-matter of the offence was received in Calcutta. But the learned lower Court in the earlier part of its judgment states that it appears from the evidence on record that the accused was to render accounts of the sale proceeds of the property at Burdwan. The accused submitted accounts in Aswin 1330 B. S. and it was detected by the complainant in Agrahayan or Pous 1330 B. S., that the account submitted was false and that the accused hereby misappropriated a portion of the sale proceeds. Such being the case I hold that the decision in *Abdul Latiff Yusuff v. Abu Mahamad Kassim* (2) fully governs the present case.

In this view of the case it must be held that the Courts in Burdwan have jurisdiction to try this case. The order of discharge is hereby set aside and a further enquiry is directed into the matter.”

Babu Probodh Chandra Chatterjee for the Petitioner.

Babu Bankim Chandra Mukherjee for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—Sec. 177, Cr. P. C., lays down the general law as to the venue of an inquiry or trial: it says that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. Sec. 179, Cr. P. C., lays down that when

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a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued. Sec. 181, sub-sec. (2) says that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed.

In the case of *Simhachalam v. Emperor* (1), it was held by this Court, on a careful review of the decisions of the different High Courts in this country, that the jurisdiction of a Court to try an offence of criminal misappropriation or breach of trust is governed by sec. 181, sub-sec. (2) and not sec. 179 of the Criminal Procedure Code; and that loss, though a normal result, is not an ingredient of the offence of criminal misappropriation or breach of trust and not therefore a consequence within the meaning of sec. 179. In a later case, namely, that of *Abdul Latiff Yusuff v. Abu Mahamad Kassim* (2) in which a firm carrying on business in Calcutta employed the accused as agent at Singapore and prosecuted him in Calcutta for criminal breach of trust in respect of monies received at Singapore for which he was to render accounts in Calcutta, it was held by this Court that the Court in Calcutta had jurisdiction to deal with the offence. To this later decision one of the Judges in the earlier case referred to

above was also a party. This later decision professed to distinguish the case of *Simhachalam v. Emperor* (1) in these words: "But here the further case of the prosecution was that for all monies received the accused was to account at Calcutta. Thus the decision directly in point is that in *Colville v. Kristo Kishore* (3). Following that decision we must hold that on the allegations made the Courts in Calcutta have jurisdiction."

In the present case the trial Court was of opinion that it had no jurisdiction in view of the decision in the case of *Simhachalam v. Emperor* (1) and in that view it discharged the accused on the ground that the offence was triable in Calcutta and not at Burdwan; while the learned Sessions Judge on an application made to him against the said order of discharge held that the Court at Burdwan had jurisdiction as well in view of the decision in the case of *Abdul Latiff Yusuff v. Abu Mahamad Kassim* (2).

Before proceeding to examine the facts of the present case, it is perhaps desirable to discuss the effect of the said two decisions and to find out the principles on which they proceed in order to ascertain what is the true rule applicable to a case of criminal breach of trust which the offence charged in the present case amounts to.

Criminal breach of trust is not an offence which counts as one of its factors the loss that is the consequence of the act. It is the act itself, which in law, amounts to the offence. I am therefore in entire accord with the decision in the case of *Simhachalam v. Emperor* (1) and am

(1) I. L. R. 44 Cal. 912; s. c. 21 C. W. N. 573 (1916).

(2) 26 C. W. N. 175 (1921).

(1) I. L. R. 44 Cal. 912; s. c. 21 C. W. N. 573 (1916).

(2) 26 C. W. N. 175 (1921).

(3) I. L. R. 26 Cal. 746; s. c. 3 C. W. N. 598 (1899).

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clearly of opinion that sec. 179, Cr. P. C., has no application to a case of criminal breach of trust. The rule is to be found in sec. 177, Cr. P. C., which lays down the general law and which again has been repeated in and made a part of the special provisions contained in sec. 181, sub-sec. (2), Cr. P. C.

According to the last mentioned provision of the law, an offence of criminal breach of trust may be enquired into or tried in a Court within the local limits of whose jurisdiction, (a) any part of the property which forms the subject of the offence was received or (b) retained by the accused person or (c) the offence was committed. It will be seen that the last part of the sub-section only repeats sec. 177 which is the general law and in view of the provisions contained in sec. 177 the last part of sec. 181, sub-sec. (2) seems to be superfluous. The above three considerations therefore in my opinion determine the forum in respect of an offence of criminal breach of trust, and they, in my opinion, are the only matters to be considered in this connection.

It is clear therefore that if the property which forms the subject-matter of the offence or any part of it was received by the accused at a particular place, the Court having local jurisdiction over the place will have jurisdiction to deal with the offence; so also as to the place where the property or any part of it was retained by the accused. The Court within the local limits of whose jurisdiction the offence was committed will also have jurisdiction.

Now, where is an offence of criminal breach of trust committed? To determine this we have to examine the provisions of sec. 405 of the Indian Penal Code which defines the offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use or

when there is dishonest user or disposal in violation of any direction of law prescribing the mode in which the trust is to be discharged or of any legal contract, express or implied, which the accused has made touching the discharge of the trust, or when the accused wilfully suffers any other person to do so. The place where the offence is committed is where there has been misappropriation or conversion or user or disposal of the property or where the accused wilfully suffers any other person to use or dispose of the property. In some cases, no doubt, the place where these acts are committed can easily be ascertained; while in by far a large majority of cases the dishonest intention of the accused is only patent on his failure to discharge the trust in accordance with the directions of law or some legal contract, express or implied. It is true that it may sometimes happen that long before the time fixed for the accounting or payment the actual misappropriation has taken place, and the offence was complete at that point of time, but the prosecutor remains ignorant of it until such time as he finds that the accused fails to pay or to account. Indeed this must be so in many cases for the offence necessarily involves secrecy and the exact manner, point of time or place where the misappropriation, conversion, user, disposal or sufferance takes place remains more often than not, a matter within the special knowledge of the accused himself. In this class of cases the overt act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence, and till the time arrives when that act is done it cannot be said with certainty that the offence was committed. A very common case of this kind is where the accused received the money for the prosecutor and fails to account for it.

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Mere retention of the money would not necessarily raise a presumption of dishonest intention, but it is only a step in that direction. If there is by law or contract a special place assigned for the keeping of the money, the fact that it was not kept there may be some evidence of its dishonest use. But where no time is fixed for the payment of the money or where no place is assigned for the keeping thereof, the accused cannot be said to have committed the offence of criminal breach of trust for merely mixing the trust money with his own and using the funds promiscuously, for he is not necessarily bound to ear-mark the identical coins or notes. In the case of *Louis Edward Lanier v. The King* (4), the Judicial Committee of the Privy Council very clearly pointed out the distinction in these words: "The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third both irregular and criminal. The distinction between these cases requires to be treated with the greatest judicial care so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken, though convenient, acts." Overt acts that are necessary to be proved in such cases may be of various kinds, e.g., retention for such a length of time as would justify the inference that the accused did not intend to pay at all, failure to credit the receipts in the books, rendering a false account, failure to account, failure to pay in the money in accordance with the terms of the contract, and so on. Mr. Chatterjee has contended that these overt acts are but evidence of the fact that the offence of criminal breach of trust has already been com-

mitted by the accused, and from these acts his dishonesty may very well be inferred; but that these acts are not essential ingredients of the offence itself which must have been complete before the acts are done. There is, in my opinion considerable force in the contention; but at the same time, looking to the words of sec. 405, I. P. C., I am disposed to take the view that if there is a contract that the accused is to render accounts at a particular place and fails to do so as a result of his criminal act in respect of the money, he can, without unduly straining the language of the section, be said to dishonestly use the money, at that place as well, in violation of the express contract which he has made touching the discharge of the trust by which he came by the money, and so commits the offence of criminal breach of trust at that place also.

Mr. Chatterjee has drawn our attention to the English law on the subject and has also relied upon the decision in the case of *Abdul Latiff Yusuff v. Abu Mahamad Kassim* (2) referred to above. The common law rule is that the proper venue for the trial of a crime is the area of jurisdiction in which the place is where a crime was committed. If the crime is an act of omission the place where the crime is committed is the place where the act which is omitted ought to have been done, *R. v. Milner* (5). So in the case of an act of commission, such as embezzlement, when there is no evidence of embezzlement except non-accounting, the venue may be laid in the place where the non-accounting occurred; but this does not apply where there is distinct evidence of misappropriation elsewhere, for then the offence is tried in either place, *R. v.*

(2) 28 C. W. N. 175 (1921).

(5) 2 Car. & Kir. 310 (1846).

(4) [1914] A. C. 221.

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Davidson and Gordon (6). It is interesting to note that the conclusions derived from a consideration of the Indian Statutes as discussed above, go the same way. As for the decision in the case of *Abdul Latiff Yusuff v. Abu Mahamad Kassim* (2), it would be apparent from what has been stated above that I agree in the principle which that decision purports to lay down. I desire, however, to say with all deference to the learned Judges who decided that case that I am unable to agree in the reasons they have given for their decision. The decision purports to follow the case of *Colville v. Krista Kishore* (3), which, as specifically pointed out in the case of *Simhachalam v. Emperor* (1), has no application to a case of criminal breach of trust, as the case related to one of cheating. Mr. Chatterjee has referred to a passage at page 747 of the report as laying down certain general principles. I am unable to read that passage as applying to any but an offence of cheating and to read into it a meaning that would apply to an offence of criminal breach of trust.

My conclusion therefore is that where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate, may inquire into and try the offence under the provisions of sec. 181, sub-sec. (2), Cr. P. C.

In the present case leaving out of account the variations which appear in the

petition of complainant, the examination of the complainant on oath and the evidence adduced in the case, which may, if at all, affect the merits of the case and not the question of jurisdiction, the prosecution story seems to be that the complainant entrusted the articles to the accused in Calcutta, giving him instructions to sell them at the best fair price for them and to remit the amount to Madhupur where the complainant had gone, and also to adjust the account at Burdwan on complainant's return to that place, that the accused sold the articles in Calcutta, remitted a part of the sale proceeds to Madhupur, and when the time came for adjusting the accounts submitted a false account instead of paying in the balance of the sale proceeds. The charge against the accused is that he committed criminal breach of trust in respect of the balance of the sale proceeds.

Applying the principles laid down above to the facts of the present case, I am of opinion that the learned Magistrate was wrong in holding that he had no jurisdiction and in discharging the accused on that ground, and that the order of the learned Sessions Judge setting aside the said order of discharge and directing a further enquiry into the matter is a proper one.

The Rule is accordingly discharged.

SUHRAWARDY, J.—I agree.

S. C. M.

(1) I. L. R. 44 Cal. 912 at p. 916: s. c. 21 C. W. N. 573 (1916).

(2) 26 C. W. N. 175 (1921).

(3) I. L. R. 26 Cal. 746: s. c. 3 C. W. N. 598 (1909).

(6) (1855) 7 Cox. C. C. 158, per Alderson B. at p. 162.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF
LOWER BURMA.]

LORD SHAW. •

LORD PHILLIMORE.

LORD BLANKENBURGH.

SIR JOHN EDGE.

LORD SALVESEN.

1924, .

Heard, 25 and

28, January.

Judgment,

1, May.

VEERAPPA CHETTY
and anr., Appellants,
v.L. A. R. ARUNA-
•CHELLAM CHETTY,
Respondent.

Partnership debt—Mortgage by one partner of his properties to secure debt, if extinguishes debt—Dissolution agreement between partners—One partner taking over exclusive liability for debt, effect of—Right of other partner to indemnity—When and how enforceable—Right of released partner to recover from co partner upon discharging debt—Contract to secure obligation to indemnify—Consideration.

One of the partners of a firm, V. executed a mortgage of his properties to secure a partnership debt and a further advance to himself. This mortgage was held not to operate as a novation of the contract and an extinction of the debt. This was followed by a dissolution of the partnership by agreement between the partners under which A took over the above amongst other debts. The creditor being no party to the agreement:

Held—That the joint liability of both partners remained unaffected by the agreement, though as between the partners themselves, A became solely responsible for the debt and V became entitled to an indemnity from the latter against all liability in respect of it and he was entitled to have that right of indemnity declared and enforced (by an order on the other, for example, to pay off the debt) if the right was disputed or the obligation neglected. But V could not recover the debt from A unless and until he himself paid it.

Subsequently A executed a mortgage in favour of S, who was benamdar for V, the consideration whereof was agreed to be paid to the creditor in part discharge of his debt. No money was in fact advanced to A or paid to the creditor in pursuance of the mortgage contract.

Held—That though there was consideration for the mortgage, which was intended to secure A's liability to indemnify V, in the circumstances no decree under secs. 86-90 of the Transfer of Property Act (now Or. 34 of the Civil Procedure Code) could be made on foot of the mortgage in favour of V against A.

This was an appeal (No. 55 of 1922) from a decree, dated the 8th March 1920, of the Chief Court of Lower Burma, reversing a decree, dated the 2nd August 1918, of the District Court of Myaungmya.

The suit was instituted by P.V.D.V. Muthia Chetty—now represented by the Appellants—to recover the balance alleged to be due to him under a mortgage executed by the Respondent on the 12th May 1910 in favour of Sethuraman Chetty and assigned to him by Sethuraman. The Respondent in his written statement admitted the execution of the mortgage deed but pleaded that there was no consideration for the mortgage. On the 22nd August the District Judge passed a mortgage decree in the Plaintiff's favour. He held that the burden of proving the non-receipt of consideration lay upon the Respondent and that he had failed to discharge it.

The Respondent appealed to the Chief Court of Lower Burma who found that no money was actually paid by the mortgagee at the time of the mortgage and that Sethuraman had never financed the Respondent.

In their view the onus of proving consideration lay upon the Plaintiff and they held that the mortgage was void for want

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of consideration and reversed the decree of the District Court.

The legal representatives of the Plaintiff appealed to His Majesty in Council.

The facts of the case and the arguments of Counsel are set out at length in the judgment of the Judicial Committee.

Messrs. DeGruyther, K. C. and Narasimham for the Appellants.

Messrs. Dunne, K. C. and Gerard Sanders for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—This is a suit to enforce by an order for sale a mortgage of certain property in Upper Burma, made by the Respondent in favour of the assignor of the original Plaintiff.

The case comes before their Lordships on an appeal from an order of the Chief Court of Lower Burma dismissing the suit, and discharging a decree for sale of the mortgaged property which had been made by the trial Judge in the District Court of Myaungmya. The question is whether there was adduced by the Plaintiff at the trial evidence sufficient to justify an order for sale of the mortgaged property.

Such suits, as the present, are governed by secs. 86-90 of the Transfer of Property Act, 1882. In effect these sections, now embodied in Or. 34 of the Schedule to the Code of Civil Procedure, protect a Defendant mortgagor against a decree for sale, unless the amount due upon his mortgage, if not admitted, has either at the hearing been proved by the Plaintiff or has been ascertained after the hearing by an account then directed, on, of course, a case for the taking of such an account having by evidence first been made.

The solution of the problem so pre-

sented to their Lordships has proved to be one of some difficulty. Veerappa, a protagonist in the transactions in question, to whom reference will constantly be made in the sequel, had died before the suit was commenced. His side of the case was testified to by witnesses whose information was to a large extent secondary. The evidence too, so far as it is really material, was taken on commission by means of interrogatories not very happily framed, while, for reasons, the adequacy of which their Lordships do not presume to question, cross-examination of the Plaintiff's witnesses was disallowed.

The facts up to a point, however, are not in doubt, and, as it happens, documentary evidence is available at critical stages in the story to supplement or correct the verbal testimony and clear up what would otherwise have been obscure. It is possible, therefore, with sufficient accuracy to ascertain the relevant facts.

The mortgage in suit originates in the arrangements made upon the dissolution in March 1910, of a money-lending business carried on at Myaungmya and two other places in Upper Burma under the style of P.V.D.V. The partners in that firm were the Appellants' grand-father, Veerappa, the Respondent, and three other persons. The Respondent was the manager of the business at Myaungmya and resided there. Veerappa lived at Rangoon.

By the end of 1909 this business had proved to be unsuccessful: serious losses had been sustained: indebtedness had increased: Veerappa was proposing to make India his permanent place of residence and dissolution of the firm was in prospect.

In January 1910, P.V.D.V. had

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amongst their creditors a Rangoon firm of money-lenders, O.A.M.K. On 11th January 1910, the P.V.D.V. debt to O.A.M.K. was Rs. 42,000. On that day Veerappa at Rangoon granted in favour of O.A.M.K. a mortgage on separate property of his own to secure Rs. 60,000, with interest. The Rs. 60,000 were made up of the Rs. 42,000 debt of P.V.D.V. and a further sum of Rs. 18,000, then proposed to be advanced to Veerappa by O.A.M.K., but never in fact advanced.

Much was made of this mortgage in the course of the discussion before the Board. It is convenient to dispose at once of one important argument with reference to it put forward by the Appellants' learned counsel.

The effect of the mortgage was, he said, to discharge the Rs. 42,000 debt of P.V.D.V. and relegate O.A.M.K. for their sole remedy in respect of that debt to Veerappa and to the security upon his property created by the mortgage.

Their Lordships can see no ground for this suggestion. It is quite clear from the accounts of P.V.D.V., from later receipts given by O.A.M.K., from payments to O.A.M.K. subsequently made by the January 1910, the P.V.D.V. debt to mention only these salient facts, that this mortgage operated neither a novation, nor an extinction of the firm's debt to O.A.M.K.

On the 2nd March 1910, the dissolution of the partnership of P.V.D.V. took place. Its terms are recorded in an agreement executed by all the partners. Veerappa thereunder made himself personally responsible for the liabilities of the firm to six named creditors: the Respondent took over the business and made himself personally responsible for the

remaining debts and liabilities of the partners in relation to it.

Amongst these was the debt of the firm to O.A.M.K. That debt is separately entered in a credit balance sheet prepared for dissolution purposes, as amounting on 1st March 1910 to Rs. 41,055-3-6.

The dissolution so agreed to was duly effectuated, and the P.V.D.V. businesses were taken over by the Respondent and carried on by him, under the style of L.A.R., all as provided by the dissolution agreement. Payments to O.A.M.K. were made—not by Veerappa, he it noted—as a result of which the dissolved firm's indebtedness to O.A.M.K. had, by the succeeding 12th May—the date of the mortgage in suit—become reduced to Rs. 36,000.

It is convenient now to consider what, as at that date, was the position, in which, in relation to this debt as one of the old firm's liabilities assumed by him, the Respondent stood to Veerappa. That position may be easily stated.

O.A.M.K. were no parties to the dissolution agreement. The direct joint liability of each of the partners to them remained entirely unaffected by its execution.

But by that agreement the Respondent, as between himself and each of his former partners, became solely responsible for the firm's debt to O.A.M.K., and Veerappa as one of these partners became entitled to an indemnity from the Respondent against all liability as a former partner of his in respect of it. And he was entitled to have that right of indemnity declared and enforced (by an order on the Respondent, for example, to pay off the debt) if the right were disputed or the obligation neglected.

But he was entitled to no more. Veerappa could not recover the debt from the Respondent unless and until he had

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himself paid it. Give Veerappa that right and the result might have been—for it would equally be the right of the three other partners—that the Respondent would be exposed to the risk of having to pay the debt twice over at the least. To put this in other words, Veerappa at this date had paid to O.A.M.K. nothing in respect of this firm debt. There was accordingly at that time no existing relation of debtor and creditor in respect of it between the Respondent and himself.

It is in these circumstances that the mortgage in suit was executed by the Respondent on the 12th May 1910. It is expressed to be made in favour of one Sethuraman, who was a money-lender of Rangoon. It purports to be made in consideration of Rs. 20,000 borrowed by the Respondent from him. The receipt for Rs. 20,000 is acknowledged in the body of the deed. Interest on the whole sum runs from the date of the deed. It is first payable on the 13th May 1911. Rs. 8,000 of the principal with accrued interest are payable on the 12th May 1912: the remaining Rs. 12,000, with interest on the 13th May 1913.

On its face, whether in respect of the amount secured or the person to whom that amount is due or otherwise, this mortgage bears no relation at all to the dissolution agreement, to the then amount of O.A.M.K.'s debt, or to Veerappa. It purports to record an independent transaction of loan of Rs. 20,000 by Sethuraman to the Respondent. And in the plaint in this suit it is so put forward by the original Plaintiff, who sought to enforce it solely in the character of an assignee from Sethuraman. But in the course of the proceedings it became common ground that the mortgage, in its terms, records no transaction that ever happened.

The Appellants admit that no money at all was lent by Sethuraman to the Respondent, nor is it denied by them that the documentary record of the transaction that took place on the 12th May 1910, is to be found, not in the mortgage alone; but in that mortgage, in a promissory note for Rs. 16,000 made by the Respondent also in favour of Sethuraman, and in a letter, Ex. H, then written and addressed by him to Sethuraman. These documents were all handed by the Respondent to Veerappa at Myaungmya on the 12th May 1910 on his demand. They show, and in particular Ex. II shows, that the whole transaction was directly connected with the liability of the Respondent as between himself and Veerappa to discharge the P.V.D.V. debt to O.A.M.K., by that time reduced as above stated to Rs. 36,000, which is the combined amount of the mortgage and the promissory note.

The following is the material part of Ex. H :—

“Corresponding with the 30th (Sitrai) I have mortgaged you my three launches and one-sixth portion of the pucca building, containing six rooms, of this place” [the property comprised in the mortgage in suit] “for Rs. 20,000 by means of registered deed. Further, I have executed a promissory note for Rs 16,000 in your favour. Pay the above amount of Rs. 36,000 to O.A.M.K. for 30th Sitrai, and tell them that it should be credited towards P.V.D.V. in their account. I will send you the money on the promised date.”

In view of the fact that Veerappa is now dead and can himself give no account of it, and that there is a conflict between the witnesses for the Plaintiff and the Respondent as to the genesis of this transaction of the 12th May 1910, the importance of this exhibit can hardly, in their Lordships' judgment, be over-estimated.

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Its preservation—it was produced in the suit by the Plaintiff—relieves them for example from the necessity of determining as between the parties the gravely disputed question with reference to the position which Sethuraman was represented to the Respondent as occupying. The Respondent's story was that he never would, under the dissolution agreement, have assumed the O.A.M.K. debt had not Veerappa promised him that when necessary he would find a lender ready, upon security, to advance to the Respondent the sum necessary to pay off O.A.M.K. Sethuraman, the Respondent goes on to say, was put forward to him by Veerappa as the lender he had found in pursuance of his promise. The case of the Plaintiff, on the other hand, was that Sethuraman was all through known to be, as in fact he was, merely *benami* for Veerappa.

Ex. H enables their Lordships to proceed without expressing any conclusion of their own upon this issue. It enables them, indeed, to act upon the Appellants' version of the transaction which was that the Respondent was required by Veerappa to give to him, in the name of Sethuraman, his *benami* (for he was himself about to depart to India), the mortgage in suit and the promissory note, for the reason that O.A.M.K. were pressing Veerappa to pay their debt and the Respondent was neglecting to settle it. All this may be accepted. It still leaves the question unresolved why the Respondent, who as their Lordships have just shown, was not at the time liable to pay Veerappa anything in respect of the O.A.M.K. debt, should by the mortgage in suit have been taken bound to make payment to his nominee of Rs. 20,000, with interest from the date of the deed, all irrespective of any payment of that sum or any part of

it by Veerappa, either to O.A.M.K. or to himself.

That question is answered by Ex. H which, in their Lordships' view, when properly understood explains with quite sufficient clearness the whole transaction even accepting the Plaintiff's witnesses' account of it so far as that account goes. Apart from and notwithstanding Mr. DeGruyther's contention, to which their Lordships will recur in a moment, it is impossible to read Ex. H without seeing that it was dealing with a real advance of Rs. 36,000 to be made to the Respondent. The mortgage deed and promissory note to which it refers bear that that sum had actually been received by the Respondent and was to be repaid by him with interest as therein respectively provided. Ex. H is the direction to Sethuraman or, if you will, to Veerappa as lender, by the Respondent as borrower, instead of paying them to himself to pay over to O.A.M.K. the Rs. 36,000 advanced and secured in discharge of the P.V.D.V. debt for which, as we know, as between the Respondent and Veerappa the Respondent was solely liable. The payment so directed was to be made as on the very day of the mortgage and at Rangoon. On the footing that it would be so made it instructed accurately enough the statement in the mortgage executed at Myaungmya that Rs. 20,000, the portion of the advance thereby secured, had that day been paid to the Respondent, and it justified the obligation to pay interest on the full amount as from the same date.

The Respondent does not dispute that if such payment had been made to O.A.M.K., as directed by him, there would have been then no further question as to his liability to repay it in terms of his mortgage. But there never was any such payment made. This was apparently ad-

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mitted in the Chief Court. It was not suggested by Mr. DeGruyther, before their Lordships, that there had. It is indeed quite clear that there had not. What then is the position?

The answer of the learned trial Judge was based upon a misapprehension. He found that the payment had been made, and accordingly he ordered a sale. But his finding arose from a misreading, on his part, of an entry in Sethuraman's books. In these there is entered as on the date of the mortgage, a credit of Rs. 20,000 in favour of Veerappa and a corresponding debit against the Respondent. But Sethuraman being only a nominee of Veerappa, these entries import no more than a recognition on the part of Sethuraman that the sum expressed by the mortgage to be owing by the Respondent belonged to Veerappa and not to himself. The entries in no way import that any sum was on that day paid by any one to any one else—least of all that any sum was on that day found or applied by either Veerappa or Sethuraman for any purpose of the Respondent. The learned trial Judge, however, mistakenly treated the entry in Sethuraman's books as a credit to O.A.M.K., and as evidence of a payment made on that day by Sethuraman to them. It was a clear misapprehension on the part of the learned Judge and Mr. DeGruyther not suggesting before their Lordships that any such payment had been made, did not seek to support the learned Judge's order directing a sale on the ground that it had. His main contention before the Board, indeed his only contention on the appeal, was that that learned Judge's order should be restored on an entirely different ground.

To the foundation of this contention of his, their Lordships have already alluded. Veerappa's mortgage to O.A.M.K. of the

11th January 1910 extinguished, he said, all liability on the part of everyone but himself for the P.V.D.V. debt to O.A.M.K. That being so the reference to that debt in the dissolution balance sheet operated to entitle him, in place of O.A.M.K., to receive payment of it from the Respondent. On that footing the recital in the mortgage in suit that Rs. 20,000 had been advanced by Veerappa's nominee, Sethuraman, to the Respondent was quite correct, Veerappa, as between himself and the Respondent being entitled to recover from the latter every part of the O.A.M.K. debt. Whatever arrangement he might or might not himself make with O.A.M.K. for its ultimate liquidation, that full debt the Respondent was bound to pay Veerappa under the dissolution agreement on demand. The mortgage in suit and the promissory note were the terms on which Veerappa was willing to give him time for payment.

Their Lordships hope that they have correctly stated the contention. In their judgment the argument breaks down at every point of fact. First of all, as they have already shown, the mortgage of the 11th January 1910 did not work either a novation of the O.A.M.K. debt or a release of the Respondent or any partner of P.V.D.V. from full liability in respect of it. This of itself destroys the whole contention. But, further, if by the date of the dissolution agreement, the O.A.M.K. debt had ceased to be a partnership liability, then under that agreement the Respondent did not contract to assume it. It was only firm liabilities that the Respondent assumed. But still further the view of the Respondent's and the P.V.D.V. position involved in this contention is completely negatived by the terms of Ex. H. It follows in their Lordships' judgment that the order of the

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trial Judge directing a sale can no more be justified on the ground suggested by Mr. DeGruyther than it can on the ground taken by the learned Judge himself.

That the trial Judge's order was erroneous was made clear on appeal to the Chief Court. The learned Judges of that Court fully appreciated the error of fact into which the trial Judge had fallen, and they, it being admitted before them that no payment as directed by Ex. H had been made to O.A.M. K., held that the suit should be dismissed on the ground that the mortgage in suit had no consideration to support it and created no security for any sum whatever upon the property comprised in it. Their Lordships do not agree. If the suit is to be dismissed it must be on some ground other than that chosen by the Chief Court. When the position in which the Respondent stood towards Veerappa in relation to this O.A.M.K. debt is remembered, there was in their Lordship's judgment ample consideration to support the mortgage. Veerappa, when it was given, was entitled to require, as their Lordships have shown, that the Respondent should, under his indemnity, procure Veerappa's release from his joint liability in respect of it, and most effectively, by making immediate payment to O.A.M.K. of the P.V.D.V. debt. Veerappa stayed his hand on the terms that by the grant of the mortgage to his nominee the Respondent's indemnity should become to the extent of Rs. 20,000 and interest, a secured instead of an unsecured indemnity. The consideration for the mortgage was therefore complete and the judgment of the Chief Court was, in their Lordships' opinion, to this extent erroneous.

But the result reached by the Chief Court may properly be arrived at in another way. It is clear that the real con-

sideration for the mortgage is not therein correctly expressed. The true consideration their Lordships take to have been proved by the Appellants themselves, and the resultant operation of the mortgage follows as a consequence from a consideration of the antecedent relations between the parties to it and the provisions of Ex. H. To the extent of Rs. 20,000 it stands as a security for such sums as Veerappa shall pay towards discharge of the P.V.D.V. debt to O.A.M.K. with interest, at the mortgage rate, from the date of each payment respectively.

Had then Veerappa paid any such sums at the commencement of this suit? In the opinion of the Board no such payments were proved. Whatever may be the true explanation of the receipts endorsed by Sethuraman on the mortgage deed—a question which their Lordships do not consider it necessary to discuss—they represent no payments by or on behalf of Veerappa. Nor is any claim on that footing put forward in respect of them by the Appellants. One or two witnesses for the Plaintiff said Veerappa had not made any payments and there is no evidence or suggestion to the contrary. Strangely enough a representative of O.A.M.K. was amongst the Plaintiff's witnesses. He gave no evidence of any such payment.

In these circumstances it appears to their Lordships that the Plaintiff entirely failed at the hearing to establish, under the sections already referred to of the Transfer of Property Act, any case whatever, either for a decree or for an account.

Their Lordships will accordingly humbly advise His Majesty that this appeal from the Order of the Chief Court should be dismissed with costs.

Solicitor: *Mr. Ed. Delgado* for the Appellants.

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Solicitor: Mr. A. M. Bramall for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 379 of 1924.

SUHRAWARDY, J.

DOVAL, J.

1924,

13, May.

NAYAN MUNJARI DASSI,
Plaintiff, Appellant,

v.

THE CHAIRMAN OF THE
COMMISSIONERS OF THE
HOWRAH MUNICIPALITY,
Defendant, Respondent.

Bengal Municipal Act (III, B. C., of 1884), sec. 245—Improvement of bustee—Bustee containing pucca buildings, if comes within the operation of the section

A Municipality is competent to deal with a collection or blocks of huts under sec. 245 of the Bengal Municipal Act even though within the area which is locally called a bustee there may be pucca buildings. *

These were appeals preferred on the 19th of December 1923 against the decree of S. A. Paterson, Esq., Additional District Judge of Howrah in Zillah Hughly, dated the 16th September 1923, affirming the decree of Babu Banwari Lal Banerjee, Subordinate Judge, 1st Court of Howrah, dated the 1st of December 1922.

The facts of the case will appear from the judgment.

Dr. Dwarkanath Mitter and Babus Narendra Chandra Bose and Dwijendra Nath Mukherjee for the Appellant.

Babus Ram Chandra Mazumdar and Manmatha Nath Roy for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

These two appeals arise out of two suits brought by the Plaintiff in respect of two proceedings of the Howrah Municipality regarding bustees—one known as Seal's bustee and the other as Kunder Bagan bustee. It appears that in view of the insanitary condition of these bustees the Commissioners of the Howrah Municipality determined to take action under sec. 245 of the Bengal Municipal Act. They then had the bustees inspected by the Deputy Sanitary Commissioner of Burdwan and their Health Officer, both qualified Medical Officers, who made reports in respect of these two bustees pointing out their insanitary conditions and giving a list of the roads required to be constructed and houses, trees and privies which it would be necessary to remove for that purpose. The Municipality accepted these reports and issued notices on the owners. The present Appellant thereupon brought two civil suits before the Subordinate Judge of Howrah and called in question the right of the Municipality to issue such notices or to compel the Plaintiff-Appellant to make the roads and other improvements found necessary. The learned Subordinate Judge dismissed the suits though without costs as he considered that the effect of the proceedings would be that the Defendant would get lands for the roads without paying for the same. On appeal to the Additional District Judge the suits were again dismissed. The learned Additional District Judge set aside the Subordinate Judge's order as to the costs and held that the costs should abide the result in each Court. The learned Additional District Judge found that the two so-called bustees were blocks of huts within definite boundaries within the meaning of sec. 245 of the Bengal Municipal Act and so that section was applicable. He further held in reference to the objection that the reports of the Medical Officers were inadmissible as they were

pality regarding bustees—one known as Seal's bustee and the other as Kunder Bagan bustee. It appears that in view of the insanitary condition of these bustees the Commissioners of the Howrah Municipality determined to take action under sec. 245 of the Bengal Municipal Act. They then had the bustees inspected by the Deputy Sanitary Commissioner of Burdwan and their Health Officer, both qualified Medical Officers, who made reports in respect of these two bustees pointing out their insanitary conditions and giving a list of the roads required to be constructed and houses, trees and privies which it would be necessary to remove for that purpose. The Municipality accepted these reports and issued notices on the owners. The present Appellant thereupon brought two civil suits before the Subordinate Judge of Howrah and called in question the right of the Municipality to issue such notices or to compel the Plaintiff-Appellant to make the roads and other improvements found necessary. The learned Subordinate Judge dismissed the suits though without costs as he considered that the effect of the proceedings would be that the Defendant would get lands for the roads without paying for the same. On appeal to the Additional District Judge the suits were again dismissed. The learned Additional District Judge set aside the Subordinate Judge's order as to the costs and held that the costs should abide the result in each Court. The learned Additional District Judge found that the two so-called bustees were blocks of huts within definite boundaries within the meaning of sec. 245 of the Bengal Municipal Act and so that section was applicable. He further held in reference to the objection that the reports of the Medical Officers were inadmissible as they were

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not examined and so the reports had not been proved, that these documents were parts of the proceeding of the Municipal body and had been sufficiently proved in accordance with sec. 18 (5) of the Indian Evidence Act. He also held in reference to the allegation that the Health Officer of the Municipality was not a competent Medical Officer to make a report under sec. 245 in view of the fact that he had already dealt with the case of the Municipal Health Officer that this contention was without substance. Lastly in reference to the contention that the reports had not been based on proper inspection, he pointed out that it was not for the Civil Court to decide whether the sanitary measures adopted by the Municipality in good faith were in fact the best that might have been adopted, and that the evidence produced by the Plaintiff was rather in the nature of putting forward an alternative scheme of improvement and criticising the scheme which had been made by the Municipality. He therefore dismissed the appeal.

On the case coming up in second appeal to this Court, the main contention of the Appellant is that on a strict interpretation of the expression "blocks of huts" in sec. 245 of the Bengal Municipal Act Seal's *bustee* and Kunder Bagan *bustee* do not come within the definition because within the areas which are the subjects of the two reports of Medical Officers there are certain *pucca* structures; for instance, we are told that within the area known as Seal's *bustee* there is a garden and a house known as the Circuit House of the Howrah District. It is contended that if once a *pucca* building exists in an area, that area cannot be subject to any proceeding under sec. 245. The plans of the *bustees* have not been laid before us by the Appellant and so we do not know how

many such *pucca* buildings there are in these *bustees*. But we have the simple finding of fact of the District Judge that definite boundaries of blocks of huts are given in the Municipal resolution and it is not denied that the structures standing within these boundaries form for the most part huts. We do not think that such a narrow construction can be put on the expression "blocks of huts" as the Appellant wishes to do. It is clear from the reports which are before us that the scheme dealt only with huts, roads and privies which would need to be removed for the constructions of certain roads for the purpose of improving the sanitation of the area which contains the huts. There is nothing to show in the reports which the Municipal Commissioners have adopted and the Commissioners' resolution that they have anything to do with anything but the blocks of huts, though it may be that outside the areas within which the blocks of huts stand there may be some *pucca* buildings. In our view therefore the Municipality is competent to deal with collection or blocks of huts in a *bustee* under sec. 245 even though within the area which is locally called the Seal's *bustee* there may be *pucca* buildings.

The next question is that the Medical Officers were not examined and their reports are inadmissible. I must confess that I do not see how this contention can be raised. The suits are brought for setting aside the notices issued in accordance with the report, the main portion of which states what huts should be removed and what lands converted into open spaces and roads. It is now contended that though the suit is really against the orders issued in accordance with that report, yet the report cannot be received in evidence. But the report contains the orders which

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the Municipality adopted and we must hold that for the purposes of the present suit these reports have been sufficiently proved. The other contention made before the learned Additional District Judge has not been pressed before us. But it has been pressed that the Municipality cannot act under sec. 245 in an arbitrary way and they would act in an arbitrary way if they deal with an area containing masonry buildings. We have already dealt with that point earlier in this judgment. It is not denied that if there had been buildings and that the Municipality did in this matter act *malâ fide*, the whole case would have been different. But there is no ground for believing nor is it alleged now that there is any *malâ fides* in this matter.

The last point is the question of costs. It is contended that there was no cross-objection at the time of the first appeal to the District Judge by the Municipality as regards the claim for costs which had been denied by the Subordinate Judge, the learned District Judge was incompetent to pass an order dismissing the appeal and varying the order for costs. We do not think that there is anything in this contention. The ordinary rule of law is that costs follow the event. The learned Subordinate Judge in the course of his judgment came to a certain conclusion which though it did not amount to decreeing the suit for the Plaintiff was to the effect that the Plaintiff was being badly treated and that for that reason did not give the Municipality these costs. The learned District Judge definitely found against the view of the facts by the Subordinate Judge. He was, therefore, in our opinion, perfectly justified in ordering that the costs should be according to the ordinary custom as there was no exceptional reason, in his opinion, for varying

the ordinary rule that costs abide the result.

In view of the above findings these two appeals are dismissed with costs.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 275 OF 1924.

WALMSLEY, J.

MUKERJI, J.

1924,

Heard, 31, July

and 1, August.

Judgment,

6, August.

T. C. S. MARTINDALE,
Appellant,
v.
THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 449 (1) (c)—Appeal against conviction in trial by jury in the High Court in a Presidency Town—Application for leave to appeal, if to be made before trial Judge or the Criminal Bench of the High Court—Omission to claim privilege of European British subject under sec 538A, if bar to such application for leave to appeal—Indian Penal Code (Act XLV of 1860), secs. 465, 420 - Forgery, cheating—False document, what is—Dishonest concealment of facts, how far a constituent in the offence of cheating—Criminal Procedure Code, sec 345 2.—Composition of offence of cheating allowed by High Court

The accused went to the market and after making some purchases tendered a cheque to the shop-keeper who called a Poddar who cashed it for a small commission. On being presented the cheque was dishonoured by the Bank. The accused was tried in the High Court Sessions on charges of forgery and cheating and convicted. It appeared that the brother of the accused, G. R. Martindale, had an account with the Bank and the signature on the cheque was only Martindale. The evidence was that he made an alteration in the date on the cheque in the presence of the shop-keeper and the Poddar as though he were the drawer but made no representation about G. R. Martindale. After his conviction the accused applied for

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leave to appeal under cl. (c), sub-sec. (1), sec. 449, Cr. P. C., which was granted :

Held—That the Criminal Bench of the High Court had jurisdiction to entertain and dispose of the application for leave to appeal, but (per WALMSLEY, J.) it was desirable that such applications should be made to the trying Judge.

That notice of such application should be given to the Crown.

That the omission on the part of the accused to claim the benefit of sec. 528A of the Code of Criminal Procedure, did not debar him from urging in support of his application for leave to appeal under sec. 449, sub-sec. (1), cl. (c), that the conditions mentioned in cl. (a) or cl. (b) of sec. 443 (1) existed.

That inasmuch as the accused had no intention of inducing in the minds of the shop-keeper and the Poddar the belief that the cheque had been signed by his brother and had no such intention in regard to the Bank, the cheque in question was not a false document and consequently the charge of forgery failed.

That in the circumstances of the case there was dishonest concealment of facts on the part of the accused and he was rightly convicted of cheating.

The High Court allowed the offence of cheating to be compounded under sec. 345 (2), Cr. P. C.

This was an appeal preferred on the 9th May 1924 against the conviction and sentences passed on this Appellant by the Court of Sessions presided over by Mr. Justice Pearson, dated the 11th March 1924.

The facts of the case will appear from the judgment.

Mr. Camell and Babus Mritunjoy Chottopadhyaya and Sarat Chunder Ghose for the Appellant.

Mr. B. L. Mitter, Standing Counsel and Mr. A. K. Bose for the Crown.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Appellant T. C. S. Martindale was committed for trial by a Presidency Magistrate and tried at the High Court Sessions before Mr. Justice Pearson, on three charges relating to forgery, and one charge of cheating. We are told that the majority of the jurors consisted of Europeans but that result was achieved by process of challenging, and not as a consequence of the provisions contained in sec. 275 of the Criminal Procedure Code. He was found guilty on all the charges, by a verdict of seven to two on the forgery charges, and unanimously on the charge of cheating. He was sentenced to four years' rigorous imprisonment on each charge, the sentences to run concurrently.

Sometime later, the Chief Justice was moved to appoint a Bench to hear his application for leave to appeal. The matter was referred to the Criminal Bench (then consisting of Newbould and B. B. Ghose, JJ.) and leave was granted, under sec. 449 (i) (c), one of the new clauses added by last year's amending Act.

The learned Standing Counsel has appeared before us and urged that no appeal lies, and that the application for leave should have been made with notice to the Crown, and that it should have been made to Mr. Justice Pearson, the Judge who tried the case.

It is convenient to deal with these points in the reverse of the order in which I have stated them.

It appears to me that the third point is merely a matter of convenience and expediency. There can be no doubt that the Bench which granted leave to appeal,

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had jurisdiction to entertain and dispose of the application. At the same time I think it is desirable that such applications should be made to the trying Judge. The right of appeal, if there is one, depends upon extraneous circumstances which have nothing to do with the guilt of the accused, and the trying Judge is better qualified than any one else to decide whether these circumstances exist or not.

On the second point, I think the learned Standing Counsel is right in urging that notice of the application should have been given to the Crown. The right of appeal, if there is one, is at best a qualified right, and very different from the right conferred by sec. 410, Cr. P. C. In other proceedings in this Court where special circumstances creating a right have to be shown, it is the practice to insist on notice being given to the Opposite Party, that he may have an opportunity of urging that these circumstances do not exist. The same rule, I think, ought to be followed in applications of this nature. In the present instance, however, we are confronted by the fact that leave has been given and that there is no counter-affidavit to rebut the statements in the affidavit upon which the leave was granted. We cannot revoke the leave, and I think we can do no more than express our opinion as I have already done.

In view of the fact that leave has been granted, it is hardly necessary to deal with the first argument that there is no right of appeal. Such right of appeal as is created by the Amending Act is contained in a Chap., No. XXXIII which, except for the one sec. 449, has no application to Presidency Towns, and the trials held in this Court under normal procedure. Chap. XLIVA contains provisions for European and Indian British subjects in cases to which Chap. XXXIII does not apply.

Under this chapter the accused might have claimed the status of a European British subject with a view to a limited sentence or with a view to the right, conferred by sec. 275, of claiming a European majority on the jury. He made no such claim, however, and though in fact he obtained a European majority it was by the luck of the ballot and not as of right under sec. 275. So far as Chap. XLIVA is concerned, the Appellant can no longer claim the status of a European British subject. I do not think, however, that that fact debars him from urging that the conditions mentioned in cl. (a) or cl. (b) of sec. 443 (1) exist. These clauses do not refer only to the status of the accused person, but to the status of two persons: one of them cannot be the accused person and in the second clause neither need be. It seems unreasonable therefore that the omission of the accused person to avail himself of the right to claim the benefit of sec. 528A should conclude the matter. The right of appeal given to the Local Government by sub-sec. (2) of sec. 449, supports this view. I am of opinion therefore that proof of the conditions mentioned in sec. 443 is what is required, and not evidence that any person concerned in the case has preferred and substantiated a claim to a particular status. On the facts set out in the affidavit therefore I think that the conditions were such as to admit of leave to appeal being granted.

Now I turn to the merits of the appeal. The case for the prosecution is that on August 8th, a Wednesday, the accused went to a shop in the New Market, and after making some purchases tendered a cheque for Rs. 800. A Poddar cashed it in consideration of a small commission; he presented it on Monday the 13th and it was dishonoured. On enquiry it was found that the cheque form had been

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abstracted from a cheque book belonging to a Mr. Maitra, on whom the accused had called that very day. The brother of the accused, G. R. Martindale, has an account with the Bank (the Imperial), but the signature is not his: in fact it bears no resemblance to his. It is an obscure signature, but "Artindale" perhaps "Martindale" can be made out of it, and as G. R. Martindale is the only constituent of the Bank with such a name, the Bank official naturally rejected the cheque as not being signed by G. R. Martindale. The evidence of the shop-keeper and the Poddar, however, is clear on the point that the accused made no representation about G. R. Martindale. He initialled an alteration in the date, as though he were the drawer. It is not necessary to go into the question whether the flourishes at the beginning of the signature are T. C. S. (Appellant's initials) assembled in the form of a monogram. So far as the charges of forgery are concerned, it is enough to say that the Appellant did not pass off the cheque to the shop-keeper and the Poddar as being signed by G. R. Martindale. In the trial Court the idea seems to have been that the Appellant attempted through the Poddar to pass off the cheque on the Bank as signed by G. R. Martindale. The evidence of the Bank officials tends to support that view, but I think that they are really under the influence of the suggestion to which I have referred. I do not think that any one who had never heard of G. R. Martindale would have read the initials as G. R. It is perhaps in consequence of the evidence from the Bank officials that the learned Judge in charging the jury about the meaning of the expression "false document" seems to have dwelt only on the fraudulent or dishonest intention, and to have ignored the other element, the passing off of the imitation as

the real. That is an essential ingredient in a false document, and it is not necessary to refer to *Martin's* case (1) or *Dunn's* case (2), for the principle of these cases is embodied in sec. 464, the section which defines a false document. The question is whether the Appellant put the signature on the cheque with the intention of causing it to be believed that it had been signed by G. R. Martindale. It is clear that he had no intention of inducing that belief in the minds of the shop-keeper and of the Poddar, and I am not satisfied that he had the intention in regard to the Bank. In my judgment therefore the cheque was not a false document and consequently on the first and second and third charges there should have been an acquittal.

The charge of cheating under sec. 420, I. P. C., names the Poddar as the person who was cheated; this is natural because it is he who parted with the money. The point made in connection with this charge is that whatever false representation there may have been such false representation was made to the shop-keeper and not to the Poddar; that when the Poddar came there was a conversation between him and the shop-keeper in Bengali, a language which the Appellant is not proved to understand; that the Appellant said nothing to the Poddar and his silence cannot be treated as concealment of facts which he ought to have disclosed.

Before this argument is reached however it is urged that the Appellant's version of what occurred is the true one. It is in short that there was a loan of Rs. 400 and that the cheque was delivered not as a cheque but as a document embodying the terms of the loan. The story is fantastic: there is nothing in the evidence to sup-

(1) 5 Q. B. D. 34 (1879).

(2) 1 Leach C. C. 52; 2 East P. C. 961, 962 (1802).

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port it, and the fact that the cheque form had been obtained surreptitiously a few hours earlier, and the fact that the date first written, August 12th, was changed by the Appellant at the instance of the Poddar to August 9th militate against it.

To go back to the argument on the prosecution case, some support is no doubt given to it by the conflicting evidence of the shop-keeper and the Poddar. They are quarreling about who is to bear the loss, and the result is that each makes statements which help the Appellant in a slight degree. It is also a point in favour of the Appellant that the Poddar understood that there would be no balance at Appellant's credit from which the cheque would be cashed on the 9th and that he inferred that Appellant had not been able to add to the balance from the request made to him to keep the cheque back a few days.

None of these considerations however really touch the main features of the case. The cheque was offered as a genuine cheque, although in fact it was written by Appellant on a form that did not belong to him, and drawn on a Bank where he had no account: the Poddar paid good money for it, and the Appellant knew that the Poddar accepted it as a genuine cheque which would be honoured if he had patience for a day or two. Whether Appellant understood the conversation between the shop-keeper and the Poddar or not, he knew perfectly well what was being done, and that he was getting Rs. 800 in return for a worthless piece of paper; by his own acts of altering the date and endorsing the cheque he fostered in the Poddar's mind the belief that the cheque was genuine; he must have understood the inference that would be drawn from the mere fact that he tendered a form taken from an Imperial Bank cheque book.

In such circumstances the silence of the Appellant must be regarded as amounting to dishonest concealment. In my opinion therefore all the elements of an offence of cheating are established, and the appeal as against the conviction under sec. 420, I. P. C., must fail.

As to sentence, the sentences passed under secs. 467, 468 and 471, I. P. C., are set aside with the convictions under these sections.

It was our intention to maintain the sentence of rigorous imprisonment passed under sec. 420, I. P. C., but for a reduced period. It is represented to us, however, that friends of the accused are ready to make good the loss sustained by the Poddar, and that the Poddar is prepared in return to compound the offence, and we are asked under sec. 345 (2), Cr. P. C., to permit the composition.

An application has also been put in to-day to that effect by the Appellant and at the foot of it there has been a note made by one Tarini Mohun Shaw, the proprietor of the Poddar's shop and the employer of Rai Mohun Shaw who has been duly identified acknowledging receipt of the sum of Rs. 800 and consenting to have the case compounded.

I think that we should give our assent. The Appellant had grave domestic trouble about the time of the incident; he was arrested a year ago, and he has served over two months of the sentence. In these circumstances I assent to the composition. In doing so I wish to express the hope that the Appellant will strive to make a proper response to the loyalty of his friends.

Let the accused be acquitted.

MUKERJI, J.—The Appellant Theodore Cecil Swinhoe Martindale was tried by Mr. Justice Pearson at the first Criminal Sessions for the year 1924 on charges

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under secs. 467, 468, 471 and 420, I. P. C. The jury returned a verdict of guilty; on the first three charges by a majority of 7 to 2 and on the last one unanimously. The learned Judge accepting the verdict convicted the Appellant on all the charges and sentenced him to undergo rigorous imprisonment for 4 years on each of the charges, the said sentences to run concurrently.

The Appellant thereupon applied for leave to appeal under the provision of sec. 449 (1) (c), Cr. P. C. The application was presented before his Lordship the Chief Justice and on his so directing it was heard by Nóbould and B. B. Ghose, JJ. The learned Judges granted the leave applied for and admitted the appeal and it then came on for hearing before us.

The learned Standing Counsel appearing on behalf of the Crown raised a preliminary objection as to the maintainability of the appeal. The objection is based mainly upon three grounds:—Firstly, that the Appellant was bound to put forward his claim to be dealt with as an European British subject before the Magistrate before whom he was produced, in accordance with the provisions of sec. 528A of the Criminal Procedure Code, and inasmuch as he did not do so, he must under sec. 528B of the Code be held to have relinquished his right to be dealt with as an European British subject and that therefore he is incompetent to assert the same in any subsequent stage of the case; and consequently he cannot now be permitted to rely on that right for the purpose of his appeal; secondly, that the Appellant never asserted either before the Committing Magistrate or before Mr. Justice Pearson his rights to be dealt with under the provisions of Chap. XXXIII, which he should have done in order to

have a proper investigation into the question of status of the parties to the case, and that he cannot be permitted to raise the said question for the first time in his application for leave to appeal; and thirdly, that the leave to appeal was not properly given, the same having been granted *ex parte* and without any enquiry and merely upon an affidavit which is not sufficient for establishing either that the Appellant is an European British subject or that his prosecutors are Indian British subjects.

With regard to the first of these grounds I may say at once that I adhere to the opinion which I expressed in the order I passed in the case of *Emperor v. Harendra Chandra Chakraverti* (3), which was tried in the Second Criminal Sessions of the High Court for the year 1924, in connection with a claim made in that case under the provisions of sec. 275, Cr. P. C. In that case I had occasion to deal with the amendments introduced by Act XII of 1923, and I held that a claim to be tried under the provisions of Chap. XXXIII of the Code is wholly different from a claim to be tried as an European British subject or an Indian British subject or an European not being an European British subject or an American, that it is the latter claim only which is dealt with in Chap. XLIVA of the Code in which secs. 528A and 528B occur, and that so far as the former claim is concerned, the question of status of the claimant does not always arise, as is evident from the provisions of sec. 443 (1) (b) of the Code. Whereas in a claim to be dealt with as an European British subject or an Indian British subject or an European not being an European British subject or an American the claimant has to prove his own status: in a claim to be

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tried under the provisions of Chap. XXXIII the claimant may or may not have to do so. If the latter claim is based upon cl. (a) of sec. 443, sub-sec. (1) of the Code the claimant will have to prove that the complainant, and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects. If it is based upon cl. (b) of sec. 443, sub-sec. (1), of the Code the claimant will have to prove that in view of the connection with the case of both an European British subject and an Indian British subject it is expedient for the ends of justice that the case should be tried under the provisions of Chap. XXXIII; this may or may not involve a question of the claimant's own status. It will also be seen that sec. 528A is expressly limited in its operation to a case to which the provisions of Chap. XXXIII do not apply, and sec. 528B relates only to such cases as are contemplated by sec. 428A, and sec. 449 under which the right of appeal is claimed is in Chap. XXXIII; consequently secs. 528A and 528B can have no application to sec. 449. This ground of objection, therefore, in my opinion, fails.

So far as the second ground is concerned it is sufficient to say that there is no provision in the Code enabling a person to put forward a claim of this character either before a Magistrate holding an enquiry or trial in a Presidency Town or before the High Court during the trial of the case. It is unreasonable to suppose that the legislature ever intended that when there was no knowing whether there would be a conviction or an acquittal (and both are open to appeal under sec. 449, Cr. P. C.), an enquiry might be asked for and the Court required to decide on the question as to whether if tried out-

side a Presidency Town the case would have been triable under the provisions of Chap. XXXIII, the only object of such an enquiry being that the result of it may be availed of for the purposes of an appeal by the accused in the case of a conviction and by the Crown in the case of an acquittal. In my opinion the proper time to raise the question is when leave to appeal is applied for, and that is when the Appellant has raised it. I therefore think that the second ground has no substance.

As for the third ground it seems to me that the Crown has a just cause for complaint. The Appellant applied for leave on the ground that the case if tried outside the Presidency Town of Calcutta would have been triable under Chap. XXXIII as it came within sec. 443 (1) (a). He alleged that he is an European British subject and the two persons on whose information he was prosecuted are Indian British subjects. The Court had to be satisfied on these points before it could grant the leave asked for; and the Crown undoubtedly was entitled to an opportunity to show, if possible, that the allegations were not true or that the case if tried outside the Presidency Town of Calcutta, would not have been triable under Chap. XXXIII. It would therefore have been better if the leave was asked for on notice to the Crown or at any rate if the same was granted with such notice. The matter, however, is of very little practical importance for if it could be shown to us even now that the case was not so triable or that the appeal did not lie we would have been bound to dismiss it. Nothing, however, has been placed before us to rebut the statements contained in the petition of appeal and the affidavit in support of it, and I can find nothing which may lead me to hold that the accused is not an European British subject or that

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the prosecutors, who are people living in Calcutta and carrying on business in Calcutta, are not Indian British subjects. I am therefore of opinion that the third ground of objection also fails.

The appeal therefore is competent and must be dealt with on the merits.

Now the case for the prosecution, shortly stated, is this: On the 8th of August 1923 the Appellant went to the hosiery shop of A. S. Mullick at No. 32, Municipal Market and purchased goods worth Rs. 22-4. He tendered a cheque for Rs. 800 drawn in his favour to Abdul Razak, the salesman of the shop and asked for the balance. Abdul Razak replied that he had not enough money to pay the balance. On that the Appellant requested Abdul Razak to send for a Poddar and get the cheque cashed. A Poddar Rai Mohon Saha was sent for: he came and inspected the cheque and asked for a commission of Rs. 1-8 which the Appellant agreed to pay and he asked the Appellant to alter the date from the 12th to the 9th. The Appellant made the alteration and initialled it. Rai Mohon Saha insisting, Abdul Razak put down the name of the firm A. S. Mullick and the address 32, New Market, Calcutta and also wrote "By the pen of Abdul Razak" on the back of the cheque. Rai Mohon went away with the cheque, brought the money Rs. 798-8 and the Appellant took it and paid Rs. 22-4 out of the amount to Abdul Razak. The Appellant subsequently requested Abdul Razak to ask Rai Mohon Saha not to present the cheque at the Bank on the 9th and promised to pay up the amount of the cheque and take it back. Rai Mohon Saha accordingly kept the cheque back till the 13th. On that day Rai Mohon Saha presented the cheque at the Bank and then it was found that the

cheque belonged to a book of cheque counterfoils supplied to one H. P. Maitra. The officials of the Bank found that the signature of the drawer of the cheque was that of a Martindale; they took it to be that of G. R. Martindale, the Appellant's brother who was the only constituent of the name of Martindale in the Bank and that the signature did not tally with the specimen signature of G. R. Martindale which was in the Bank. Thereupon no payment was made on the cheque.

The above is the main story of the prosecution, and the version of the transaction as narrated above is what has been deposed to by Abdul Razak. The Poddar Rai Mohon Saha, however, makes some variation, mainly to the effect that the cheque was sent to him in the first instance by Abdul Razak through a boy named Jamaluddin, that he on examining the cheque found that it did not contain the endorsement of the firm of A. S. Mullick and also that the date was the 12th and upon that he came to Abdul Razak and all the conversation that he had with regard to the cheque was with Abdul Razak and none with the Appellant. He, however, states that he would not have agreed to cash the cheque if he knew that it was worthless, and that he paid the amount of the cheque entirely relying on Abdul Razak. He says, he does not know English and that Abdul Razak assured him that the Appellant was a known customer of his. The boy Jamaluddin supports in substance the version given by Abdul Razak. One Sheik Attar Ali who works in the shop of A. S. Mullick also gives practically the same story and endeavours to make out that the transaction was directly between Rai Mohon Saha on the one hand and the Appellant on the other. Mahabat Ali, a shop-keeper who has got his shop opposite to

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that of A. S. Mullick, also supports the version of Abdul Razak.

The Appellant's version of the transaction in short was that he had been dealing with the firm of A. S. Mullick for 11 or 12 years, that he was badly in need of money for the medical expenses for his wife's illness, that he expected money from his brother Mr. G. R. Martindale in a few days and in order to meet his urgent demands he approached Abdul Razak and asked for a temporary loan of Rs. 400 and that Abdul Razak agreed to lend him the amount at 12½ per cent. interest if he was prepared to give some security. The Appellant's case is that he obtained the blank cheque form from one Mr. Smith who belongs to the firm of H. P. Maitra and Co., that thereafter he saw Abdul Razak who said that he would have to sign a cheque for Rs. 800 and that it would be understood that if he returned the money by the 13th he would have to pay only Rs. 400 plus interest, but otherwise he would have to pay Rs. 800. The Appellant says that on that condition he made out the cheque and that Abdul Razak thereafter sent for Rai Mohon Saha and had some conversation with him which the Appellant neither heard nor understood. He says that he was thereafter requested to alter the date from the 12th to 9th which he did, and was paid only Rs. 400. He then gives a story as to the subsequent events which is unnecessary to narrate here.

The Appellant's version of the transaction is not supported by any evidence. It may be said that on the assumption that it was true it would not be possible for him to get witnesses to support it. That may be so; but the story is so inherently improbable that one should feel great hesitation in accepting it. Why Abdul Razak who is the salesman of a shop carrying

on business in hosiery should suddenly convert himself into an extortionate money-lender, lending out money on condition that it would be doubled if it was not repaid within 5 days, it is difficult to conceive; it is still more difficult to imagine that the Appellant who is a man of the world and a business man and not altogether helpless would agree to such extortionate stipulation. Then again if Abdul Razak wanted to have some security for the loan would he have agreed to accept as security a cheque written by the accused in that way unless he believed that the accused had an account in the Bank upon which the cheque could be drawn? The story that the cheque was meant merely to be evidence of the transaction and not as security it is impossible to believe. On a careful consideration of the whole of the facts and circumstances it appears to me impossible that the transaction that took place was anything like the one suggested on behalf of the defence. I have carefully scrutinized the evidence of the witnesses who have supported the prosecution version of the transaction, but I have not been able to discover anything in that evidence which may lead me to suspect that the prosecution version of the transaction does not represent the truth. The conflict between the evidence of Rai Mohon Saha on the one hand and that of Abdul Razak, Jamaluddin, Attar Ali and Mahabut Ali on the other, noticed above, is easily explicable on the hypothesis that while Rai Mohon Saha endeavours to make out that the firm of A. S. Mullick and Abdul Razak is responsible for the money, that latter and the other witnesses attempt to repudiate any suggestion of that responsibility.

I therefore find that the Appellant gave the cheque to Abdul Razak for encashment, which act carried with it the re-

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presentation that it was a good cheque on which payment would be obtained from the Bank; that he did not disclose that he had no account or money in the Bank; that when Abdul Razak expressed his inability to pay the amount, the Appellant suggested that the cheque might be cashed with some Poddar; that Abdul Razak honestly believing that it was a good cheque requested Rai Mohon Saha to make the payment allowing him a commission of Rs. 1-8; that Rai Mohon Saha wanted to be safe and so got Abdul Razak to sign for the firm on the back of the cheque; that Rai Mohon Saha was not willing to wait till the 12th which was the date that the cheque bore and intended to get the cheque cashed in the Bank on the 9th and so got the Appellant to alter the date which the Appellant readily did; and that the Appellant subsequently requested Abdul Razak to see that the cheque was not presented promising to pay the amount in cash and so redeem the cheque.

On these findings it is necessary to consider what offence or offences were committed by the accused.

The cheque purports to bear a signature which is said by the prosecution to represent that of G. R. Martindale, and by the defence to be that of T. C. S. Martindale, the Appellant himself. A good deal of evidence has been adduced on behalf of the prosecution to establish that the Appellant's brother G. R. Martindale has an account in the Imperial Bank of India, that the signature cannot be read as that of T. C. S. Martindale but only as of G. R. Martindale, and that as a matter of fact it was so read by the officials of the Bank. On the other hand, the defence has endeavoured to show that the signature may be read as that of T. C. S. Martindale, that it does not resemble the

specimen signature of G. R. Martindale which is in the Bank, and that a loop below the curve of "C" and a line which is to be found there now were not there when the cheque was in the Court of the Committing Magistrate. In my opinion it has not been made out sufficiently clear that the signature really represented that of G. R. Martindale rather than that of T. C. S. Martindale, but I do not consider the matter to be of any real importance. The controversy that has centered round this question, in my judgment, is entirely unprofitable and is likely to cloud the real issues. I do not think that there is anything on the record which may go to show that the Appellant ever contemplated that the cheque would get to a stage when it would happen to be presented at the Bank and payment would be made upon it on the impression that it was a cheque issued by G. R. Martindale; for, in that case, some endeavour would have been made by the Appellant to make the signature resemble that of G. R. Martindale. It is admitted on all hands that the signature of the drawer of the cheque does not bear the faintest resemblance to the specimen signature of G. R. Martindale and is in fact wholly dissimilar to it.

The real question is what was the intention of the accused in making out the cheque. With regard to this matter there are two views that may possibly be taken. It may have been the intention of the accused to make it appear that the cheque had been drawn by somebody else in his favour. In that view it is immaterial whether the signature was T. C. S. Martindale or G. R. Martindale or was of any body else, either real or fictitious. If it was intended to represent that the cheque had been drawn by somebody else in favour of the Appellant and it was made

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out with that intention and with the object of tendering it for payment or for being used as security it would be a false document. The principle was laid down in the case of *Dunn* (2) in these words: "First, that if a person gives a note or other security as his own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a fictitious name may indeed be a cheat, but that will not amount to forgery; for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But, secondly, that if a note be given in the name of another person, either really existing or represented so to be, and in that light it obtains a superior credit, or induces a trust which will not be given to the party himself, it is then a false instrument and punishable as forgery." We have to judge of the intention at the time when the document was made and it is upon that intention that the criminality of the act has to be judged. Now the fact that the drawer's signature was obviously made to look as altogether different from the name of the drawee and the fact that the signature of the Appellant on the back of the cheque as endorser is like the writing of the payee's name on the face of the cheque and is wholly dissimilar to his signature on the cheque as drawer thereof, lend some support to the theory that the intention was to make it appear that it was a cheque issued in favour of the Appellant by somebody else, it does not matter whether it was G. R. Martindale or a fictitious person, and it is just possible that such was his intention when the Appellant made out the cheque. If the Appellant had this intention, then the document he

made was a false document and he was guilty of forgery. This, however, is a mere possibility and I am not inclined to press it too much against the accused in the face of the evidence relating to the use that the Appellant actually made of the cheque and from which his intention may as well and perhaps with greater certainty be gathered. There is no evidence to show that he made any other representation than that it was a cheque which he was drawing upon the Bank. Neither Abdul Razak nor Rai Mohon Saha ever thought of looking to the drawer's signature as a guarantee for the payment of the cheque. On the other hand, the fact that they asked the Appellant to alter the date of the cheque and thought that he was competent to do so and that the Appellant did so in their presence shows unmistakably that they took it as a cheque drawn by the Appellant himself and lends support to the theory that in making out the cheque the Appellant intended to pass it off as a genuine cheque drawn by himself in his own favour. If that was the Appellant's intention there was no preparation of a false document and so no forgery. In that view of the Appellant's intention the case would clearly be on all fours with that of *Reg. v. Martin* (1). In that case a prisoner gave a cheque drawn in the name of a fictitious person upon a Bank in which there was no account answering to that signature but the prosecutor took the cheque believing that it was drawn in the prisoner's name and the Court following the ruling in *Dunn's* case (2) cited above held that there was no forgery. The law in sec. 464, I. P. C., is exactly the same. The intention in such a case must be to cause it to be believed

(1) 5 Q. B. D. 84 (1879).

(2) 1 Leach C. C. 59; 2 East P. C. 961, 962 (1802).

(2) 1 Leach C. C. 59; 2 East P. C. 961, 962 (1802).

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that such document was made or signed or executed by or by the authority of a person by whom or by whose authority it was not made, signed or executed. I accordingly think that there was no false document made, and therefore there was no forgery. In that view the charges under secs. 467, 468 and 471, I. P. C., must fail and the convictions and sentences passed on these charges cannot stand.

As to the charge under sec. 420, I. P. C., the Appellant's contention is that he did not make any representation to Rai Mohon Saha whom he is alleged to have cheated, that whatever conversation there was, was between Abdul Razak and Rai Mohon Saha and though the Appellant was sitting in the same room he was at some distance, and he could neither hear nor follow the conversation as it was in Bengali. In view of the findings at which I have arrived with regard to the nature of the transaction, I hold that the Appellant used Abdul Razak merely as an agency for communicating the representations to Rai Mohon Saha. He knew perfectly well that he had not disclosed to Abdul Razak the fact that the cheque was absolutely worthless, and that he had no account in the Bank, far less any money, against which the cheque could be drawn. He knew perfectly well that as a security the cheque was worth nothing. It was his plain duty to disclose the real state of affairs to Abdul Razak, for he must have understood that when Rai Mohon was paying Rs. 798-8 on the cheque he was acting on the representation which the cheque carried with it that it would be honoured on presentation. This representation the Appellant intended to convey through Abdul Razak to Rai Mohon Saha; and this representation Abdul Razak did in fact convey to Rai

Mohon Saha in the presence of the Appellant by making over the cheque to Rai Mohon Saha and getting the money from him. A dishonest concealment of facts is deception within the meaning of sec. 415, I. P. C. I hold that the Appellant dishonestly concealed the most material fact that the cheque could never be paid on presentation and on the other hand confirmed Abdul Razak and Rai Mohon Saha in their belief that it was a good cheque by altering the date from the 12th to the 9th when requested to do so. It makes no difference to the criminality of the transaction that Rai Mohon Saha took the precaution of getting Abdul Razak to sign for the firm on the back of the cheque. Nor does it matter whether the Appellant understood the conversation that passed between Abdul Razak and Rai Mohon Saha. So far as the offence under sec. 420, I. P. C., is concerned I am of opinion that the Appellant has been rightly convicted in respect thereof.

Having regard, however, to the circumstances mentioned in the judgment of my learned brother I agree in allowing the offence under sec. 420, I. P. C., to be compounded.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

MIS. CASE No. 24 OF 1925.

NEWBOULD, J.	}	A. H. TURNER,
B. B. GHOSE, J.		Accused, Petitioner,
1925,		v.
18, February.		THE KING-EMPEROR,
		Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 449 (1) (c), sec. 448 (1), cls. (a) and (b)—Application for leave to appeal against conviction in trial by jury in High Court in a Presidency Town—Question to be tried in disposing of such application—Such application to be heard by Division Bench.

On an application under sec. 449 (1) (c) for leave to appeal the Court has only to

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decide whether the case would, if it had been tried outside the Presidency Town, have been triable under the provisions of Chap. XXXIII of the Code of Criminal Procedure in view of the conditions set out in sub-cl. (a) and (B) of cl. (1) of sec. 443 of the Code of Criminal Procedure.

If the existence of these conditions is decided by the High Court in favour of the accused he is entitled as of right to an appeal.

Such application for leave to appeal should be heard by a Division Bench of the High Court rather than by a single Judge.

This was an application for leave to appeal against the conviction of the accused at a trial by a jury in the High Court Sessions.

The facts of the case will appear from the judgment.

Mr. Charu Chandra Biswas, Advocate, and Babu Manindra Kumar Bose, Vakil, for the Petitioner.

Mr. B. L. Mitter, Standing Counsel, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is an application under cl. (c) of sec. 449, Cr. P. C., for leave to appeal against the conviction in a case tried by a jury in this High Court. This is the second time that such an application has been made to this Court since the power to appeal in such cases was introduced by the recent amendment of the Code of Criminal Procedure.

In the first case, that of *T. C. S. Martin-dale v. King-Emperor* (1), the application for leave to appeal was also heard by this Bench. It was then granted on an *ex parte* application. After the granting of

(1) 29 C. W. N. 447: s. c. 40 C. L. J. 256 (1924).

leave to appeal the appeal itself was subsequently heard by another Bench and it was then held that the application for leave to appeal should be made on notice to the Crown. Further one of the Judges who heard that appeal was of the opinion that though a Divisional Bench had jurisdiction to entertain and dispose of the application nevertheless as a matter of convenience and expediency the application should have been made to the Judge who tried the case. When the application was made for leave to appeal orders were passed that the application should be made to this Bench. At the same time we are informed that this order was no bar to our deciding whether or not applications of this nature should be made to a Division Bench or to the Judge who heard the case.

The point is one of considerable importance as a matter of procedure and has been fully argued before us by the learned Standing Counsel and the learned Advocate who appeared for the Petitioner. The relevant portions of sec. 449, Cr. P. C. are in the following terms :—"Where a case is tried by jury in the High Court in a Presidency Town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a Presidency Town, have been triable under the provisions of this chapter, then an appeal may lie to the High Court on a matter of fact as well as on a matter of law." In order to determine the question of convenience and expediency the first point that arises is what is to be decided before leave to appeal is granted.

On behalf of the Petitioner it is contended that if he is able to show that the case, if it had been tried outside a Presidency Town, would have been triable under the provisions of Chap. XXXIII of the Code, then he has an absolute right

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of appeal. The learned Standing Counsel contends that before leave to appeal is granted not only must the Court be satisfied on this point which for convenience we may call "the question of status," but also that there are other circumstances which render the case a fit one for allowing an appeal. This issue is clearly raised in the present application, since the petition for leave to appeal is based on the assumption that there is an absolute right of appeal if the status is proved. It appears to us that the contention raised on behalf of the Petitioner is right. Except for the provisions in sec. 449 granting an appeal, the provisions of Chap. XXXIII are by sec. 443 applicable only to cases of trials outside a Presidency Town. Sec. 449 gives the right of appeal against the decision of a High Court in three classes of cases. The first class is cases tried by jury in a High Court under the provisions of this chapter and can only apply to High Courts outside a Presidency Town. The second class of cases are those which would otherwise be tried under the provisions of this chapter but are under this Code committed to or transferred to the High Court and tried by jury in the High Court. In these two classes of cases an absolute right of appeal is given. It is contended by the learned Standing Counsel that if it had been intended to give an absolute right of appeal in the third class of cases similar words would have been used in cl. (c) as are used in cls. (a) and (b), and the condition of the High Court granting leave to appeal would be unnecessary. We are unable to accept this contention. The cases which come under cl. (b) would sometimes be tried by jury in the High Court in a Presidency Town. In such cases the accused if convicted would have the absolute right of appeal and it is difficult to understand why the

legislature should give this right of appeal in some cases tried by such High Court and not in others. The necessity for the insertion of the condition of granting leave to appeal in cl. (c) appears to us to be due to the fact that in cases which come under cl. (b) the question whether Chap. XXXIII is applicable or not has been decided before the case is committed to or transferred to the High Court. In cases which come under cl. (c) this question has not arisen, and it was necessary for the legislature to provide for a decision of this question. We think that the clause is not well-drafted, but its meaning is that "the question of status" is to be decided by the High Court before leave to appeal is granted and that if that is decided in the accused's favour he is entitled as of right to an appeal. The wording of cl. (c) also supports this view, since it states the ground on which leave to appeal may be granted. We do not think that this ground would be stated in this manner if other grounds had to be considered by the Court when granting leave to appeal. It is urged that the power to grant leave to appeal also includes the power to refuse leave to appeal. That is so. But if the power to grant leave to appeal is limited to a single ground all that follows is that the Court which has power to grant leave to appeal on that ground can refuse leave to appeal when that ground is not established.

We hold, therefore, that the Court to whom an application for leave to appeal is made has only to decide whether the case would, if it had been tried outside the Presidency Town, have been triable under the provisions of Chap. XXXIII of the Code of Criminal Procedure. The conditions that would make a case, if it had been tried outside a Presidency Town, triable under Chap. XXXIII are

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set out in sub-cl. (a) and (b) of cl. (1) of sec. 443 and are as follows :—(a) That the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, (b) that in view of the connection with the case of both a European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this chapter. So far as the cases coming under sub-cl. (a) are concerned we cannot see that the Judge who tried the case would be in a better position to decide this simple issue than a Division Bench. As regards sub-cl. (b) cases might occur in which it would be easier for the Judge who tried the case to decide whether that condition has been established, but we think that such cases would be rare and they would not be sufficiently frequent to render it desirable that the application should be heard by the Judge who tried the case rather than a Divisional Bench. On general grounds we think it is desirable that the application for leave to appeal should be heard by a Divisional Bench rather than by a single Judge. In this country it is unusual for the legislature to make provision for leave to appeal to be granted by the Court against which the appeal is sought to be preferred. In England the provision is more frequent, but that is usually qualified by providing for an appeal against an order refusing leave to appeal. We think, therefore, that since no appeal would lie against the decision of the single Judge refusing leave to appeal under this section it is better in the interest of justice that the application should be heard by a Divisional Bench.

In the present case it is not disputed that the facts bring it within sub-cl. (a)

of cl. (1) of sec. 443, Cr. P. C. and we accordingly grant leave to appeal in this case.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.

LORD BLANESBURGH.

LORD SALVESBURY.

1924,

Heard,

12, February.

Judgment,

12, February.

SABU RAM KUMAR,
Appellant,

v.

MUHAMMAD Y QUB
and anr.,
Respondents.

Building contract—Stipulation to deduct commission on agreed rates of payment on completion—Alteration in the work substantially increasing it in size and dimensions—Stipulation, if applies to it.

In a building contract under which a particular building of given size and dimensions was to be completed within a year it was stipulated that at the final adjustment of accounts, 10 per cent. of the scheduled rates for articles supplied whatever their cost had been would be deducted from the amount found due to the builder. But as work progressed, the dimensions of the work were nearly doubled so that it could not be and was not completed within a year:

Held—That the failure to complete during the year was not due to any fault of the builder and the stipulation for deduction of commission did not apply to the new conditions which came into existence subsequently to the contract.

This was an appeal (1st of 1923) from a decree of the High Court at Allahabad, dated the 4th March 1919, which reversed a decree of the Court of the Subordinate Judge of Moradabad, dated the 30th September 1916.

The Appellant entered into an agree-

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ment in May 1913 with the 1st Respondent that the latter should build him a house in accordance with a tender submitted by the said Respondent. The rates payable under the tender were to be subject to a deduction of 10 per cent. "commission." Under the agreement advances were to be made weekly by the Appellant to enable the contractor to procure materials and pay his labour.

An advance of Rs. 500 was made on the 28th May 1913 and other small advances were made from time to time.

On the 29th July the Appellant obtained the sanction of the Municipality to add another row of outhouses and to build a reservoir and temple and other appurtenances thereto. Sanction for further buildings and for the erection of an upper storey on the original bungalow was obtained on 1st November 1913.

In September 1914 the contractor stopped work on the ground that he was not receiving sufficient advances to enable him to provide materials and labour. The facts are set out in greater detail in the judgment of the Privy Council.

The Appellant filed his suit on the 24th September 1915 against the contractor and the 2nd Respondent was added as his surety. He contended that the building contract stipulated for the completion of the building within a year and he claimed Rs. 9,562 and interest as being advances made over and above the actual value of the premises already constructed.

The Subordinate Judge passed a decree in the Plaintiff's favour for Rs. 8,287 but on appeal the High Court held that the stoppage of work was not due to any default on the part of the contractor, and that the Plaintiff had failed to show that he had advanced to the Defendant any money in excess of the value of the work already done.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.

Messrs. Dunne, K. C. and W. Wallach for the Respondents.—The argument before the Privy Council was mainly confined to the question whether the Appellant was entitled to deduct 10 per cent. from the rates mentioned in the tender.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 4th March 1919. This decree reversed that of the Additional Subordinate Judge of Moradabad dated the 30th September 1916, decreeing the Plaintiff's claim.

A building contract by way of offer and acceptance had been concluded between the Plaintiff, Appellant, who was the owner of certain land, and the Respondent, a builder apparently in a humble way of business, who was a contractor. Certain subsidiary matters of accounting were referred to in the minute argument delivered before the Board. Even if that argument had been in all points sound, it would have resulted in a relatively trivial readjustment of the figure of the alleged balance. Their Lordships content themselves with observing that the appeal is decided upon a consideration of the only ground which appears in the reasons of the Appellant. It is not legitimate to raise at this Board other and subsidiary points which were apparently neither raised nor canvassed in the Courts below.

The reasons for the Appellant's appeal to this Board are substantially confined to one point. That has reference to a 10 per cent. allowance, to be made by the contractor to the owner "for commission."

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The Board will now proceed to discuss the matter in the light of the contract between the parties. The form of the suit is by the owner against the contractor for a sum amounting to nearly Rs. 10,000, on the allegation that that Rs. 10,000 consisted of over-payments made by him as compared with the sums to which the contractor was entitled under the bargain. The Appellant made certain strong allegations against the Respondent and declined to make further advances, and the work was stopped.

Their Lordships refer in particular to the offer of the 27th May 1913. The early portion of that offer is in these terms, and it is that early portion which raises, and completely raises, the question now at issue before the Board :—

“In compliance with your order the undersigned applicant”—that is, the contractor—“is willing to construct the new ‘kothi’ in the *bach* near the distillery in mauza Manpur at the rate specified below, less Rs. 10 per cent for commission. Rs. 500 will remain as an advance, which will be deducted from the amount of the last bill. If the work is done honestly and well, something by way of reward may kindly be allowed to the undersigned from the Rs. 10 per cent. commission.”

There is further reference in the acceptance to what is manifest, and is agreed, was a most important circumstance, namely, that the work was to be done within one year. In the acceptance of the offer this and another point are made clear, namely (1) “you should within a year construct” the building, and (2) “if you would require money during the progress of the work you will continue to get money weekly also according to need.” Finally it may be stated that under the contract no provision or bargain is made as to additions or alterations.

Their Lordships have carefully considered the ambit of these clauses. It appears to the Board to be clear that the contract refers to one particular building, the size, dimensions and even plans of which had already been fixed. The new kothi thus singularised was that which had been the subject of an application, with submitted plans, to the local authority and by that date approved.

As this contract work proceeded, however, it was found that the views of the owner were very much larger than those for which he had obtained the specific sanction. Within a few weeks of the acceptance of this contract radical changes began to be ordered by the owner. To speak roughly, those consisted of the doubling of the size of the main building itself; it was converted into a two-storey instead of a one-storey building; a large, and apparently extensive, compound was walled in, and various other buildings, including a temple. These were made the subject of orders from the owner, and work proceeded accordingly. None of these items, as already mentioned, were within, at least, the express scope of the original contract.

Their Lordships are clearly of opinion that the arrangements thus made, forming an addition of a kind so substantial as to increase the original cost from Rs. 21,000 to nearly Rs. 42,000, must be attributed to a new arrangement between the parties, and that that arrangement could not, in point of fact, have been completed within anything like the stipulated period of 12 months applicable to the first and definitely limited contract.

In those circumstances it was quite clear that the builder still required, and possibly in even a fuller degree, to be

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accommodated with cash to enable him to undertake the heavy and fresh obligations under the new contract. It is also further clear on the facts that when payments to account, or payments to discharge builders' accounts or the accounts of persons supplying material, were made no deduction of 10 per cent. commission was in fact made from these. These facts have a real bearing on the question of what was the stage at which such an allowance was to be made.

It appears to their Lordships that upon a review of the first contract it is plain that the arrangement by way of rebate or a deduction of 10 per cent. commission in favour of the owner, was an arrangement which was only exigible and became crystallised when the work was completed and the final accounts at the end of the year were to be made up. Upon that occasion the Rs. 500 originally advanced was to be deducted from the cumulative sum due to the builder, and further the estimate of the 10 per cent. commission would be made, not from the sums paid but from the scheduled rates for the articles supplied, whatever their cost had been. After this reckoning was made within or at the close of the year, there would be completely determined the amount of the debt falling under the 10 per cent. commission charged. It was then, in those circumstances, that the opportunity would have arisen to the owner; to forego making that large deduction from his contractor's prices, and to limit the 10 per cent. by such an allowance as was left to his own good-will. But the conditions for making such a deduction never arose; the contract was not possible of completion within the year; it in point of fact was not completed; and the Board agree with the High Court that the failure to complete was not due to any

fault on the contractor's part. The stipulation accordingly disappeared.

A fortiori, in their Lordships' opinion such a deduction was never agreed to with regard to the further work. What was done was that it entered into the head of the owner that he had largely over-paid the contractor. As it turns out this idea of his was illusory; he had not done so. On the best computation that can be made the accounts were fairly square, even at the old rates.

In those circumstances, when a suit was brought for the sum of nearly Rs. 10,000 of alleged over-payment, the parties most sensibly agreed that a skilled referee should settle the amounts. Nor does the Board question the propriety of their having said to the referee that they were willing that the rates charged in the original schedule should be made applicable to the extra works executed. But the question remains as to what was to be done with regard to what one might call the prolocution of the right to deduct 10 per cent. commission. In the opinion of the Board there was no such prolocution. It would have required a special and particular contract to make such a charge applicable to a condition of affairs entirely new.

Their Lordships, however, are further relieved to find that the referee, looking over the charges and the work, does go into the question of whether the work was fairly charged at the contract rates without any allowance being made for the 10 per cent. commission. He gives evidence which is thus narrated in the judgment of the High Court: "Rustanji"—that is, the arbiter—"admits that the work was well done and worth the full rates entered in the schedule of the 27th May 1913, without any Rs. 10 per cent. deduction." No injustice as between

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these parties entering into this mercantile contract is to ensue. The contrary is the case. The allowance of the 10 per cent. which is now claimed in this suit by the owner of this piece of land would be an allowance which would permit him to pay only 90 per cent. of the value of the work which is actually on his property.

Their Lordships are satisfied that the result arrived at by the High Court is sound; and they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitor : *Mr. Ed. Dalgado* for the Appellant.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD BUCKMASTER.	}	BALGOBIND, since
LORD DUNEDIN.		deceased (now re-
LORD CARON.		presented by Suraj
SIR JOHN EDGE.		Dat and anr.), and
LORD SALVESEN.		ors., Appellants,
1923,		v.
Heard, 20, April.	}	BADRI PRASAD and
Judgment, 10, May.		anr., Respondents.

Wajib-ul-arz, record of, by Settlement Officer—Value as evidence.

A custom is not established by an ambiguous statement of it in a wajib-ul-arz.

Settlement Officers in recording customs in wajib-ul-arzes have to perform duties which the Government orders them to perform.

One of these duties is to record customs as the Settlement Officer finds them and not as he may think they ought to be. When it is not shown by reliable evidence

that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

This was an appeal from a judgment and decree, dated the 15th July 1919, of the Court of the Judicial Commissioner of Oudh, reversing a decree, dated the 2nd April 1918, of the Subordinate Judge of Gonda.

The only question in the appeal was whether there was a custom in the family of the litigants whereby daughters and daughters' sons were excluded from inheritance.

The village in suit is called Aunian Durga and is situated in Oudh. Radha Pande—the brother of Balgobind whose representatives are the present Appellants—died in 1901 and his widow Musammat Janka inherited his property for the term of her life. In the following year she alienated a portion of this property and in a suit brought against her by the next reversioner of Radha Pande it was held that daughters and daughters' sons were excluded from inheritance. Subsequently Musammat Janka made a gift of her interest in the village in dispute to the present Respondents.

Musammat Janka died in 1917 and the present suit was brought by Balgobind as next reversioner to recover possession of the village and mesne profits. Transferees from Balgobind were joined with him as co-Plaintiffs.

The Subordinate Judge found in favour of the Plaintiffs on the question of custom and passed a decree in their favour. On appeal the Judicial Commissioners (Lyle

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and Ashworth, J. C.) were of opinion that the custom had not been proved. They considered the oral evidence of knowledge of the existence of the custom as valueless, and held that an entry in the *wajib-ul-arz* of the village was ambiguous and insufficient and reversed the decree of the Subordinate Judge.

The Plaintiffs now appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and B. Dubé for the Appellants.—The judgment in the earlier suit against Musammat Janka, though not "*res judicata*," is evidence supporting the custom which is also established by the *wajib-ul-arz*.

Sheo Mangal v. Jagpal Singh (1).

Messrs. Kenworthy Brown and S. Hyam for the Respondents.—There is insufficient evidence to support the custom. The language of the *wajib-ul-arz* was at least ambiguous, and it was signed by only one person and he not uninterested.

There are no instances to support the alleged custom. Moreover the evidence required is considerable seeing that the custom is at variance with Hindu law.

Parbati Kunwar v. Chandarpal Kunwar (2) and *Anant Singh v. Durqa Singh* (3).

The previous decision carries the matter no further as the question turns solely on the *wajib-ul-arz*.

Mr. Dubé in reply referred to sec. 23 of the Indian Evidence Act.

THEIR LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, which reversed a de-

cree of the Subordinate Judge of Gonda, and dismissed the suit. The suit was a suit for the possession of the village Aunian Durga in the District of Gonda, and for mesne profits, and it depended on whether there was or was not a family custom in the village by which daughters and their issue were excluded from inheritance. The Subordinate Judge found that there was such a custom and decreed the suit. The Court of the Judicial Commissioner on appeal found that the custom was not proved, and accordingly dismissed the suit.

In order to understand how this question as to a custom excluding daughters and their issue from inheritance has arisen in this suit, it is necessary to refer briefly to the family to which the Plaintiff, Balgobind Pande, had belonged. Balgobind Pande and his three elder brothers, Sital Prasad Pande, Radha Pande and Raghubar Pande, had, with their father, Narain Dat Pande, constituted a joint Hindu family which was governed by the law of the Mitakshara subject to any lawful variation of that law by custom. A lawful variation of that law would be a custom which excluded daughters and their issue from inheritance. Such a custom is not uncommon in Oudh and in other parts of India.

The elder brother of Narain Dat Pande was Harnarain Pande, who was a sanad holder, and was possessed of considerable immoveable property in Oudh. Harnarain Pande gave some of his villages to Narain Dat Pande absolutely. Narain Dat Pande also acquired other villages, one of which was the village Binduli. Their Lordships do not know when Narain Dat Pande died. At the Settlement in Oudh after the Mutiny, the villages which Narain Dat Pande had self-acquired and those which he had acquired by gift from his

(1) 12 Oudh Cases 63 at p. 69.

(2) L. R. 36 I. A. 125: s. c. 13 C. W. N. 1073 (1904).

(3) L. R. 37 I. A. 191: s. c. 14 C. W. N. 770 (1910).

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elder brother were by courtesy described as taluqa Binduli, and the property was in the settlement papers referred to as a taluqa. It is not necessary to consider whether that property was or was not correctly described as a taluqa.

Sital Prasad Pande was at the time of the Settlement the manager on behalf of the then joint family, and he was also the Lambardar of some, if not of all, the villages included in the taluqa.

The Settlement Officer prepared a *wajib-ul-arz* for each of the villages. The fourth paragraph of the *wajib-ul-arz* of Binduli as translated by the official translator is as follows:—

"Para. 4.—Rights of transfer and inheritance.

"Each of the two co-sharers has the right to transfer his share; but so long as one of them is willing to purchase, the other shall not sell to a stranger. The rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares and the daughter does not get any share by inheritance. If a co-sharer has several wives, of whom one has one son and the other several, then on the death of the co-sharer his share will be divided equally among his sons. There is no custom of Stribhag (division according to number of wives). When one wife has sons and another has daughters only, then such other will not get a share. The issue of the (former) wife will possess the share and maintain (in food and clothing) the daughters and bear the expenses of their marriage. If there is no male issue born of the wives, they will remain in possession in equal shares. The widows have no power to adopt; on (their) death the nearest relation of the husband succeeds to the share. An unmarried wife and her children are given maintenance: they do not get (inherit) a share."

The vernacular words of the sentence which the official translator has translated as "The rule of inheritance and division

(thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares, and the daughter does not get any share by inheritance," given, presumably correctly, by the learned Judicial Commissioners in their judgment, do not include between the words "equal shares" and the words "the daughter" any word which could be translated as "and." Their Lordships do not consider it necessary to refer this case back to the Court of the Judicial Commissioner for a report as to whether a word representing "and" is or is not in the original *wajib-ul-arz* between the words "equal shares" and the words "the daughter," as in either event the sentence, in their Lordships' opinion, would have the same meaning, that is, that a daughter and her issue are excluded from a right of inheritance. Para. 4 of the *wajib-ul-arz* of Binduli is not repeated in the *wajib-ul-arz* of Aunian Durga as the villages of the Settlement were treated as villages of the taluqa Binduli, having a common custom as to rights of inheritance, but reference as to the customs of Aunian Durga is made to para. 4 of the *wajib-ul-arz* of Binduli. Sital Prasad Pande signed the *wajib-ul-arz* of the village of Binduli, and verified before the Settlement Officer the *wajib-ul-arz* of Aunian Durga, and no exception was taken by any one to the record of the custom.

After the Settlement the brothers separated and the village Aunian Durga fell to the share of the second brother, Radha Pande. Radha Pande married Musammat Janka, but whether the marriage took place before the Settlement or afterwards their Lordships do not know. Radha Pande had by his wife a daughter, Musammat Thakur Dei, but no son. Musammat Thakur Dei married and had

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a son, Badri Prasad, who is Defendant No. 1. Radha Pande died in 1901, and on his death Musammat Janka came into the possession of Aunian Durga for the interest of a Hindu widow. On the 4th April 1902, Musammat Janka granted a perpetual lease of 80 bighas of Aunian Durga to Tibhawan Tewari and Baleshar Tewari, the Defendants Nos. 4 and 5, and on the 1st May 1902, mortgaged with possession an undivided moiety of the village to the predecessors-in-title of Defendant No. 3. On the 31st October 1916, Musammat Janka made a gift of a 6-annas share in Aunian Durga to Gajadhar Prasad, Defendant No. 2. On the 3rd November 1916, Musammat Janka and her daughter Musammat Thakur Dei gave all such rights and interest as they possessed in the remaining 10-annas share of Aunian Durga to Badri Prasad, Defendant No. 1. On the 4th March 1917, Musammat Janka died. On her death the Plaintiff Balgobind Pande was the next reversioner to her husband, Radha Pande, Sital Prasad Pande and Raghubar Pande being then dead. On the 24th August 1917, Balgobind Pande gave an 8-annas share in Aunian Durga to Kesho Dat Ram Pande and Tikam Dat Ram Pande, who were grandsons of Sital Prasad Pande, being the sons of his son, Mahadeo Prasad, who was then dead. On the 7th September 1917, Balgobind Pande, Kesho Dat Ram Pande and Tikam Dat Ram Pande brought this suit. Balgobind Pande is now dead and is represented in this appeal by his sons, Suraj Dat and Jagdisil Dat, a minor, through his guardian.

It is not proved or contended that any of the alienations already mentioned by Musammat Janka were made for necessity, and the only question which it is necessary for their Lordships to consider

is whether by custom daughters and their issue are excluded from inheritance in Aunian Durga. As has been already stated, the learned Subordinate Judge who tried the suit found that that custom was proved. The learned Judicial Commissioners who heard the appeal apparently did not doubt that the entry of the custom in the *wajib-ul-arz* of the village Binduli was evidence of the custom which governed the right to inherit in the village Aunian Durga, but they were of opinion that para. 4 of the *wajib-ul-arz* of Binduli was ambiguous and that owing to that ambiguity the custom was not proved. It is quite true that a custom is not established by an ambiguous statement of it in a *wajib-ul-arz*.

In their Lordships' opinion there is no ambiguity in the statement as to the custom. The only construction to which it is open is in their Lordships' opinion that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance, whether he had left sons or not. How such a custom would operate in cases in which an owner died leaving no relation but a daughter who could inherit it is not necessary now to consider. If a daughter had no right to inherit her issue could not inherit. The provision that on the death of a co-sharer his sons became owners of his share in equal shares was probably inserted to exclude any claim under a custom of primogeniture which is not an uncommon custom in Oudh.

Settlement Officers in recording customs in *wajib-ul-arzes* have to perform duties which the Government orders them to perform.

One of these duties was to record customs as the Settlement Officer found them, and not as he might think they

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ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

There was no evidence to prove or even to suggest that the Settlement Officer in stating the custom as he did in the *wajib-ul-arz* had in any way neglected his duty in ascertaining what the custom was, or was misled as to the custom; nor was there any evidence given in this suit in denial of or at variance with the custom.

Their Lordships find that the custom excluding daughters and their issue from inheritance was proved, and they will accordingly humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs, and that the decree of the Subordinate Judge should be restored and affirmed.

Solicitor: *Mr. Ed. Delgado* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1261 OF 1924.

SCHRABARDY, J.

CUMING, J.

1924,

Heard, 11, 12 and

15, December.

1925,

Judgment,

12, January.

RADHA KRISHNA

MAHARAJ, Defendant

No. 1, Appellant,

v.

SARABSWAR N G and

anr., Plaintiffs,

Respondents.

Indian Evidence Act (I of 1872), secs. 11, 13, 21, 32—“Transaction,” “claim” and “assertion” in sec 13. meaning of—“Fact” in sec 11, meaning of—Statement in pottah relating to adjoining land about land in suit belonging to Plaintiff, if can be proved on his behalf and if admissible

The Plaintiffs as lessees sued for establishment of title to and recovery of possession of a plot of land. It appeared that a pottah executed by one of the Plaintiffs' lessors a year after their lease in respect of an adjoining plot of land contained a statement that the land in suit belonged to the Plaintiffs' lessors:

Held—That the pottah not relating to the land in suit, was not a transaction within the meaning of cl. (a) to sec. 13 of the Evidence Act and the statement in the pottah was a mere recital and did not amount to an assertion of right or a claim within the meaning of cl. (b) to sec. 13 of the Evidence Act and could not be proved on behalf of the Plaintiffs and hence that document was inadmissible in evidence.

It was an admission in favour of the person making it which was not admissible under any clause of sec. 32 and could not be said to be a “fact” within the meaning of sec. 11 of the Evidence Act.

This was an appeal against the decree of Babu Hem Kumar Neogi, Subordinate Judge of Assansol in Zillah Burdwan, dated the 17th of February 1922, reversing the decree of Babu Gopal Chandra Basu,

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Munsif of Assansol, dated the 9th of July 1921.

The facts of the case will appear from the judgment.

Babus Ramesh Chandra Sen and Bankim Chandra Banerjee for the Appellant.

Mr. M. A. S. M. Akram for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SUBHAWARDY, J.—Plaintiff No. 1 along with his lessee Plaintiff No. 2 brought this suit for establishment of title to and recovery of possession of a plot of land alleging dispossession by the Defendants in 1918. Plaintiff's claim is based on a lease from the alleged owners of the land Makhan Ray and Ananta Ray, dated 14th Falgun 1306. The Defendants resist the Plaintiff's claim by virtue of a lease, dated 14th Chaitra 1306, from Defendants Nos. 2 and 3 to whom they assert the land in suit belongs. They further deny Plaintiff's possession within the statutory period and also claim title by adverse possession. On these pleadings two principal issues were raised as to title and limitation. In the trial Court the learned Munsif found both the issues against the Plaintiffs and dismissed the suit. On appeal by the Plaintiffs the learned Subordinate Judge set aside the decision of the trial Court and decreed the suit. Hence this appeal by the Defendants. It is admitted that none of the parties has been able to produce any document showing title in their respective lessors: the question of possession therefore assumes paramount importance. The learned Subordinate Judge in finding possession of the Plaintiffs has relied among other pieces of evidence, on a statement made by Makhan Ray, one of Plaintiffs' lessors in pottah, Ex. 4. This pottah is a

granted by Makhan in 1305 to another person of a plot of land adjoining and to the east of the disputed land. In giving the boundaries of the plot leased out by the pottah the western boundary is given as the plot in suit which is described as belonging to the lessor. The learned Subordinate Judge has attached great importance to this statement in the pottah by the Plaintiff's lessor made a year before the Plaintiff's lease and at a time when there was no dispute about the land in suit. It is argued before us—and that is the only point urged in the appeal—that the above statement in the pottah cannot be used as evidence against the Defendants as it is in the nature of an admission which cannot be used in favour of the person making it or any other person claiming through him.

Under sec. 21 of the Evidence Act an admission cannot be used as evidence in favour of the person making it or any person claiming under him except under some circumstances, one of which is that it may be so used if it is relevant otherwise than as an admission. It is therefore necessary to consider if the statement above referred to is otherwise relevant and as such can be proved on behalf of the person making it. It is not seriously contended that the statement is relevant under sec. 11, Evidence Act, as it can hardly be said to be a "fact" within the meaning of that section, nor is it maintained that it is admissible under any of the clauses of sec. 32, though it appears that Makhan Ray is now dead. But it is attempted to make it evidence under sec. 13 of the Evidence Act. It is said that the pottah was evidence of a transaction or a particular instance in which the right to the land or possession thereof was claimed or asserted by the Plaintiff's lessor. It may not be a transaction as the

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pottah did not relate to the land in suit, *Bansi Singh v. Mir Ameer Ali* (1), but great stress is laid on cl. (b) of that section. That clause is in these words:— "Particular instances in which the right or custom was claimed, recognised or exercised or in which exercise was disputed, asserted or departed from." This sub-section is divided into two parts: the first part deals with particular instances when the right was claimed, the second part speaks of particular instances when the exercise of the right was asserted. In the present case there was no assertion of an exercise of the right. Assertion indicates some act or deed which may or may not follow a statement. It remains therefore to consider whether in the present case the right to the land in suit was "claimed" by the Plaintiff's lessor by describing it as belonging to him in giving the boundaries of a contiguous plot of land let out under Ex. 4. The word "claim" has not been defined in the Act nor, so far as we are aware, has it received judicial interpretation. In the Oxford Dictionary the verb "claim" is said to mean: "(1) To demand as one's own or one's due; to seek or ask for on the ground of right; (2) to assert and demand recognition of an alleged right, title, possession, attribute, acquirement or the like; to assert one's own to affirm one's possession of: Sense (1) claims delivery of a thing; sense (2) the admission of an allegation." The word therefore denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of claim.

(1) 11 C. W. N. 706 (1907).

There is a distinction, not too subtle, between a statement of a claim and a claim, though in some circumstances a statement may amount to a claim. The latter is made with reference to a right in a thing which was at that time being dealt with or directly in contemplation, the former may be casual or made with reference to some other right or thing. The illustration under sec. 13 affords some indication of the meaning to be attached to the words used in the section. To give "claim" a wider meaning will practically neutralise the effect of sec. 21 and make all statements wherein a right is stated to exist provable on behalf of the person making them, however recent they may be. I make a note in my note-book that I have lent Rs. 1,000 to A: thereafter I bring a suit against A, and put in my note-book to prove the entry I had made therein. If this evidence is admissible in my favour, I do not know what statement sec. 21 seeks to exclude. In my judgment the statement made in Ex. 4 that the land to the west of the land demised under that pottah belonged to the Plaintiff's lessor is a mere recital and does not amount to a claim and cannot be proved on behalf of the Plaintiff and hence that document is inadmissible in evidence. In this connection attention may be drawn to the cases of *Ramadin Rai v. Dhunwanti Koer* (2) and *Ramani Pershad N. Singh v. Mahanth Adya Gossain* (3).

In these cases similar statements were held inadmissible but without sufficient discussion of the law. In the case of *Ramadin Rai v. Dhunwanti Koer* (2) even a statement made by the predecessor of the Defendant while dealing with the property claimed was held inadmissible.

(2) 17 C. W. N. 1016 (1912).

(3) I. L. R. 31 Cal. 680 (1903).

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sible against the Plaintiff. It is not necessary to go so far but it shows the anxiety of the Court to uphold the salutary principle of disallowing proof of statements in favour of a party making it or his representatives-in-interest and thus not permitting a party to take advantage of his own act.

The finding of the learned Subordinate Judge on oral evidence of possession adduced by the parties is vague and indefinite though it seems, from his comments on the Defendant's evidence, that he prefers the oral evidence on behalf of the Plaintiff. But as I have stated there is no documentary evidence of title on either side and as the learned Subordinate Judge has relied upon the pottah, Ex. 4, in proof of Plaintiff's possession, we cannot, in second appeal, say that excluding the pottah he would have arrived at the same conclusion on the question of possession. The learned Subordinate Judge has not also entered any finding on the issue of limitation.

We are therefore constrained to allow the appeal and send the case back to the lower Appellate Court for a re-examination of the evidence on record excluding the pottah, Ex. 4, from consideration and we order accordingly. The costs will abide the result.

CUMING, J.—I agree.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 770 S) of 1924

IN

S. A No. 741 of 1922.

GREAVES, J.
CHAKRAVARTI, J.
1924.

Heard, 21 and
24, November.
Judgment,
24, November.

KRISHNA MOHAN
GHOSH, Appellant,
Petitioner,

v.

SCRAPATI BANERJI and
ors., Respondents,
Opposite Party.

Limitation Act (IX of 1908), sec 5 and Sch. I, Art 177 (as amended by Act XXVI of 1920)—Application for substitution out of time—Ignorance of law, if sufficient cause within the provisions of sec. 5 of the Limitation Act

Where a Respondent died on the 13th December 1923, and the Appellant filed an application on the 9th June 1924 for setting aside the abatement of the appeal as against that Respondent and for substituting his heir, and the Appellant stated in his affidavit that although he was aware of the death of the Respondent he did not know that substitution of his legal representative was necessary or that it was his duty to bring in the said legal representative on the record :

Held—That under the circumstances of the case the delay was bonâ fide and sufficient cause had been shewn within the provisions of sec. 5 of the Limitation Act.

This was a Rule granted on the 16th June 1924 calling upon the heir of the deceased Respondent No. 2 and the surviving Respondents to show cause why the abatement of the appeal as against the deceased Respondent should not be set aside and the substitution made as prayed.

The facts of the case will appear from the following sworn petition of the Appellant on which the Rule was issued :—

"1. That the above appeal arises out of a suit for ejectment brought by the Opposite Party above-named against your Petitioner

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in respect of a plot of *bastu* land which forms the ancestral homestead of your Petitioner.

2. That the Respondent No. 2 named Amarapati Banerji died intestate on the 13th December 1923 leaving as his sole heir his only son named Umapado (Kanta) Banerji who is a *sui juris*.

3. That although your Petitioner was aware of the death of the said person, he did not know that substitution of his legal representative was necessary or that it was your Petitioner's duty to bring in the said legal representative on the record.

4. That your Petitioner is an ignorant milkman and has had no experience of any litigation previous to the present one.

5. That on the 6th June 1924 the said appeal came on the peremptory board for the first time and on that day the Respondents' Vakil informed your Petitioner's Vakil about the death of the Respondent No. 2, and thereon the case was adjourned and your Petitioner's Vakil sent for your Petitioner and informed him that the appeal cannot be heard without a proper substitution.

6. That your Petitioner will be seriously prejudiced if the said appeal is not heard on the merits and the decree for ejectment of your Petitioner from his ancestral homestead prevails."

Babu Hiralal Chakravarti for the Petitioner.—Reads the petition. I submit that the facts stated in the petition would be "sufficient cause" within the meaning of sec. 5 of the Limitation Act for extending the period of limitation.

Babu Hemendra Chandra Sen for the Opposite Party refers to *Sitaram Paraji v. Nimba* (1), where West, J., said: "Mere ignorance of the law cannot be recognised as a sufficient reason for delay under sec. 5 of the Act for that would be putting a premium on ignorance."

[The Petitioner's Vakil having prayed for time to consult the case-law their Lordships adjourned the hearing to Monday the 24th November.]

Babu Hiralal Chakravarti for the Petitioner.—I submit that upon the facts stated in the petition the delay was *bond fide*. Refers to *Ham Raji Jambhekhar v. Pralhaddas Subharn* (2) and *Durga Charan Naskar v. Dookhiram Naskar* (3).

The deceased Respondent was one of the Plaintiffs. The effect of the non-substitution of his heir will be that the appeal will be held incompetent on this preliminary ground, and the decree for ejectment of the Petitioner will stand.

Babu Hemendra Chandra Sen for the Opposite Party.—Mere ignorance of the law cannot be "sufficient cause" within the meaning of sec. 5 of the Limitation Act. The cases cited by my learned friend have no application.

[CHAKRAVARTI, J.—There are cases in which extension of time has been granted under sec. 5 where there was *bond fide* mistake in law.]

Yes, but there is difference between mistake in law and mere ignorance of the law. Mere ignorance of the law, I submit, can never be and has never been held to be a ground for extension of time under sec. 5 of the Limitation Act, while mistake of law in certain cases may be so. Even mistake of law is not *per se* sufficient reason for asking the Court to exercise its discretion under sec. 5 but when in fact through *bond fide* mistake erroneous proceedings are instituted extension of time may be granted under that section on the analogy of sec. 14: see *Brij Indar Singh v. Kanshi Ram* (4). For example, pursuit of a remedy in good faith in a wrong Court or by an application for a review.

Such is not the case here. There is no

(2) I. L. R. 20 Bom. 133 at p. 143 (1895).

(3) I. L. R. 26 Cal. 925 (1899).

(4) I. L. R. 45 Cal. 94 at p. 106; s. c. 22 C. W. N. 169 (P. C.) (1917).

(1) I. L. R. 12 Bom. 320 at p. 322 (1887).

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question of any *bond fide* mistake. Para. 3 of the petition states the ground for the delay which is simply ignorance of the statutory provisions of the law. If mere ignorance of the law is held to be sufficient cause for extending the period of limitation under sec. 5 it will lead to disastrous results. One may wait as long as he chooses, and then apply under sec. 5 for extension of time on the simple ground of ignorance of the law of limitation. There can be no such thing as *bond fide* ignorance of the law. The question of *bond fide* does not arise at all. Sec. 5 of the Limitation Act does not release a person from the obligation to know the law of the land.

I submit that no case has been made out under sec. 5, and the Rule ought to be discharged. Your Lordships are not concerned with the question of the effect of the discharge of this Rule on the competency of the appeal. My client has secured a valuable right and unless sufficient cause is shewn within the meaning of sec. 5 he ought not to be deprived of the advantages he has obtained by virtue of the abatement of the appeal as against the deceased Respondent.

The JUDGMENT OF THE COURT was as follows :—

We think that under the circumstances of the case the delay was *bond fide* and sufficient cause has been shewn within the provisions of sec. 5 of the Limitation Act.

We accordingly make the Rule absolute. Costs one gold mohur will be costs in the cause.

H. C. S. Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 58J of 1924

SUBBAREDDY, J.	}	ASWINI KUMAR DUTT
MUKERJI J.		and ors., 1st party,
1924,		Petitioners,
Heard,		v
10, September.		PUTI and ors.,
Judgment,		2nd party, Opposite
12, September.		Party.

Criminal Procedure Code (Act V of 1898), sec. 360, if applicable to enquiries under Chap. XII—Accused, meaning of.

Sec. 360, Cr. P. C., is applicable to enquiries under Chap. XII of the Code.

"Accused" in sub-sec. (1) of sec. 360 means a person over whom the Criminal Court is exercising jurisdiction.

This was a Rule granted on the 15th July 1924 against the order of the Deputy Magistrate of Munshigunge (Mr. S. N. Chatterjee), dated the 8th March 1924, declaring under sec. 145, Cr. P. C., that the second party were entitled to possession until evicted therefrom in due course of law, an application for revision of which order was rejected by the Sessions Judge of Dacca (Mr. R. F. Lodge), on the 23rd June 1924.

The facts of the case will appear from the judgment.

Babus Suresh Ch. Talukdar and Mohendra Kumar Ghosh for the Petitioners.

Babu Dwijendra Krishna Dutt for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—One of the grounds upon which the present Rule has been issued relates to the non-compliance of the provisions of sec. 360, Cr. P. C., in recording the depositions of the witnesses examined in the proceedings.

By the terms of sec. 356, Cr. P. C., the

ASWINI KUMAR DUTT v. PUTI.

evidence of witnesses examined in inquiries under Chap. XII have to be recorded in the manner provided for by that section. Sec. 360, sub-sec. (1) expressly refers to sec. 356 and lays down that as the evidence of each witness taken under sec. 356 is completed it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. Then follow sub-secs. (2) and (3) which need not be quoted. Sub-sec. (1) does not make any reservation or exception in respect of evidence recorded in inquiries under Chap. XII, and on the face of it makes sec. 360 applicable to all evidence recorded under sec. 356. On principle also very little distinction can be made between enquiries under Chap. XII and other enquiries or trials. In my judgment in the case of *Hira Lal Ghosh v. The King-Emperor* (1), I have discussed the intention of the legislature in enacting this provision and I can see nothing on which I can reasonably make a distinction.

The only difficulty is created, as has been urged on behalf of the Opposite Party to this Rule, by the use of the word "accused" in sub-sec. (1) of sec. 360. I am inclined to take the view that the word has been used in its wider significance as meaning a person over whom a Criminal Court is exercising jurisdiction.

In my opinion sec. 360, Cr. P. C., is applicable to enquiries held under Chap. XII and inasmuch as admittedly the provisions of that section have not been complied with, the enquiry was vitiated. The order must therefore be set aside and the Rule made absolute.

It will be open to the Magistrate to take further proceedings if there is still any apprehension of a breach of the peace.

(1) 26 C. W. N. 683 (1924).

SUBRAWARDY, J.—I agree.
S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 906 OF 1924.

SUBRAWARDY, J.	}	ISHAN CHANDRA SAMANTA, Petitioner, v. HRIDOY KRISHNA BOSE, Opposite Party.
CUMING, J.		
1924,		
Heard,		
17, December.		
Judgment,	}	
22, December.		
—		
BUCKLAND, J.	}	
1924,		
6, February.		

Criminal Procedure Code (Act V of 1898), secs. 145, 360—Party to proceedings under sec. 145 is an accused—Depositions of witnesses, if should be read over under sec. 360 in the presence of parties to proceedings under sec. 145—Magistrate, if must give reasons for final order Full Bench reference to—Third Judge to whom reference is made on difference of opinion, if can make reference to Full Bench.

Held per BUCKLAND and CUMING, JJ. (SUBRAWARDY, J., contra).—That a party to a proceeding under sec. 145, Cr. P. C., is not an accused person within the meaning of sec. 360, Cr. P. C., and that section does not apply to such proceedings.

Per BUCKLAND and SUBRAWARDY, JJ. (CUMING, J., contra).—The final order under sec. 145, Cr. P. C., should contain a statement of the reasons for the decision sufficient to enable the High Court to determine whether the Magistrate has or has not complied with sub-sec. (4) of sec. 145 and directed his mind to the consideration of the effect of the evidence adduced before him.

Per BUCKLAND, J.—A third Judge to whom a reference is made under sec. 429, Cr. P. C., cannot make a reference to a Full Bench.

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This was a Rule granted on the 30th September 1924 against an order of the Deputy Magistrate of Sea'dah (Mr. J. Dutt), dated the 1st July 1924, an application for reference to the High Court against such order having been rejected by the Sessions Judge, 24-Perganahs (Mr. G. N. Roy) on the 28th August 1924.

The Rule came on for hearing in the first instance before SUHRAWARDY and CUMING, JJ., who having differed in opinion, the case was referred for hearing to BUCKLAND, J.

The facts of the case, so far as they are material, will appear from the judgments.

Babu Dwijendra Krishna Dutt for the Petitioner.

Mr. S. K. Sen, Counsel and Babus Satindra Nath Mukerjee and Prafulla Chandra Chakravarty for the Opposite Party.

The dissentient JUDGMENTS OF SUHRAWARDY AND CUMING, JJ., were as follows:—

SUHRAWARDY, J.—I have the misfortune to differ from my learned brother in the interpretation of sec. 360, Cr. P. Code and its applicability to proceedings under Chap. XII of the Code. Sec. 356 provides that in all trials and in enquiries under Chaps. XII and XVIII the evidence of each witness shall be taken down in writing in the language of the Court. Sec. 360 says that as the evidence of each witness taken under sec. 356 is completed it shall be read over to him in the presence of the "accused" or his pleader. No exception is made in the section in the case of proceedings under Chap. XII which could easily have been made if the legislature intended to exclude them but it is argued that the use of the word "accused" limits the applicability of

sec. 360 to cases where a person is charged with the commission of any offence for which he is liable to be punished, and excludes Chap. XII. The whole controversy therefore hinges on the meaning of the word "accused" which has not been defined in the Code or any other enactment.

There is ample authority for the view that the term "accused" means any person over whom the Criminal Court exercises jurisdiction. See *Jhojha Singh v. Queen-Empress* (1), *Lalit Mohon Maitra v. Surja Kanta Acharjee* (2), *Hopcroft v. Emperor* (3), *Queen-Empress v. Mona Puna* (4) and *Queen-Empress v. Mutusaddi Lal* (5). I must demand very cogent reasons to make me deviate from an unchanging current of decisions. I am not impressed by the argument that a witness in a criminal case is a person over whom the Criminal Court assumes jurisdiction as it can summon him and even issue warrant to enforce his attendance. It is not assuming jurisdiction as a Criminal Court but as a Court, in the same way as a Civil Court, doing a quasi-ministerial act, as a preliminary to exercising its criminal jurisdiction over some other person. Nor am I persuaded by the circumstance that there may be more parties than one in a 145 case and all of them should not be called accused or that the order under that section may be passed in the absence of a party. A Criminal Court does pass orders against an absconding accused. The view which my learned brother entertains in this matter has led him to hold

(1) I. L. R. 23 Cal. 493 (1896).

(2) I. L. R. 23 Cal. 709 (714); s. c. 5 O. W. N. 749 (1901).

(3) I. L. R. 36 Cal. 163; s. c. 13 O. W. N. 151 (1908).

(4) I. L. R. 16 Bom. 561 (1893).

(5) I. L. R. 31 All. 107 (1906).

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in *Benod Behari Nath v. Emperor* (6), that a person against whom proceedings under Chap. VIII have been taken is not an accused person though he may be punished with imprisonment on failure to give security. I am unable to agree in the view that sec. 360 does not apply to proceedings under Chap. XII and adhere to the decision in *Aswini Kumar Dutt v. Puti* (7) to which I was a party. My opinion is that in all criminal cases where evidence is taken down under the provisions of sec. 356, the requirements of sec. 360 must be complied with. Otherwise there is no sense in taking down evidence *verbatim* or *in extenso*, as distinguished from a mere memorandum of it, unless its correctness is checked in the manner provided in sec. 360.

The second ground on which this Rule was granted is that the Magistrate should have given some reasons for his decision. Here also I am not in agreement with my learned brother that it is not absolutely necessary for the Magistrate to do so and I follow the decision in the case of *Bhuban Chandra Hazra v. Nibaran Chandra Santra* (8) to which I was a party. But it is not necessary to pursue this point as I am of opinion that the judgment of the Magistrate does not offend in that respect. Considering the state of the record, the judgment is unassailable on this ground.

It remains now to consider what order I should like to pass in this case. In view of the evidence adduced in the case, I am of opinion that the decision of the Magistrate is correct on the merits. I am also of opinion that though there has been an infringement of the law in defiance of a

(6) I. L. B. 50 Cal. 985 : s. c. 27 C. W. N. 996 (1922).

(7) 29 C. W. N. 474 (1924).

(8) I. L. B. 49 Cal. 187 : s. c. 25 C. W. N. 887 (1921).

mandatory provision in this case, my discretion under sec. 439, Cr. P. C., not to interfere with the order of the Magistrate remains unaffected. But considering that in many instances this Court declined to look into the merits on the ground that the entire trial was illegal and that this case raises a point which ought to be settled for the guidance of the subordinate Courts, I have decided to differ from my learned brother in the result and would make the Rule absolute on the first ground on which it was issued.

As we are unable to agree and divided in opinion the case should be laid before another Judge under sec. 439 read with sec. 429, Cr. P. Code and the papers should be placed before the Chief Justice for necessary orders.

CUMING J.—This Rule was granted on two grounds :

(1) That the learned District Judge was wrong in holding that a party to a proceeding under sec. 145, Cr. P. C., was not an accused person within the meaning of sec. 360, Cr. P. C.

(2) That the learned District Judge should have held that the judgment of the trial Court was not in accordance with law inasmuch as the findings were not supported by sufficient reasons.

The form of the petition is perhaps open to objection because the Petitioner should not have moved against the order of the District Judge which was simply an order refusing to refer the case to the High Court but against the order of the Magistrate which is really the order we are now asked to revise.

The District Judge, or to be more correct, the Sessions Judge, had no power to deal with the matter beyond referring it to the High Court.

The Petitioner contends that the evidence of the witnesses was not read over

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to them as required by the provision of sec. 360 in view of the decision of this Court in the case of *Hira Lal Ghosh v. The King-Emperor* (9).

Sec. 360 is as follows :—"As the evidence of each witness taken under sec. 356 or 357 is completed it shall be read over to him in the presence of the accused if in attendance or of his pleader if he appears by pleader and shall, if necessary, be corrected."

The first difficulty that presents itself in applying sec. 360 to proceedings under sec. 145 (Chap. XII of the Code) is that in a proceeding under Chap. XII there is no accused person. There are parties, always two, sometimes more. Each of these parties may consist of many persons. Sometimes there are several hundred persons party to such proceedings. The Petitioner contends that all the parties are accused persons. To support this argument he relies on the case of *Jhojha Singh v. Queen-Empress* (1) in which it was held that "accused" means "a person over whom the Magistrate or other Court is exercising jurisdiction." With great respect to the learned Judges the acceptance of this definition would lead to some somewhat startling results. For instance a Magistrate exercises jurisdiction over a witness for he issues a summon to the witness which witness is bound to obey and can enforce his attendance by a warrant. This seems to me to be exercising his jurisdiction over the witness. A witness would be therefore an accused and no oath could be administered to him (sec. 342, Cr. P. C.). The same train of reasoning would apply to a juror. Again the parties being accused persons none of them could be examined on oath in the proceedings nor could they be cross-exa-

mined. I am not therefore prepared, with great respect to the learned Judges, to accept this definition of an accused. Moreover the learned Judges were deciding in that case the meaning of the term "accused" with regard to the provision of sec. 340 and therefore this definition can only be held good so far as sec. 340 is concerned. If I had to define the term "accused" which the Code has not defined I should define "an accused" as a person charged with an infringement of the law for which he is liable if convicted to be punished. Turning to Chap. XII itself it is significant that the word "accused" is nowhere found in the chapter. The persons concerned are described as parties and the sec. 145 (?) even provides for the substitution of the legal representative of a party on his death. I am unaware if any provision of the law by which a legal representative of an "accused" can be substituted on his death. For instance, could the legal representative of a person accused of, say, theft, violence or murder be substituted on his death? In other part of the Code for instance Chaps. XVIII, XIX, XX, XXI, XXII, XXIII, which deal with trials and enquiries preliminary to commitment for trial, the expression "accused" is always used to denote the person proceeded against. In Chap. XII it cannot be strictly said that anyone is proceeded against.

The Magistrate draws up a proceeding stating that he is satisfied that a dispute likely to cause a breach of the peace exists and requires the parties to attend his Court to put in their statement as to their claims and then decides which party is entitled to possession. It is to be noted that the parties are not obliged to attend nor can they be compelled to do so. Admitting for the sake of argument that the expres-

(1) I. L. R. 23 Cal. 493 (1896).

(9) 28 C. W. N. 968 (1924).

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sion "accused" applies to the parties in a proceeding under Chap. XII it must presumably apply to all the parties. It cannot be held that one party is complainant and another party accused. The evidence must be read over presumably in the presence of all the accused and so of all the parties. But it sometimes happens that some of the parties are not present and are not represented by a pleader. How could the evidence be read over in their presence? The fact that sec. 356 and sec. 357 are mentioned in sec. 360 does not necessarily show that the section refers to all evidence taken under those sections. Had it been so the legislature would probably have inserted the words "or parties" after the word "accused." It has been argued that if the reading which I would put on the section is correct no one could be prosecuted for giving false evidence in such proceedings. I fail to see any substance in this objection. The false evidence that a person is prosecuted for giving is the actual statement he makes in Court. The record is only a piece of evidence to prove what statement he did make.

It is argued that sec. 80 of the Evidence Act would not apply to deposition so recorded and not read over. So long as the statement had been taken in accordance with law the presumption of correctness under sec. 80 applies. Sec. 80 is only a rule of evidence and if it did not apply it would still be possible to prove the correctness of the statement recorded by examining the person who heard and recorded it.

Then it has been contended that if the expression "accused" does not include parties sec. 526 has no application to proceedings under sec. 145.

I admit I do not follow this argument. There is nothing in this section which

would lead to the conclusion that it applies only to matters in which there is an accused person. Sub-secs. (5) and (6) which are relied on to support this contention simply prescribe the procedure to be followed when an accused person makes the application. But it does not follow from this that no one else can make an application for transfer under this section. Complainants sometimes apply. Even if the contentions were correct this Court would still have the power of transfer under its general power of superintendence.

The conclusion to which I am bound to come is that sec. 360 has no application to proceedings under Chap. XII and in such proceedings it is not obligatory on the Court to read over the deposition to the witnesses. The reason of the distinction from real criminal enquiries and trials is an obvious one. It has to be borne in mind that these proceedings under Chap. XII are summary proceedings of a quasi-civil nature, the object of them being to prevent breaches of the peace when a dispute about property arises. No right or title is decided and no one's life or liberty is in question.

Practically they simply decide who is to be Plaintiff and who Defendant in the inevitable civil suit.

The next ground taken is that the judgment is not in accordance with law as the Magistrate does not support his decision with sufficient reasons.

Sub-sec. (4) provides that the Magistrate after hearing the parties and considering the evidence shall decide whether any or which party was in possession. The word "decide" does not necessarily include giving reasons for the decision; when the Code intends that reasons should be given, it says so. As an instance sec. 263 (h) may be referred to. The Code clearly contemplates cases in which no

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reasons are to be given. See sec. 370 (l) which makes it clear that only where a Presidency Magistrate inflicts a sentence of more than a certain amount is he obliged to give reasons.

See also sec. 213 which provides that the Magistrate shall give reason for committing an accused for trial. Sec. 366 and sec. 367 of the Code have no application, for these proceedings under Chap. XII are not trials.

The conclusion to which a careful consideration of the Criminal Procedure Code leads me is that the law does not require that the Court should give reasons for the decision in a proceeding under Chap. XII. The reason is obvious. These proceedings are summary proceedings to prevent breaches of the peace and nothing more.

I would discharge the Rule.

[Owing to this difference of opinion, the case was heard again before BUCKLAND, J.]

Babu Dwijendra Krishna Dutta for the Petitioner.

Mr. Pugh, Counsel and *Babus Satindra Nath Mukerjee* and *Profulla Chandra Chakraverty* for the Opposite Party.

The JUDGMENT OF BUCKLAND, J., was as follows :—

BUCKLAND, J.—This case has been referred to me under sec. 489/429 of the Code of Criminal Procedure. Two points arise for decision: *Firstly*, whether in proceedings under Chap. XII, Cr. P. C., the provisions of sec. 360 (i) as to reading over the evidence to the witnesses in the presence of the accused have to be complied with, and *secondly*, whether under sec. 145 (4) it is the duty of the Magistrate to state his reasons for his decision.

As to the first point, the case depends upon whether or not the parties are persons to whom the section refers by the

words "the accused." Several authorities have been cited in support of the contention that the parties to proceedings instituted under Chap. XII are persons to whom the section so refers.

A definition of an accused person was formulated by the High Court of Bombay in *Queen-Empress v. Mona Puna* (4) in which their Lordships held that an accused is a person over whom the Court is exercising jurisdiction. That definition has been adopted in other cases, both by this Court and at Allahabad [*Jhojha Singh v. Queen-Empress* (1) and *Queen-Empress v. Mutasaddi Lal* (5)].

In my opinion that definition cannot be accepted as one of universal application, and I entertain considerable doubt whether any of the learned Judges intended that it should be so applied. The Court exercises jurisdiction over, for instance, witnesses, and a definition of an accused person so stated would be equally applicable to them. It may be that in a case or class of cases a party is subject to sanctions or entitled to rights similar to those to which an accused person is subject or entitled. In such circumstances the phrase used in the judgment of this Court in *Hopcroft v. Emperor* (3) that a party "is in the position of an accused person" is to be preferred. But that is a very different thing to holding that such a party is an accused. *Queen-Empress v. Mona Puna* (4) and *Jhojha Singh v. Queen-Empress* (1) have been distinguished by this Court in *Benod Behari Nath v. Emperor* (6). I do not, however, understand that the authorities have been cited in support

(1) I. L. R. 23 Cal. 493 (1896).

(3) I. L. R. 36 Cal. 163: s. c. 13 C. W. N. 151 (1908).

(4) I. L. R. 16 Bom. 661 (1892).

(5) I. L. R. 21 All. 107 (1898).

(6) I. L. R. 50 Cal. 985: s. c. 27 C. W. N. 993 (1922).

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of any argument by analogy, but solely as providing a definition applicable to this case.

I have been referred to a recent unreported decision precisely upon the point, *Aswini Kumar Dutt v. Puti* (7) in which my learned brothers Mr. Justice Suhrawardy and Mr. Justice Mukerji have held that sec. 360 is applicable to enquiries held under Chap. XII, and Mr. Justice Mukerji, in referring to the use of the word "accused," said :—

"I am inclined to take the view that the word has been used in its wider significance as meaning a person over whom the Criminal Court is exercising jurisdiction."

With all respect to the learned Judges who decided that case, I am unable to take the same view. The Code of Criminal Procedure provides for trials and inquiries. Accused persons have to be tried. They are charged or liable to be charged with having committed an offence. An offence is defined [sec. 4 (o)] as an act or omission made punishable by any law for the time being in force,

Under Chap. XII the Magistrate holds an enquiry. An enquiry is not a trial [sec. 4 (k)]. To such an enquiry there are parties. No one is charged with having committed an offence. The ultimate decision should be a finding as to possession. The parties to such enquiry are so referred to, and the word "accused" does not find a place in the chapter.

The foregoing reasons in themselves appear to be sufficient to decide the point, but sec. 340, as recently amended, is, to my mind, conclusive, and the attention of the learned Judges who heard the case with which I now have to deal and *Aswini Kumar Dutt v. Puti* (7) does not appear to have been drawn to it.

Formerly the section ran :— "Every
(7) 29 C. W. N. 474 (1924)

person accused before any Criminal Court may of right be defended by a pleader." Now the section recognises persons (1) accused of an offence before a Criminal Court, and (2) against whom proceedings are instituted under the Code, that is to say, two classes of persons.

Sec. 340 (2) then goes on to say :— "Any person against whom proceedings are instituted in such Court under sec. 107, Chap. X, Chap. XI, Chap. XII or Chap. XXXVI or under sec. 552 may offer himself as a witness in such proceedings."

This provision is entirely new. Formerly, such persons were unable to offer themselves as witnesses. To that extent, they may then be said to have been in the position of persons accused of offences who neither then nor now may offer themselves as witnesses in proceedings in which they are charged with such offences. Sec. 342 (4) provides that no oath shall be administered to the accused. Were it to be held that persons against whom proceedings are instituted under Chap. XII are accused persons, the result would be that though they might offer themselves as witnesses in such proceedings, no oath could be administered to them.

There is also another difficulty in the way of the Petitioners to which my attention has been drawn on behalf of the Opposite Party. Sec. 360 provides :—

"As the evidence of each witness taken under sec. 356 or 357 is completed, it shall be read over to him in the presence of the accused, if he is in attendance, or of his pleader, if he appears by pleader, and if necessary, shall be corrected."

It has been decided by this Court in *Kefatullah v. Feruzuddin Miah* (10) that parties to an inquiry under Chap. XII cannot be compelled to attend
(10) 5 C. W. N. 71 (1920).

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by the issue of a warrant, in itself a material difference from the position of an accused person. Assuming, therefore, that the parties to such inquiry do not attend nor appear by pleaders, there are no means whereby sec. 360 (1) can possibly be complied with, and if the view which I am invited on behalf of the Petitioners to take is the correct one, the result would be that in such circumstances there could not be any legal conclusion to an inquiry under Chap. XII.

In my judgment, the parties to proceedings under Chap. XII of the Code of Criminal Procedure are not persons referred to by the words "the accused" in sec. 360 (1) of that Act.

The second point which has been argued is that the Magistrate has not given reasons for his order under sec. 145 (4). I may say at once that reliance is not placed upon secs. 366 and 367 of the Criminal Procedure Code, to which reference was made in *Bhuban Chandra Hazra v. Nibaran Chandra Santra* (8). In that case, however, the learned Judges said:—

"Whether these sections did or did not apply to proceedings under sec. 145, they were entitled to require from the trial Magistrate a statement of the reasons for the decision sufficient to enable them to determine whether he has or has not complied with sub-sec. (4) of sec. 145 and directed his mind to the consideration of the effect of the evidence adduced before him." With that judgment and also the judgment in *Motaherili v. Ishaque* (11). I am in entire accord. To what extent a Magistrate should give effect to what has been so decided one cannot lay down by general rule, but I may say that provided he complies with what learned Judges

have said is necessary for the purpose of enabling this Court to appreciate and deal with the case in revision, a degree of brevity which would be out of place in a judgment to which sec. 367 applies would not necessarily be open to objection.

The learned Magistrate in this case has merely stated that one witness was examined on behalf of the first party and five were examined on behalf of the second, but there is nothing from which one can weigh his appreciation of the evidence beyond the bare statement of his finding.

The first question is as to the order which I ought to make. I observe that my learned brother Mr. Justice Suhrawardy stated that in his opinion the decision of the Magistrate is correct on the merits. Though my learned brother Mr. Justice Cuming would have discharged the Rule he has not expressed an opinion as to the merits. Had he expressed a similar opinion even though I hold the view which I have stated as to the duty of a Magistrate under sec. 145 (4), I should have discharged the Rule. As it is, the order I make is that the final order of the Magistrate, dated the 1st July 1924, be set aside, and I direct that the case be re-opened at the point reached on that date and that after hearing the parties afresh and after recording a statement of the reasons for his decision such as I have already indicated, the learned Magistrate do dispose of the matter in accordance with the law.

Before I part with this case I wish to refer to the position that arises by reason of my differing from the judgment in *Aswini Kumar Dutt v. Puti* (7). Under sec. 429, Cr. P. C., the third Judge before whom the case is laid is required to deliver his opinion and the judgment or order shall follow such opinion. That

(8) I. L. R. 49 Cal. 187; s. c. 25 C. W. N. 887 (1921)

(11) 89 C. L. J. 836 (1924).

(7) 29 C. W. N. 474 (1924).

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does not enable me to refer the point to a Full Bench. References to a Full Bench are made under Chap. VII, rr. 1 and 5 of the Appellate Side Rules of this Court. The difficulty, however, is that sitting alone as a third Judge, to whom the case has been referred under sec. 429, Cr. P. C., I do not constitute a Division Bench within the meaning of the Rules and it is not therefore open to me to refer the point. Were I able to do so, I would refer it, but in the circumstances it appears to me that I have no option.

Learned Counsel asks that the case should go back to Mr. J. Dutt, who is now sitting at Alipore, though at the time when he made the order in question he was sitting at Sealdah. There is no question of jurisdiction and as he has concluded the inquiry the case should go back to him.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 374 OF 1924.

MUKERJI, J. 1924, 18, September.	}	GOKUL KHATIK, Appellant, v. THE KING-EMPEROR and anr., Respondents.
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Indian Evidence Act (I of 1872), secs 14, 15 — Evidence of previous fraud, if admissible in trial under sec. 420, I P. C.

Evidence with regard to a previous act of fraud alleged to have been committed by an accused person who is on his trial on a charge under sec. 420, I. P. C., is inadmissible in law. Such evidence cannot be brought in either under sec. 14 or sec. 15 of the Indian Evidence Act, the case being one in which the innocence or guilt of the accused depends upon proof of actual facts and not upon the state of the accused's mind.

This was an appeal preferred on the

25th June 1924 against an order of the Honorary Presidency Magistrate, Calcutta (Mr. J. N. Sen), dated the 23rd May 1924, convicting the Appellant under sec. 420, I. P. C., and sentencing him to pay a fine of Rs. 500.

The facts of the case will appear from the judgment.

Babu Probodh Chandra Chatterjee for the Appellant.

Babu Surendra Nath Dutt for the Crown and the Complainant.

THE JUDGMENT OF THE COURT was as follows :—

The Appellant Gokul Khatik has been convicted by Mr. J. N. Sen, Honorary Presidency Magistrate, under sec. 420, I. P. C., and sentenced to pay a fine of Rs. 500, in default to undergo rigorous imprisonment for two months; and a further order has been made directing the payment of Rs. 400 out of the fine, if realised, to the complainant as compensation. The facts of the case, shortly stated, are these: that about two years ago the complainant pledged certain gold and silver ornaments with the accused for Rs. 350, that on the 2nd January 1924 at about 9-50 A.M., she went to the place of the accused accompanied by a number of witnesses and gave him Rs. 350 being the principal with Rs. 120 as interest due on it and wanted the ornaments back, that the accused asked the complainant to wait for sometime and promised to return the ornaments after bringing them from a person who was alleged to have kept them, that the complainant waited till about 5 P.M. in the evening but the accused did not return, that she thereafter came away and on the next morning at about 10 A.M., she again went to the house of the accused accompanied by some witnesses but could not find him.

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The defence of the accused as it appears from the trend of the cross-examination of the prosecution witnesses and also from the statement which he made in Court was to the effect that he did not receive any money, as alleged on behalf of the complainant. The accused, however, after process was issued by the Court, produced the articles before the Court and also stated that the complainant had not paid him any money. Upon the allegations set forth above, the learned Magistrate framed two charges in the alternative against the accused, one under sec. 406, I. P. C., and the other under sec. 420, I. P. C. The charge under sec. 406 was to the effect that on 2nd January 1924 the accused committed criminal breach of trust in respect of several gold and silver ornaments pledged with him by the complainant and thereby committed the said offence. The charge under sec. 420, I. P. C., was to the effect that on the 2nd January 1924 the accused dishonestly induced the complainant to part with several gold and silver ornaments on false representation and thereby committed the said offence. It will be clear on an examination of this charge under sec. 420, I. P. C., that it does not correctly set out the facts of the case for the prosecution upon which it is founded; for, it was not the case of the complainant that she had been induced to part with her ornaments on any false representation. The real charge under sec. 420, I. P. C., which could be framed upon the case as presented on behalf of the prosecution was that the accused dishonestly induced the complainant to part with the sum of Rs. 470, dishonestly concealing from the complainant the fact that he never intended to return the ornaments for the return of which the amount was being paid. This defect in the framing of the

charge, though a material one, does not appear to have prejudiced the accused in any way for it seems from the answer which the accused gave to the Court when examined under the provisions of sec. 342, Cr. P. C., that he understood exactly what the case against him was. It also appears from the evidence that was adduced on behalf of the defence that it was clear to the accused what case he had to meet.

The judgment of the learned Honorary Magistrate which I have perused with care appears to me to be not very satisfactory in consequence of certain errors into which he seems to have fallen. In the first place, he says that all the witnesses examined on behalf of the prosecution are disinterested and independent persons, forgetting that at least one of the witnesses, namely, P. W. No. 5, is a daughter of the complainant, prosecution witness No. 1. There is also a defect in the consideration of the evidence that was adduced on behalf of the defence to be found in the judgment of the Honorary Magistrate inasmuch as he states that it was the duty of the accused to call the doctor whose coachman has been examined as the D. W. No. 1 and he was not prepared to rely upon the evidence of the coachman because his master was not examined. There are other defects in the judgment of the learned Honorary Magistrate which I need not specifically refer to. There is also the fact that evidence has been let in with regard to a previous act of fraud which is alleged to have been committed by the accused person, I mean the evidence of P. W. 6, who speaks to the fact that on a particular occasion he was cheated by the accused in respect of a certain sum of money. That evidence to my mind is clearly inadmissible in law and it cannot be brought

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in with the aid either of sec. 14 or sec. 15 of the Indian Evidence Act. This was a case in which the question of the guilt or innocence of the accused depended upon proof of actual facts and not upon the state of the accused's mind. Therefore the evidence as to any previous act of fraud was not admissible under any provision of the law. That evidence therefore has got to be excluded in considering whether the case against the accused has been properly and legally proved.

Turning now to the evidence that has been adduced on behalf of the prosecution it appears that the complainant is supported in her testimony by the evidence of prosecution witnesses Nos. 2, 3, 4 and 5. Her statement with regard to her visit on the first day, namely, the 2nd January 1924, is supported by the evidence of prosecution witnesses Nos. 2, 3 and 4 and with regard to her visit on the next day, namely, the 3rd January, it is supported by the evidence of prosecution witnesses Nos. 2 and 5. Of these witnesses the evidence of prosecution witness No. 4 is discounted to a certain extent by reason of the fact that the complainant herself in her examination before the Court does not say that she was accompanied by this witness; and further it would appear from the cross-examination of this witness himself that he said that he did not know the parties and saw them only on the day of occurrence. His evidence is to the effect that the payment of Rs. 470 was made in his presence, that in the evening he enquired of the complainant whether she had received the ornaments back and was told that she had not. On the next day he met the complainant but after that he had no talk either with the complainant or with anybody. This evidence to my mind is not

quite satisfactory. I am not prepared to rely upon the evidence of this witness in so far as it is not corroborated by the other evidence on the record. The evidence of the other witnesses examined on behalf of the prosecution, however, leaves no doubt in my mind that as a matter of fact the story put forward on behalf of the prosecution is a true one. It is true that the prosecution witness No. 2 lives in a *bustee* in Kumartoli, prosecution witness No. 3 lives at Sobhabazar and prosecution witness No. 5 lives in Sickdarbagan—the place where the complainant also lives; and it is true that they did not in their evidence say how it was that they came together for the purpose of going to the house of the accused. But if any point as to the improbability with regard to the three witnesses having come together for the purpose of going to the complainant's house had got to be made out on behalf of the defence, it was clearly the duty of the defence to put questions to the witnesses in order to bring out facts which would go to show that there was such improbability or at any rate to ascertain why they collected together on that particular occasion. But it does not appear from the record that any such question was put to the said witnesses. There is also the further point to be considered in connection with this—that is, the story of the complainant herself. According to the complainant she waited all day; and although, as stated by her in her evidence, she cried when she found that the accused did not return it does not appear that she created any row or that the people of the neighbourhood were informed about the matter. She also says that she went to the place on the next day and enquired of a *dhopi* but did not take any further steps. But this to my mind is not a piece of conduct altogether inconsistent with what might

GOKUL KHATIK v. THE KING-EMPEROR.

be expected of the complainant under the circumstances. On the first day she waited and found that the accused did not return. That did not take away from her mind all hope of recovery of the ornaments and it might well be that she did not take any steps for the purpose of recovering the amount until the next day when she lost all hopes of recovering them. On the whole, taking into consideration the evidence of all these witnesses and also the probabilities and improbabilities of the case, in my mind there is no doubt that the case as put forward on behalf of the prosecution has been fully and conclusively proved.

There remains the evidence of the witnesses examined on behalf of the defence. The first witness examined on behalf of the defence is the coachman of the doctor. His evidence is to the effect that he always remained at the dispensary every morning from 8 to 9 or 9-30 A.M., with his carriage and that during 9 or 10 months he did not see the prosecution witness No. 1 at all there. The evidence of the defence witness No. 2 is that he has got a shop in the same house as the accused and he says that he did not see prosecution witness No. 1 at that place. He, however, is a tenant of the accused. The defence witness No. 3 is a neighbour of the accused and he also speaks to the effect that there was no *hullah*. The evidence of these three witnesses is not very convincing. It is negative evidence of a character upon which reliance cannot be placed for the purpose of discrediting the testimony of the prosecution witnesses whose evidence I have already referred to. It is true that defence witness No. 4 has been examined for the purpose of proving an entry made in the *thana* diary at the instance of the complainant which is to the effect that the charge which the com-

plainant made at the *thana* on the 3rd January at about 6 P.M., was only for detaining her silver ornaments. It is urged that in this entry there is no mention of the fact that money was paid by the complainant to the accused. Regard, however, being had to the way in which these entries are made, I am not prepared to infer from this omission that the story with regard to this payment was a subsequent invention.

On a consideration therefore of the whole evidence in the case and the facts, circumstances and the probabilities, I have come to the conclusion that the conviction of the accused is correct and that the sentence passed upon him is not severe; and I accordingly dismiss the appeal.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD DUNEDIN.	}	SAIYID MANZUR
LORD CARSON.		HASAN and ors.,
LORD DARLING.		Appellants,
1924,		
Heard,		v.
27, May.		SAIYID MUHAMMAD
Judgment,		ZAMAN and ors.,
13, November.		Respondents.

Civil right—Religious procession, right of a sect to conduct, along highway—Extent of right—Obstruction—Special damage, if necessary to found suit for damages or injunction against obstructors—English law, inapplicable.

Persons of whatever sect in India are entitled to conduct a religious procession with its appropriate observances along a highway, subject to the orders of the local authorities regulating the traffic, to the Magistrate's directions and the rights of the public.

Persons of different sects or religions cannot as of right claim that the func-

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tions of the procession should cease as it passes places of worship belonging to the former, but it would be open to the Magistrate in the special circumstances of a case to order that the observances should cease within a certain distance of such a place of worship.

The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India.

A suit for damages for preventing the Plaintiffs from conducting a religious procession along a highway or for a declaration and injunction is maintainable without proof of special damage other than the obstruction of the procession.

PARTHASARADI AYYANGAR v. CHINNA KRISHNA AYYANGAR (1), SUNDRAM CHETTI v. THE QUEEN (2), SADAGOPACHARIAR v. A. RAMA RAO (3), BASLINGAPPA PARAPPA v. DHARMAPPA BASAPPA (7) and MOHAMMED ABDUL HAFIZ v. LATIF HOSEIN (6) approved.

VIJIARAGHAVA CHARIAR v. EMPEROR (4), SATKU VALAD KADIR SAUSARE v. IBRAHIM AGA VALAD MIRZA AGA (5) and KAZI SUJAUDIN v. MADHAVDAS (6) disapproved.

This was an appeal from a decree of the High Court at Allahabad, dated the 30th May 1921, which reversed a judgment and decree of the Court of the Subordinate Judge of Aligarh, dated the 10th September 1918.

The dispute in this litigation was

between the Sunni and Shia Mahomedans of Aurungabad. The Appellants are Shias, the Respondents are Sunnis. The Moharram festival had for many years been celebrated in Aurungabad by the Shia community by taking in procession the *zulgenah*, flags, *tazias* and effigies, etc., through the streets, and holding *majlises* wherein *mersia* or elegies are recited. The procession would stop every 2 to 4 paces, form itself into a circle and perform the *matam*, that is, wailing, beating of the breast, and crying the names of Hasan and Hosain.

One of the streets through which the procession used to pass ran at the back of the Jama Masjid, a mosque of the Sunnis, where it was only about 12 feet wide. The lamentation, beating of the breast and other indications of violent and unrestrained mourning were regarded by the Sunnis as contrary to the principles of their religion.

For the first time in the history of the celebrations the procession was interfered with by members of the Sunni community in 1916, and in the following year the matter was brought to the notice of the District Magistrate by the Shias, and after an investigation he passed an order that *matam* was not to be performed within a certain distance of the Sunni mosque.

In 1918 the Plaintiffs brought the suit on behalf of the Shia community and claimed (1) a declaration that the Plaintiffs, along with other Shias, residents of qasba Aurungabad, were "entitled to stay and perform the *matam* in a circle at the public thoroughfare at the back of the Jama Masjid, and that the Defendants have no right or title to offer obstructions to the same or to stop it at any time;" (2) Rs. 200 by way of damages for articles of the "*majlis*" alleged to have been

- (1) I. L. R. 5 Mad. 304 (1882).
- (2) I. L. R. 6 Mad. 203 (F. B.) (1883).
- (3) I. L. R. 26 Mad. 376 (1902).
- (4) I. L. R. 26 Mad. 554 (1903).
- (5) I. L. R. 2 Bom. 457 (1877).
- (6) I. L. R. 18 Bom. 693 (1893).
- (7) I. L. R. 34 Bom. 571 (1910).
- (8) I. L. R. 34 Cal. 524 (1897).

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damaged and mental pain; and (3) a permanent injunction against the Defendants.

The Defendants alleged that the performance of *matam* was a misuser of the passage behind their mosque and constituted a nuisance. The subordinate Court decreed the Plaintiffs' claim in regard to the user of the passage and dismissed the claim for damages and a declaration was made that "subject to the orders of the local authorities regulating the traffic, the Plaintiffs have got the right to make short stays on the road at the back of the Jama Masjid for the performance of the *matam* and the Defendants are prohibited from making interference in the performance of the *matam*."

The Defendants appealed to the High Court and the Plaintiffs lodged cross-objections contending that the decree should have been made unconditionally.

On the 30th May 1921, the Appellate Court (Tudball and Sulaiman, JJ.) reversed the decision of the trial Judge and dismissed the Plaintiffs' suit and cross-appeal. The learned Judges were of opinion that the Plaintiffs' claim was "absolutely inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. In plain words what they ask from the Court is a declaration that they have a right to block the passage in a very unreasonable manner."

Messrs. L. DeGruyther, K. C., W. Wallach and Fateh Singh for the Appellants.

Sir George Lowndes, K. C. and Mr. Abdul Majid for the Respondents.

The following authorities were referred to in the course of the arguments :—

Herklot's *Manners and Customs of the Mussulmans of India* (2nd Ed. 1863), pp. 112, 144.

Ross's *Hindu and Mahomedan Feasts*, 1914, p. 106.

Buck's *Faiths, Fairs and Festivals of India*, p. 196.

Muthialu Chetty v. Bapun Saib (9), *Parthasaradi Ayyangar v. Chinna Krishna Ayyangar* (1), *Sundram Chetti v. The Queen* (2), *Sadagopachariar v. A. Rama Rao* (3), *Vijayaraghava Chariar v. Emperor* (4), *Kandasami Mudali v. Subroya Mudali* (10), *Mohamed Abdul Hafiz v. Latif Hosein* (8), *Beatty v. Gillbanks* (11), *Harrison v. Duke of Rutland* (12), *Ex parte Lewis* (13), *Hickman v. Maisey* (14), *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga* (5) and *Kazi Sujaudin v. Madhardas* (6).

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In the town of Aurangabad there are two sects of Moham-medans, the Shias and the Sunnis. These sects worship in the month of Moharram in a different manner. In particular the Shias conduct a procession along with various emblems, which it is not necessary to specify, all alluding to the martyrdom of Hasan and Hosain, and as the procession proceeds they from time to time perform a ceremony called *matam* which means that they stop for a little and wail. The Sunnis also revere the martyrdom of Hasan and

(1) I. L. R. 5 Mad. 304, 309 (1882).

(2) I. L. R. 6 Mad. 203, 214, 217 (F. B.) (1883).

(3) I. L. R. 26 Mad. 376 (1902); on (P. C.) L. R. 34 I. A. 93; 11 C. W. N. 585 (1907).

(4) I. L. R. 26 Mad. 554 (1903).

(5) I. L. R. 2 Bom. 457 (1877).

(6) I. L. R. 18 Bom. 693 (1893).

(8) I. L. R. 24 Cal. 524 (1897).

(9) I. L. R. 2 Mad. 140 (1880).

(10) I. L. R. 32 Mad. 478 (1909).

(11) L. B. 9 Q. B. D. 308 (1882).

(12) [1893] 1 Q. B. 142.

(13) L. R. 21 Q. B. D. 191 (1888).

(14) [1900] 1 Q. B. 152.

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Hosain but worship in a different way. In the town of Aurangabad from time immemorial the procession of the Shias has passed along a certain public road which passed behind the back of a mosque used by the Sunnis. In 1916 for the first time the Sunnis interfered with the procession and alleged that it disturbed their devotions in the mosque. *Modus vivendi* was arranged for a time. In order to prevent disturbances for the moment the Magistrates passed a regulation for the year in question that there should be no performance of *matam* within a certain distance of the mosque until the procession had passed a certain distance beyond the mosque. A similar arrangement was made in 1917. To bring matters to a crisis the Shias then, in 1918, raised an action in the Court of Aligarh, asking for a declaration of their right to go in procession and use *matam* and for a perpetual injunction against the Sunnis again interfering with them. They also asked for damages. The action was opposed by the Sunnis. The District Judge granted the declaration that they craved but subject to any order that from time to time the Magistrates might make, and refused damages. Appeal was taken to the High Court by the Defendants and the Plaintiffs raised a cross-appeal asking that the rider as to the power of the Magistrates might be deleted. The High Court reversed the judgment and dismissed the suit, holding that the Plaintiffs had not made out any cause for a declaration. They treated the suit as a prayer to be allowed to block absolutely the highway, which, their Lordships considered, could not be allowed.

Leave was asked to appeal to the Privy Council and was granted by the Chief Justice and another Judge who had not heard the appeal, and it is abundantly clear from the observations which were

made by them that they thought the question one of great importance.

The case seems to their Lordships to raise for authoritative decision the question as to the right of religious processions to proceed along the roads in India, practising their religious observances, and the decided authorities in India are certainly conflicting. The first question is, is there a right to conduct a religious procession with its appropriate observances along a highway? Their Lordships think the answer is in the affirmative. In *Parthasaradi Ayyangar v. Chinna Krishna Ayyangar* (1) Turner, C. J., lays down the law thus:—

“Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace.”

In *Sundram Chetti v. The Queen* (2) before a Full Bench the position was maintained, and it was further laid down that the worshippers in a mosque or temple which abutted on a high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. At p. 217 Turner, C. J., says:—

“With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed, that they should be compelled to allow the passage of such a procession past the temples they revere.”

In *Sadagopachariar v. A. Rama Rao* (3) in a civil case the same view was taken, but

(1) I. L. R. 5 Mad. 304, 309 (1882).

(2) I. L. R. 6 Mad. 203 (F. B.) (1883).

(3) I. L. R. 26 Mad. 376 (1902).

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in a criminal case in the same volume, *Vijayaraghava Chariar v. Emperor* (4), two Judges held that to use a highway as a place of worship was not legitimate. One Judge, who had taken part in the former case, dissented and, at a former hearing, the Chief Justice had also dissented. The first of these cases came to this Board and no doubt was there thrown on the right of religious worship in a highway. Two other questions have, however, emerged. In several cases one sect claimed the exclusive use of the highway for their worship. This has been consistently refused. The other question, which goes deep into what ought to be done in the present case, is this :—Does a civil suit lie against those who would prevent a procession with its observances? Here there is an obvious discrepancy between Bombay and Madras, and Calcutta upholds Madras. The leading Bombay authority is the case in *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga* (5), Westropp, C. J., and Melvill, J. This was a suit by certain Mussulmans who carried tabuts in procession along a public road. They were disturbed in so doing by Mussulmans of a rival sect. The head-note sets forth the judgment accurately :—

“Held, in special appeal the Plaintiffs could not maintain a civil suit in respect of such obstruction unless they could prove some damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying tabuts along a public road is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action.”

The judgment really proceeds entirely on English authorities, which lay down

the difference between proceedings by indictment and by civil action.

In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India. This judgment was followed, as was natural, in *Kazi Sujaudin v. Madhavdas* (6) by two judges. Nevertheless in the next case, *Baslingappa Parappa v. Dharmappa Basappa* (7), Sir Basil Scott, C. J., and Batchelor, J., disregarded the authority of their own Court in *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga* (5) and pronounced a judgment which, without saying that it overruled *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga* (5), clearly did so. The lower Court had followed *Satku Valad* case (5), and dismissed the suit. The head-note is :—

“On second appeal by the Plaintiffs held, reversing the decree and allowing the claim, that the suit was not for the removal of a public nuisance but for a declaration of the right of an individual community to use a public road.”

The Madras cases already cited were all cases (except the criminal one) in which declarations were sought and either granted or, if asking for exclusive right, refused, but in none of them was the idea entertained of special damage other than the obstruction of the procession being needed.

In *Mohamed Abdul Hafiz v. Latif Hosein* (8), the Madras view was taken. The head-note is :—

“A suit for declaration of right to carry

(5) I. L. R. 2 Bom. 457 (1877).

(6) I. L. R. 18 Bom. 698 (1898).

(7) I. L. R. 34 Bom. 571 (1910).

(8) I. L. R. 24 Cal. 524 (1897).

(4) I. L. R. 26 Mad. 554 (1903).

(6) I. L. R. 2 Bom. 457 (1877).

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religious emblems in a procession through the streets of a village and for damages for preventing the Plaintiffs from doing so, lies in the Civil Court."

Their Lordships are of opinion that the views of the Madras Courts are right and that the Bombay judgment is wrong. They think that the Appellants are entitled to the declaration granted to them by the District Judge but propose to add to it, after the word "traffic" (line 3, p. 42 of record), the words "to the Magistrate's directions and the rights of the public." If their Lordships were simply to dismiss the appeal the effect would be misunderstood in India. Every different sect or religion when places of worship are upon the routes where the processions of those with whom they do not agree pass, would appeal to the judgment as settling that the functions of the procession should cease as it passed them. But if the declaration as made by the District Judge is granted the Magistrates will still be able to make any arrangement they choose, and if they choose, to repeat the order that forbade doing *matam* within a certain distance of the mosque. That order would be an order passed in respect of special circumstances, not a general pronouncement as to rights.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the declaration granted as above indicated, and that the Appellants should have the costs of the appeal before this Board, but inasmuch as in the Courts below they asked that there should be no declaration as to the Magistrates' right, no costs should be allowed to either party in the Courts below.

Solicitors: Messrs. T. L. Wilson & Co. for the Appellants.

Solicitor: Mr. Douglas Grant for the Respondents.
G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

1923,

Heard, 1, 6, November.

Judgment,

29, November.

SM. NAGENDRA-
BALA DAS and
anr., Appellants,
v.

DINANATH
MAHISH and ors.,
Respondents.

Pleader, purchase by, of decree obtained against client in the benami of his wife and purchase of property at Court sale in name of latter—Concealment, if vitiates sale—Trusts Act (II of 1882), sec. 88—Advantage gained by concealment by person in fiduciary position.

A decree before it was fully executed was, without the knowledge of the judgment-debtors, purchased by the person who had acted as their pleader in the suit benami in the name of his wife N and in partial execution of the decree certain properties were purchased in the name of N with leave obtained on her behalf to bid at the sale, but in this transaction also the pleader was the real purchaser, and this fact was not disclosed to the Court:

Held—That the pleader was bound to reconvey both the decree and the properties to the judgment-debtors, although he had ceased to be the judgment-debtors' pleader when the properties were purchased and no unfair dealing was established—the mere fact of concealment by a person standing in a confidential position whereby he secured an advantage being sufficient to vitiate the transactions.

Sec. 88 of the Trusts Act embodies the

SM. NAGENDRABALA DASÍ v. DINANATH MAHISH.

ordinary equitable conditions which apply to such cases.

LEWIS v. HILLMAN (1) and MCPHERSON v. WATT (2) referred to.

This was an appeal from a judgment and decree, dated the 20th May 1921, of the High Court of Judicature at Fort William in Bengal, which modified a judgment and decree, dated the 14th July 1919, of the Officiating Subordinate Judge of Midnapur.

The main questions which were raised on the present appeal were two, namely, (1) whether Appellant No. 1 was a *benami* purchaser of a certain decree for her husband, Appellant No. 2, and (2) whether the Plaintiffs-Respondents were entitled to a reconveyance of the decree and the properties purchased in execution thereof.

The Courts below decided the first question against the Appellants, but they differed in regard to the second.

The facts which gave rise to the litigation were as follows:—Some of the Plaintiffs and *pro forma* Defendants executed a mortgage, dated the 31st March 1900, in favour of one Rani Mrinalini, who brought a suit (No. 191 of 1906) to enforce it against the mortgagors in the Court of the Subordinate Judge of Midnapur. Appellant No. 2, Nabakumar Hazra, who was a pleader, was engaged by the Defendants in the above suit to defend the action on their behalf. The suit was, however, amicably settled, and a compromise, dated the 19th February 1907, containing the terms of the settlement was filed, and the said Subordinate Judge made a decree in accordance with its terms on the 19th February 1907.

The said decree-holder, Rani Mrinalini, then proceeded to execute the decree against some of the judgment-debtors,

(1) 3 H. L. C. 607, 630 (1872).

(2) 3 App. Cas. 254 (1877).

and on the 7th February 1915, she sold the unexecuted decree, dated the 19th February 1907, for the sum of Rs. 11,500 to Appellant No. 1, Srimati Nagendrabala Dasí, wife of the pleader, Nabakumar Hazra, Appellant No. 2.

Appellant No. 1 thereupon applied to the said Subordinate Judge for substitution of her name as the assignee of the decree in place of the said decree-holder, and by an order, dated the 11th March 1915, in terms following, her application was granted:—

“Notices served on the judgment-debtors on the peon's own knowing. Service seems efficient. The judgment-debtors Nos. 9 and 10 who appeared, and took time to file objection, do not appear to-day. No objection raised by anybody. Let the purchaser of the decree Srimati Nagendrabala Dasí be substituted in place of original decree-holder, and the execution do proceed in her favour against the judgment-debtors.”

Subsequently some of the judgment-debtors applied to the said Subordinate Judge contending that the said decree, dated the 19th February 1907, in suit No. 191 of 1906, had really been bought by the said pleader (Appellant No. 2), and that his wife (Appellant No. 1) was merely a *benamidar*. The Subordinate Judge found that the contention was well-founded, and held that the effect of the purchase of the decree by the pleader for the judgment-debtors was to satisfy the decree and to discharge the judgment-debtors. Appellant No. 1, Srimati Nagendrabala Dasí, appealed from the said order of the Subordinate Judge to the High Court of Judicature at Fort William in Bengal, which delivered judgment on the 29th August 1917.

The High Court held that the question as to who was the real purchaser of the

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decree could not be decided in the absence of the pleader, Appellant No. 2, who was not a party to the proceedings. It further held that, even if it were assumed without deciding it, that the said pleader was the real purchaser of the decree, the Subordinate Judge was in error in thinking that the effect of that assignment to the pleader was the extinction of the decree. The High Court accordingly allowed the appeal, and made the following direction in its judgment :—

“ We hold accordingly that this appeal must be allowed and the order of the Subordinate Judge set aside. The assignee (the Appellant before us) will be entitled to proceed with the execution of the decree, and the execution proceeding will stand revived for that purpose. No steps, however, will be taken in execution till the 1st January 1918, so that the judgment-debtors may have ample time to institute, if they are so advised, a suit against the assignee of the decree, and her husband to obtain a transfer of the decree in their own favour, on proof of the allegations they have made, and upon payment of such sum as the Court may determine.”

The Plaintiffs-Respondents thereupon filed the present suit, on the 22nd December 1917, against the present Appellants, who were the principal Defendants. The Plaintiffs averred in their plaint that the Appellant No. 2, who was their pleader in the previous suit (No. 191 of 1906), was the real purchaser of the said decree, dated the 19th February 1907, and that his wife (Appellant No. 1) was a mere *benamidar*.

In execution of the said decree, dated the 19th February 1907, some of the mortgaged properties were sold by the Court and were purchased by Appellant No. 1, and a sale certificate was granted to

her on the 28th September 1918. The Plaintiffs applied to the Subordinate Judge on the 29th January 1919, praying that the following additional relief might be granted to the Plaintiffs :—

That the Defendant No. 1 being the pleader appointed by the judgment-debtors, the Plaintiffs, etc., in the mortgage suit, the purchase made by him of the decree under a *kobala* in the name of the Defendant No. 2 on a consideration of Rs. 11,500 may be held to have been made on behalf of the judgment-debtors, the Plaintiffs, etc., as trustee, and that accordingly Defendants Nos. 1 and 2 may be ordered to assign (it) in favour of the Plaintiffs on a consideration of the said Rs. 11,500, in respect of the said decree or for any price which the Court may think proper.

The principal Defendants filed separate written statements denying the claim of the Plaintiffs. It was pleaded that the lady and not her husband was the real purchaser of the decree.

After recording and examining evidence, both oral and documentary, produced by the parties, the Subordinate Judge delivered judgment on the 14th July 1919. He found all the material issues against the principal Defendants. In his opinion the money for the purchase of the decree had been supplied by the pleader, and he considered that “ whatever money she (*i.e.*, the wife) had, she must have got from her husband.” He also found that the Plaintiffs must pay the sum of Rs. 13,750 to the principal Defendants before getting a reconveyance.

As regards the relief, the learned Subordinate Judge held that in view of the pleadings, the Plaintiffs were entitled to a reconveyance of the decree, dated the 19th February 1907, and not to a reconveyance of the mortgaged properties which had

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been purchased by Appellant No. 1. He concluded his judgment on this point as follows :—

“ It appears that the prayer for assignment of the decree was not at first in the plaint. So Defendant No. 2 executed the mortgage decree in question after expiry of the time allowed by the Honourable High Court, and in execution purchased some of the mortgaged properties herself. The Plaintiffs have not added any prayer for reconveyance of their mortgaged properties to them. Still, however, money is due on the decree in question, and the Plaintiffs may on that account as well pray for an assignment of the decree in their favour. What the effect of such a decree will be on the lands thus sold in execution of the mortgage decree in question, is a different question with which the Court has nothing to do in the present suit, as framed.”

In the result the Subordinate Judge made the following decree :—

“ It is ordered and decreed that this suit be decreed in a modified form after contest: that it be declared that the mortgage decree in title suit No. 191 of 1906 was purchased by the Defendant No. 1 in the *benami* of the Defendant No. 2 by a *kobala*, dated 7th February 1915. Upon the Plaintiffs depositing for payment to the Defendants Nos. 1 and 2 Rs. 13,750 as consideration money of the *kobala* within one month from to-day, together with price of stamps and registration costs, the Defendants Nos. 1 and 2 do transfer the said decree in the name of the Plaintiffs. In default of the Plaintiffs depositing the said money in Court within the said period, this suit would be considered as dismissed for default. The other reliefs prayed for by the Plaintiffs are dismissed.

“ The parties do bear their own costs.”

The Plaintiffs appealed from the said

decree of the Subordinate Judge to the High Court of Judicature at Fort William in Bengal, and the principal Defendants also filed a memorandum of cross-appeal.

The High Court delivered judgment in the appeal of the Plaintiffs on the 20th May 1921. The learned Judges of the High Court affirmed the decision of the Subordinate Judge except in one respect, which will appear from the following remarks :—

“ Finally, as regards the form of the decree for reconveyance, it is plain that the Court below should not have ignored the event which had happened during the pendency of the litigation, namely, the sale in execution of the mortgage decree and the purchase of the mortgaged properties by the assignee of the decree. . . . The Court may accordingly grant a decree for reconveyance, such decree to cover not merely the mortgage decree in so far as it is still unexecuted, but also the mortgaged properties which have been purchased by the assignee of the decree in part-satisfaction thereof.”

The result was that the High Court made a decree modifying the decree of the said Subordinate Judge, and from that decree the Appellants appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Dubé for the Appellants.

Mr. Abdul Majid for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In 1901 certain persons, among whom were the Respondents, borrowed a sum of Rs. 19,999 from the Raja Narendra Lal Khan Bahadur and executed a mortgage in favour of his wife, Rani Mrinalini Debi. In 1906 the Rani put the mortgage in suit. Defences of various kinds were entered.

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The male Appellant in this case acted as pleader for all the Defendants and on their behalf effected a compromise of the suit. This compromise was dated the 19th February 1907. Payments under the compromise not having been duly made, the Rani proceeded to execute afresh and some properties were sold, but eventually and before the decree was fully executed the Rani, on the 7th February 1915, sold the unexecuted decree for Rs. 11,500 to the female Appellant, who is the wife of the male Appellant. Thereafter the female Appellant proceeded to execute the decree. Objections were made by several of the judgment-debtors. It is not necessary for the purposes of the present appeal to follow minutely the progress of the execution proceedings. It is sufficient to state that some of the properties were brought to sale and that the female Appellant, on the 18th February 1918, obtained leave to bid and that she herself purchased certain properties at the sale.

The present suit was raised by the judgment-debtors to have it declared that the purchase of the unexecuted decree was really a purchase *benami* of the male Appellant; that it was therefore bad as a purchase by a pleader of the property in suit with concealment of the fact that he was the real purchaser and praying for appropriate relief.

The Subordinate Judge found that the purchase was *benami*, and ordered a reconveyance of the decree to the Plaintiffs on payment of Rs. 13,750, being the amount paid on the transfer of the decree plus certain sums which had been paid to save the property from being taken for other executions. The High Court so far affirmed the judgment, but added that the Defendants must also convey the proper-

ties purchased by the female Defendant at the sale in execution of the decree.

As both Courts had found that the purchase of the decree by the wife was truly *benami* for the husband, who was at that time the pleader, the Appellants were obliged to accept this fact. Their argument, however, came to this:—They admitted that the result is that they are bound to surrender the unexecuted decree to the Respondents at the price they paid for it; but they say that the decree was a good decree in their hands and that sales actually effected under it must stand. At the time of the sales of the properties in question the male Appellant had long ceased to be pleader; the Respondents were represented by other pleaders, and it was not said that any knowledge he had obtained while he acted as pleader was in any way conducive to his action in buying the properties through his wife when the properties were offered for sale upon the execution of the decree.

Their Lordships have carefully considered this argument, but they do not think that in the circumstances it is good. Had the purchase of the properties been open and above board by the male Appellant the result might have been otherwise, for the disability attaching to him as pleader which would have prevented him cannot exist indefinitely, and provided he had not availed himself in any way of knowledge gained in his position of pleader, there would have been nothing to prevent his acquiring the property of his *quondam* clients. The consequences which ensue from a person in a confidential position making use of that position to obtain an advantage over the person with whom he is in confidentiality are embodied in sec. 88 of the Trusts Act. That Act does not apply to the part of India with which there is here concern, but the or-

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ordinary equitable conditions which are applicable come to the same result. Now there is no more certain way of taking advantage than the way of concealment. The matter is expressed very clearly by Lord Chancellor St. Leonards in *Lewis v. Hillman* (1):—

“I should lay it down as a rule that ought never to be departed from that if an attorney or agent can show he is entitled to purchase, yet if instead of openly purchasing he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment.”

And the same doctrine is repeated in the later case of *McPherson v. Watt* (2) where at p. 266 Lord O'Hagan lays down the conditions which must exist to validate a purchase by an attorney from his client and adds:—

“And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another without communication of the fact to the pleader the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist.”

These *dicta* are not directly applicable here because the buying of the decree was not a contract between the pleader and the persons with whom he was in confidentiality, but between him and the Rani. But such advantage as he secured he must give up. This is admitted by the Appellants so far that they admit he must surrender the decree for what he gave for it. But having got the decree, what use did he make of it? He allowed his wife to get leave to bid and then to purchase. Now here again there was concealment. Had the Judge been told that the wife really

held *benami* for the pleader, who had had no business to acquire the decree, their Lordships cannot doubt that the leave to bid would have been refused. That an advantage was got by the pleader being allowed to bid under colour of his wife's name and then to buy, their Lordships cannot doubt, for otherwise the point would not be contested. They therefore come to the conclusion that the second deception vitiates the sale also; that consequently the male Appellant cannot be allowed to keep the purchase made in name of his wife and that the judgment of the Appeal Court was right. The result is that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Watkins & Hunter* for the Appellants.

Solicitors: *Messrs. Francis & Harker* for the Respondents.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 73 OF 1924.

BUCKLAND, J.	}	MAURICE MAYANAS
1925,		v.
24, February.		W. MORLEY and anr.

Limitation Act (IX of 1908), sec 20—Payment by cheque—Mode of computation of the fresh period of limitation—Liability, after dissolution, of partners in respect of goods sent during partnership on inspection

Under sec. 20 of the Limitation Act, the fresh period of limitation in cases of part payment by cheques is to be computed from the date when the cheque is actually handed over and not from the date when the cheque is cashed.

KEDARNATH MITTER v. DINABANDHU SAHA (1) followed.

GARDEN v. BRUCE (2) distinguished.

(1) I. L. R. 42 Cal. 1043; s. c. 19 C. W. N. 742 (1915).

(2) L. R. 3 P. C. 300 (1868).

(1) 3 II. L. C. 607 at p. 630 (1872).

(2) 3 App. Cas. 254 (1877).

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Subsequent dissolution of a partnership does not absolve persons who were members of the firm at the time the goods were sent to the firm, from liability though the cause of action might not have accrued until the return, after dissolution, of such of the goods as were not required.

The facts of the case will appear from the judgment.

Mr. A. N. Sen (with him Mr. Satish C. Bose) for the Plaintiff.—The fresh period of limitation should be computed from the date of payment when the cheque was cashed and not from the date when the cheque was given to the manager. *Garden v. Bruce* (2).

Further the transactions constitute but one cause of action. Limitation runs from the date of the last item in the series.

Kedarnath v. Dinabandhu (1).

Defendant Andrews is liable for goods sent during partnership under the circumstances of the case.

Mr. Sambhu N. Banerjee for the Defendant Andrews.—The period of limitation runs from the date when the cheque was actually handed over. If payment by cheque is relied upon for saving limitation under sec. 20 of the Limitation Act, the fresh period must be computed from that date. If payment by the bankers on the cheque is relied on, such payment does not appear in the hand-writing of the person making the payment, which is *sine qua non* for saving limitation under sec. 20.

The transactions do not constitute one cause of action. The facts in the case of *Kedarnath Mitter v. Dinabandhu Saha* (1) are entirely different from the facts in the present case.

The Defendant Andrews is not liable for

(1) I. L. R. 42 Cal. 1043: s. c. 19 C. W. N. 742 (1915).

(2) L. R. 3 C. P. 300 (1868).

goods sent on inspection during partnership, as the Plaintiff's cause of action is founded on the purchase of the goods after dissolution.

The Defendant Mr. Morley appeared in person.

The JUDGMENT OF THE COURT was as follows:—

BUCKLAND, J.—This is a suit to recover a sum aggregating Rs. 4,069 as the balance of the price of goods sold and delivered. The Plaintiff sues two Defendants, William Morley and Percy T. Andrews, who he says until January 1921 were carrying on business in partnership under the name and style of Morley and Andrews. While they were so carrying on business in partnership, he supplied at the end of October or beginning of November 1920, the goods specified in the first bill annexed to the plaint, and on the 17th November 1920 the goods specified in the second bill annexed to the plaint. Subsequently more goods were sent to the Defendants on inspection. That was in the month of December. In the month of January 1921 the firm was dissolved and later some of the goods were returned. He accordingly made out against the Defendants the third bill for the value of the goods retained.

The defence put forward by the Defendant Morley, who is appearing in person, is a denial that he at any time had the goods or that he was ever in partnership with his co-Defendant and he submits that the claims are barred by limitation.

The Defendant Andrews has challenged one of the items appearing in the first bill and denies liability for the amount of the third bill, on the ground that the partnership, which he admits, was dissolved in the month of January 1921.

The points that arise for decision

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therefore fall under three different heads, first as to the orders and details of the bills, secondly, whether there was any partnership so as to make the Defendant Morley liable, and lastly, the question of limitation.

With regard to the details of the bills, the vouchers have been proved and there is no doubt in my mind that the details given are correct and that the goods were ordered by Andrews and were supplied.

With regard to the items specified in the third bill, I find that the goods were sent on inspection during the time that the partnership, if there was a partnership, was subsisting. The fact of the subsequent dissolution of such alleged partnership cannot have the effect of absolving the members of the firm, at the time when the goods were sent, from liability, though the cause of action may not have accrued until the return of the goods which were not required. I therefore find as regards the third bill that the Defendant Andrews is liable, and also Morley, assuming he was a member of the firm.

With regard to the question of partnership, I do not think there can be any question upon the evidence that Morley was a partner. His case is that he was engaged in business elsewhere, and the arrangement between him and Andrews was that he was to devote such time as he could spare from his other business for the purpose of doing work in this tailoring business, which was carried on under the name of Morley and Andrews, and for that purpose he was to attend in the morning and evening. He says he was to have a half-share in the net profits and denies that he was in any way liable for the losses. The Plaintiff appears to have regarded him as a partner, though there is no substantive evidence

to the effect that he was a partner given by the assistants who have given evidence. But there is the statement of the Defendant Andrews, and it was admitted by Morley himself not only that the business was carried on in the name of Morley and Andrews, but that there was a banking account in such name upon which he was entitled to draw cheques. He has also admitted that he signed a lease of the business premises, though he says that he did so as a surety. His explanation as to the use of his name is that without his name no tailoring business would have been done.

I find that at the time with which I am concerned the Defendant Morley was in partnership with Andrews, and as such may be liable to the Plaintiff.

I now come to the question of limitation. I will dismiss at once any question of there being a continuous account, such as was before the Court in *Kedarnath Mitter v. Dinabandhu Saha* (1). It is clear from the evidence given on behalf of the Plaintiff that separate and distinct orders were given for the items comprised in the three bills. The bills were submitted separately and the Plaintiff refers in the plaint to the causes of action which arose on the 2nd November 1920, the 17th November 1920 and the 14th May 1921, clearly treating the subject-matter of the three bills as giving rise to different causes of action.

The Plaintiff alleges in his plaint that on the 6th January 1921 the Defendants paid Rs. 1,000 by cheque. This is relied upon as an acknowledgment under sec. 20 of the Limitation Act. In point of fact it now appears from the evidence given on behalf of the Plaintiff by Balmukund Khettry and from the evidence

(1) I. L. R. 42 Cal. 1043; s. c. 19 C. W. N. 724 (1915).

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of the Defendant Andrews that the cheque was paid by the Defendant Andrews to Balmukund Khettry on the afternoon of the 5th January 1921, and so far, therefore, as the cheque extends the period of limitation under sec. 20, the fresh period of limitation must be computed from the 5th and not the 6th January 1921. The plaint was filed on Monday, the 7th January 1924, but if limitation should be computed from the 5th January 1921, then obviously it ought to have been filed on the 5th January 1924.

Before I deal with this, there is one small point, and that, is that the first bill amounts to Rs. 1,200-11; the second bill amounts to Rs. 2,362-3. The payment was Rs. 1,000, which does not even cover the total amount of the first bill. In his plaint, the Plaintiff says that the sum was a part payment of the two bills, and this appears from an entry in the Plaintiff's cash book, where the payment is entered in these terms:—
“Received from Messrs. Morley and Andrews in part payment of bills Nos. 1705-13 by cheque . . . Rs. 1,000.”

The Defendant Andrews in the witness-box has stated that he gave a cheque in payment for the two pieces of serge which are to be found in the first bill and that the balance of the goods were to be returned. Nothing of the sort, suggesting appropriation by Andrews, was put in cross-examination to the Plaintiff's witnesses. It seems to me rather strange that a sum not even sufficient to cover the first of the two bills should be appropriated to the two bills, in order, if necessary, to save limitation in respect of each; but nevertheless the Plaintiff is in law entitled so to do unless an appropriation has been made by the person making the payment. In my opinion, there was no such appropriation

by Andrews when the payment was made and the Plaintiff was entitled to make the appropriation in that manner, and the entry in the cash book certainly supports him.

But the dates present a more serious difficulty in the way of the Plaintiff. It has been contended that though the cheque bears the date the 5th January, and though it was paid to the manager of the Plaintiff on that date, nevertheless the actual payment from which the fresh period of limitation should be computed is the date of payment when the cheque was presented at the bank. There is not before me any evidence as to the actual date when the cheque was presented and paid at the bank, but inasmuch as it was handed over to the Plaintiff's representative after banking hours on the 5th January, I will assume that it was paid on the 6th January 1921, and this would suffice for the Plaintiff's purpose, if his contention is otherwise correct. In support of this contention I have been referred to *Garden v. Bruce* (2). That was a suit for money lent. The Plaintiff in lending the money handed the Defendant a cheque for the amount. The Defendant paid it into his bank and received credit. The Plaintiff's bankers paid the cheque some days later. The question there arose whether limitation ran from the date when the cheque was handed by the Plaintiff to the Defendant or from the date when it was met by the Plaintiff's bankers, and it was decided that the action being one to recover money lent, limitation only ran from the date when payment was made by the Plaintiff's bankers. A number of authorities were there cited in support of the proposition that a cheque, unless dishonoured, is pay-

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ment, and the learned Chief Justice said in his judgment :—

“ I quite agree with all the cases that have been cited, but in all of them the cheque has been treated as an acknowledgment of a pre-existing debt. Here the debt did not accrue till the payment of the cheque.”

In those words lie the essential difference between that authority and the case which I have to decide. I have to consider the cheque which was paid on the 5th January from the point of view of an acknowledgment of the pre-existing debt. But the matter, in my opinion, is covered by authority, by which I am bound, viz., the case to which I have already referred.

There the learned Chief Justice said :—
“ It seems to me clear that if a cheque is delivered to a payee by way of payment and is received as such by him it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives.”

It is clear that the learned Chief Justice was treating the cheque as the payment, for later on he observes :—
“ If I am right in the view that the cheque actually was a payment, the very payment was in the hand-writing of the person making the same.”

The Plaintiff, it appears to me, is in this dilemma, if the payment is not the cheque itself, in which case there is no doubt that the fact of the payment appears in the hand-writing of the person making it, then the payment is the payment by the bank clerk across the counter on presentation of the cheque or as otherwise may occur, and in such case the fact of the payment does not appear

in the hand-writing of the person who makes it.

I hold that there was no acknowledgment within sec. 20 of the Limitation Act, and in consequence the claims based upon the first two bills are barred by limitation, but for the reasons which I have already given as to goods comprised in the third bill, I think the Plaintiff is entitled to recover, and consequently there will be judgment against both the Defendants for Rs. 1,501-8, with costs on scale No. 2, interest on judgment at 6 per cent.

Messrs. Dey & Kshetrya, Solicitors for the Plaintiff.

Mr. S. S. Banerji, Solicitor for the Defendant Andrews.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1237 OF 1922.

SUHRAWARDY, J. CUMING, J. 1921, 26, November.	}	ALIMUDDIN MOLLAH and ors., Defendants, Appellants, v. K. S. BONNERJEE, Plaintiff, Respondent.
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Bengal Tenancy Act (VIII of 1885), sec. 50 (2)
— Question, whether tenant held at a uniform rate for 20 years, whether of fact or law—Slight variation in rent, if affects presumption.

Before a presumption under sec. 50 (2) of the Bengal Tenancy Act can be raised, it must be found as a fact that the tenant has held at a uniform rent or rate of rent for 20 years. This question is a question of fact and not of law and not even of mixed fact and law, upon which the finding of the Court of first appeal is conclusive.

PARAN CHANDRA SOW v. KANTA MOHAN MALLIK (1), SATIS CHANDRA BISWAS v. NIL MADHUB SAHA (2) and MOHINI KANTA

(1) 39 C. L. J. 437 (1924).

(2) 37 C. L. J. 598 (1922).

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SAHA CHOWDHURY v. PREO NATH NEOGY
(3) referred to.

A slight variation in the rent, even though unexplained, does not deprive the tenant of the benefit of the presumption under sec. 50 of the Act.

TARA KUMAR GHOSE v. KUMAR ARUN CHANDRA SINGH (4) relied on.

This was an appeal against the decree of J. Bartley, Esq., Special Additional Judge of Zillah Tipperah, dated the 18th of February 1922, reversing the decree of Babu Rai Charan Pal, Assistant Settlement Officer, Tipperah, dated the 10th of March 1920.

The facts of the case will appear from the judgment.

Babus Dhirendra Lal Kastgir and Satyendra Kishore Ghose (for Sris Chandra Gupta) for the Appellants.

Babu Mon Mohan Banerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J.—This appeal by the Defendant arises out of an application under sec. 105, Bengal Tenancy Act, by the Respondent for settlement of fair and equitable rent and relates to *khatians* Nos. 12, 28, 39 and 75. It is necessary to deal with the different *khatians* separately as the points with reference to them are not the same.

As regards *khatian* No. 12, it is argued that the learned Special Judge should have raised the presumption of fixity of rent under sec. 50 (2), Bengal Tenancy Act. With reference to this particular *khatian*, the Assistant Settlement Officer held that the Defendant had proved that the rent entered in the record-of-rights is

(3) I. L. R. 49 Cal. 861 : s. c. 35 C. L. J. 309 (1922).

(4) 35 C. L. J. 359 (1922).

the same as paid by them in 1894 and hence he raised the presumption under sec. 50 (2), Bengal Tenancy Act, in favour of the tenant. The learned Special Judge in appeal has differed from the lower Court and refused to raise the presumption from the circumstances pointed out by him. The fact is that the tenant had produced only one *dakhila* of the year 1894 which shows that the rent paid then was Rs. 38-12 which is the rent entered in the record-of-rights. From this one circumstance he has refused to draw the presumption of fixity of rent and the grounds he assigns are that the tenant himself has not given his evidence in this case (hence no direct proof of payment), that the *dakhila* was produced by a person who came with a bundle of *dakhilas* to prove the cases on behalf of all the tenants, that there is no proof of payment in subsequent years at the same rate and that there is no material pointing to the continuance of this rent throughout the intervening period. The learned Judge then observes : " I should demand from the tenant some more cogent grounds for a belief that for 20 years before the suit he has paid the same rent. He must establish that before the presumption arises in his favour and before any onus is thrown on the Appellant (Respondent before us). It is not a difficult task to do so by the production of his *dakhilas* for the last 20 years. I presume that his *dakhilas* would not support such a state of things." The first question that has to be considered is whether the question as to whether a presumption should or should not be raised from certain facts is a question of fact or of law. Sec. 50 of the Bengal Tenancy Act provides that if it is proved in any suit or proceeding under this Act that either a tenure-holder or a *raiyyat* and his predecessors-in-interest have held at a

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rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or the proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. The section lays down that if the Court finds as a question of fact that the tenant held the land at a uniform rent or rate of rent for at least 20 years before suit, it is the duty of the Court to raise the presumption that the tenant held the land at that rent or rate of rent from the time of Permanent Settlement. It is therefore necessary that the facts which would give rise to the presumption must be established before it can be raised in law; in other words, the Court must believe that the tenant has held the land at a uniform rate for more than 20 years before it should be called upon to raise the presumption. It is undoubtedly a question of fact and a Court of fact is the only competent Court to deal with it. My opinion is that the question as to whether the tenant has held the land for more than 20 years at a uniform rent is a question of fact and the decision of the Court below thereon is not liable to be challenged in second appeal. Our attention has been drawn to the case of *Paran Chandra Sow v. Kanta Mohan Mallik* (1). There the Court of appeal below had refused to draw the presumption of fixity of rent from three *dakhilas* produced by the tenant, one, dated 1-99, the second, dated 1311 and the third, dated 1313. As the learned Judges held that the tenant had succeeded in proving from the production of the *dakhilas* that the rent was uniform between the dates of the first and the last *dakhilas*, they allowed the presumption to be raised under sec. 50 (2), Bengal Ten-

ancy Act in favour of the tenant. Whether the question relating to the proof of uniform payment of rent for over 20 years is a question of law or fact was not raised or decided in that case. That case therefore is no authority for the contrary view. I am not prepared even to admit that it is a mixed question of law and fact; the fact must be found before the law can be invoked. The view I take is supported by the decision in the case of *Satis Chandra Biswas v. Nil Madhub Saha* (2). There it appears that the learned Special Judge had insisted upon proof by means of rent-receipts that the rent was paid uniformly for 20 years. The tenants in that case gave evidence which was accepted that rent paid from 1891 to 1895 was the same as paid by them from 1904 to 1908. The learned Judges in these circumstances held that the lower Appellate Court was wrong in supposing that the law insisted upon proof of uniform payment of rent by production of rent-receipts for 20 consecutive years. They referred to certain authorities and observed that the view taken by the Court below as to the interpretation of the law was incorrect and they sent the case back to that Court for a reconsideration of the matter in view of the rule of law laid down, namely, that it is not necessary to insist upon the production of rent-receipts for 20 consecutive years. In sending the case back to the lower Appellate Court they made the following observation: "It is theoretically possible that in the interval there may have been an enhancement of the rent followed by a reduction, so as to make the rent payable in 1904 identical with that paid in 1895. But it is really for the Court of fact to decide, from all the circumstances of the case, whether the principle of con-

(1) 39 C. L. J. 437 (1924).

(2) 37 C. L. J. 598 (1922).

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tinuity or the principle of discontinuity should be applied." This decision is an authority for the view that the question whether the evidence in the case is sufficient to establish uniform payment of rent is a question for the Court of fact to decide. Our attention has also been drawn to the case of *Mohini Kanta Saha Chowdhury v. Preo Nath Neogy* (3). In that case the learned Special Judge had based presumption of fixity of rent under sec. 50 (2), Bengal Tenancy Act, on certain facts and the learned Judges held that he was justified in raising such presumption. That case therefore has no bearing on the question in issue. In my opinion the finding of the Special Judge with reference to *khatian* No. 12 based as it is on a consideration of the evidence adduced before him and of the facts of which he as a Court of fact alone is entitled to take cognizance is not liable to be assailed in second appeal.

With reference to *khatian* No. 28 it is argued that as there has been a splitting up of the original *jama* but no increase in the *jama*, the presumption of fixity of rent should have been raised. The finding arrived at by the learned Special Judge concludes the matter. He has found that this *jama* came into existence in 1306 and there is nothing in connexion with it which effectually shows it to have existed unchanged for 20 years. This is clearly a finding of fact with which we cannot interfere in second appeal.

With regard to *khatian* No. 39, the learned Special Judge has found that it was by mistake entered as "*mokurari*" in place of *khatian* No. 72. The Assistant Settlement Officer discussed *khatian* No. 39 along with *khatian* No. 135 and as I understand his judgment, he found both

the *khatians* bore a consolidated *jama* of Rs. 31-15-6 as shown by Exbts. Nos. D182 and D185. In discussing the evidence relating to these *khatians* he came to the conclusion that the tenants were not entitled to any presumption in that case. But strangely in his decree he has included *khatian* No. 39 only in the list of *khatians*, the rent of which he found to be unenhanceable.

With regard to *khatian* No. 75, the learned Vakil for the Appellants argues with great force that the variation is so slight that the Court ought not to have refused to raise the presumption. On the authority of the case of *Tara Kumar Ghose v. Kumar Arun Chandra Singh* (1) and the other cases referred to therein, I think that this contention ought to prevail. It has been held in that case that a slight variation in the rent, even though not explained, does not deprive the tenant of the benefit of the presumption under sec. 50, Bengal Tenancy Act. The variation here is from 6 pies to one anna. The *jama* recorded in the record-of-rights is Rs. 4-6-6. This was the *jama* found to be in existence in 1321 before which it was Rs. 4-6. The earliest *dakhila* shows a total rent and cess as Rs. 4-8-0 and the latest as Rs. 4-9-0. If from the *jama* indicated by the last mentioned *dakhilas* the cess of about 2 annas is deducted there is hardly any appreciable difference between the *jama* as recorded in the record-of-rights and as stated in the *dakhilas*. The learned Special Judge's attention was not drawn to the law on the subject and it is proper that he should reconsider this matter in the light of the law as laid down by the authorities. I am therefore of opinion that the case with reference to this *khatian* should be sent back to the learned Special Judge for reconsideration of it.

(3) I. L. R. 49 Cal. 661: s. c. 35 C. L. J. 309 (1922). -

(4) 36 C. L. J. 389 (1922).

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The result therefore is that the appeal with reference to *khatians* Nos. 12, 28 and 39 will stand dismissed and that with reference to *khatian* No. 75 will be allowed and the case sent back to the lower Appellate Court for reconsideration in the light of the above observations. The Appellants will pay three-fourths of the costs of the Respondents.

CUMING, J.—This appeal arises out of certain proceedings under sec. 105, Bengal Tenancy Act, for the settlement of fair and equitable rents and relates to four *khatians* Nos. 12, 28, 39 and 75. The Assistant Settlement Officer held that the rent of the parcels of land covered by these *khatian* numbers was liable to enhancement on the ground that they were not held at a fixed rate of rent. This decision was upheld by the Special Judge and the tenants have appealed to this Court. I shall deal with the four *khatian* numbers separately.

Khatian No. 12.

With regard to this plot of land the Appellants contend that the Judge has found that in 1887 it was held at the same rate of rent as in 1918 and also that from 1910 to 1920 the rent remained the same rent (what that rate of rent was is not stated or proved) and that on these findings the Court was bound to have presumed that it had been held at the same rent or rate of rent for 20 years before the date of the suit and hence that the Appellants were entitled to the presumption under sec. 50, Bengal Tenancy Act, that it had been held at the same rate of rent since the Permanent Settlement and so was not liable to be enhanced. Now the Court had to find before the presumption could be applied that the land had been held at the same rate of rent for 20 years before the date of the suit. That is a finding of fact and this Court cannot in second appeal inter-

fere with a finding of fact. Had the Court come to this finding on no evidence whatever it would have been open to this Court to have interfered.

But the Court had certain evidence before it and after considering that evidence it came to the conclusion that the facts that had been proved did not convince it that the land had been held at the same rate of rent for twenty years. What that evidence was has already been stated. It may well be that this Court if it were a Court of fact might have come to a different conclusion. But it cannot be urged as a point of law that on the facts found the Court must have come to the conclusion that the tenancy was a permanent one and to have come to any other would give the Appellant an appeal on a point of law. A fact is often to be proved or not proved by inferences drawn from a number of other facts. A Court may well draw a wrong inference from the facts that are proved. But all the same the inference that it draws is a finding of fact. By no stretch of the imagination could it be said that a Court must hold that because it has been found that the rent was the same in 1918 as it was in 1887 and that for a portion of the time the rent was unchanged, although at what rate is not proved, that the land had been held for the 20 years preceding the suit at the same rent or rate of rent and that if it does not do so it commits an error of law. I have been referred to the case of *Paran Chandra Sow v. Kanta Mohan Mallik* (1).

In that case there were three *dakhilas* with a period of twelve years in between each of them and the Special Judge found that this was not sufficient to prove that the tenant had held at the same rate of rent. The learned Judges held that in the absence of anything to shew that there

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was any change in the tenancy or that during these intervening periods there was any alteration in the rent that the Judge should not have held that the Appellant was not entitled to the presumption which arises under sec. 50 (2), Bengal Tenancy Act, and held that it had been proved in the case that the rent of the holding was not liable to increment. With the utmost respect to the learned Judges it seems to me that this amounts to a finding of fact come to in a second appeal and I am not prepared to follow it. The other authority to which we have been referred is the case of *Mohini v. Proo Nath* (3). The case does not support the contention put forward by the Appellant. I think that we are concluded by the findings of fact of the lower Appellate Court and that so far as the land covered by *khatian* No. 12 is concerned the appeal must be dismissed.

Khatian No. 28.

Exactly the same arguments apply to this plot also. The Appellant argues that there has been splitting up of the holding and that there had been no increase in the rate of rent. The learned Judge has dealt with the evidence and has held that it has not been proved that the land has been held at the same rate of rent for 20 years. This again is a finding of fact and cannot be challenged in second appeal.

Khatian No. 75.

I agree with some hesitation with the order that my learned brother proposes to pass in this case.

Khatian No. 39.

I have nothing to add to what has been said by my learned brother on this part of the case. I therefore concur with the order that my learned brother makes on the whole appeal.

N. G.

(3) I. L. R. 49 Cal. 661; S. C. 35 C. L. J. 309 (1922).

CIVIL APPELLATE JURISDICTION.

APPEALS FROM APPELLATE DECREES

Nos. 2499 AND 2500 OF 1919.

WALMSLEY, J.
B. B. GHOSE, J.
1922,
22, August.

DHIRENDRA CH. RAY
and ors., Defendants,
v.
Appellants,
NAWAB KHAJA HABIB-
ULLAH and ors.,
Plaintiffs, Respondents.

Bengal Alluvial Land Settlement Act (XXXI of 1858), sec. 2—Diara proceeding—Accretion to estate, assessment of revenue of—Bengal Land Revenue Settlement Regulation (VII of 1832), sec. 2—Determination of rent of accreted land of tenant under Act XXXI of 1858 or Reg. VII of 1832, if valid and binding on tenant—Proper procedure—Bengal Tenancy Act (VIII of 1885), Chap. X, Part II, or sec. 52.

Where certain lands which formed an accretion to an estate were brought under diara operations and the same were formed into a separate estate and settled with the proprietor, and the revenue authorities in the course of the proceeding for assessment of the revenue determined the rent to be paid by a tenure-holder for lands which accreted to his tenure, and on the basis of that rent the proprietor (settlement-holder) sued the tenure-holder for rent:

Held—That the Plaintiff was not entitled to recover the rent claimed as there was no liability on the Defendant to pay the rent settled by the diara officer.

In order to make the tenant liable for additional rent for accretions to his tenure such rent must be settled under Chap. X of the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation sec. 52 of that Act or any other appropriate provision of the law.

Under Act XXXI of 1858 of Reg. VII of 1832, the revenue authorities are empowered only to ascertain and record the

DHIRENDRA CH. RAI v. NAWAB KHAJA HABIBULLAH.

existing rights and not to settle the rents payable by tenants to their landlords, and so the determination of such rent under the said provisions is not binding on the tenants.

These were appeals against the decree of Babu Nagendra Nath Ghosh, Subordinate Judge, 2nd Court, Zilla Bakarganj, dated the 2nd September 1919, affirming the decree of Babu Satish Ch. Bose, Mun-sif, 1st Court, dated the 5th June 1918.

The facts of the case will appear from the judgment.

Babus Surendra Chandra Sen and Indu Bhusan Roy for the Appellants.

Babu Surendra Nath Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

GHOSE, J.—These two appeals are by the Defendants and arise out of two suits for rent. The suit out of which appeal No. 2500 arises was for rent for about 213 acres of land comprised in permanent *miras* tenure created in 1864 A. D. in favour of the predecessor of the Defendants at a rent of Rs. 359 odd. There has been gradual accretion of some lands contiguous to the lands of the *miras* in the bed of a river and the Defendants are entitled to those lands as an increment to their tenure. The Plaintiffs did not include these accreted lands in their suit for rent for the *miras*. It is argued on behalf of the Appellants that the Plaintiffs were bound to give the extent and boundaries of the land in their suit for rent under sec. 148 of the Bengal Tenancy Act and as the accreted lands are an increment to the tenure the Plaintiffs were bound to include those in their suit and as they did not do so the suit ought to be dismissed. We do not think that the contention is sound. The Plaintiffs sued

for rent for the lands let out under the lease of 1864 A. D. of which a proper description was given in the plaint. The fact that they might have asked for increased rent for the accretion to the tenure does not impose on them the penalty of having their suit for rent for the lands actually dismissed. This appeal therefore fails and is dismissed with costs.

The appeal No. 2499 arises out of a suit for rent for about 98 acres of land at the rate of Rs. 550 odd. These were lands gained by gradual accession from a river and are contiguous to the lands for which the other suit was brought. The lands were brought under *diara* operations and formed into a separate estate of which the Plaintiffs took settlement from Government. The liability of the Defendants to pay the rent is thus set forth in para. 2 of the plaint :—“ The Defendants have a *miras* taluk recorded at the annual rent of Rs. 550-3 as, in respect of 98.7 acres of land . . . in 5/1 mouja Kistakati bearing No. 2436 . . . and the same was recorded in *khewat* No. 2 and the Defendants are in possession thereof.” It is not necessary to set out the pleas taken in defence. The lower Appellate Court has overruled the objections taken by the Defendants and passed a decree in favour of the Plaintiffs affirming that of the trial Court. It found that the *diara* officer fixed the rent payable by the Defendants as claimed, which is fair and equitable and that the Defendants are liable to pay rent at that rate. The grounds urged by the Appellants against the decree are :—

1. The suit of the Plaintiffs is barred as *res judicata*;
2. the Defendants are not liable to pay the rent fixed by the revenue authorities for the lands and the Plaintiffs can only claim for increase of rent under sec. 52 of the Bengal Tenancy Act;
3. the lands being an increment to the old tenure

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of the Defendants separate suit for the rent of these lands is not maintainable.

The plea of *res judicata* is based on the judgment of the Appellate Court in R. Appeal No. 30 of 1912 arising out of a previous rent suit. The pleadings in the suit have not been filed nor the judgment of the trial Court. It is not clear from the judgment produced what the issues in the rent suit were and form the materials on the record, so it is not possible to hold that the present suit is barred by *res judicata*. This ground must therefore fail.

In support of the second ground it is urged by the Appellants that the *diara* officer was not vested with any authority under the law to settle any rent with regard to the lands in suit so as to fasten liability on the Defendants and all that he was authorised to do was to ascertain the amount of rent capable of being realised from the lands for the purpose of assessment of revenue. The Defendants are not consequently bound to pay the rent settled by the *diara* officer. This contention seems to be well-founded. Under cl. (1) of sec. 4 of Reg. XI of 1825 these lands are to be considered as an increment to the tenure of the Defendants. The last paragraph of that clause which referred to the liability of the under-tenant for payment of increase of rent has been repealed by the Bengal Tenancy Act and sec. 52 of that Act has made provisions for increase of rent for increase of area. No additional rent was claimed for increase of area of the tenure under that section or any other provision of the law by the Plaintiffs. The learned Vakil for the Respondents relies upon the provisions of sec. 2 of Act XXXI of 1858 and contends that the tenant is bound to pay the rent determined by the revenue authorities under that section. The first paragraph of that section leaves the

rights of under-tenants as to alluvial land under cl. (1), sec. 4 of Reg. II of 1825 unaffected. The second paragraph is to the following effect: It shall be the duty of all officers making settlements of such lands . . . to ascertain and record all such rights according to the rules prescribed in Reg. VII of 1822; and to determine whether any and what additional rent shall be payable by the person or persons entitled to any under-tenures in the original estate. It may at first sight seem that this leads to the inference that the under-tenant would be bound to pay the rent so determined, but there does not appear to be any provision in the law under which it would be obligatory on him to do so. The learned Vakil for the Respondent referred us to sec. 9 of Reg. VII of 1822 as empowering the officer to settle rent. It seems to me, however, that the Collector is not empowered under that section to determine any rent so as to fix the under-tenant with liability to pay the amount fixed to his landlord, but he is only to record existing rights. If proceedings had been taken, under Part II of Chap. X of the Bengal Tenancy Act, by the *diara* officer he might have settled rent under the provisions therein laid down with consequential results. But there is no suggestion that any action was taken under that chapter. The *diara* proceedings have not been produced nor is there any evidence as to what was actually done by the *diara* officer. In order to make the tenant liable for additional rent for accretions to his tenure such rent must be settled under Chap. X of the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation sec. 52 of the Act or any other appropriate provision of the law. R. 550 of the Bengal Survey and Settlement Manual, 1917, may also be referred to in

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this connection. The relevant passage runs thus :—" He (the *diara* officer) will ordinarily be working under Chap. X of the Bengal Tenancy Act and will prepare the record under that chapter. If there be no notification under Chap. X of the Bengal Tenancy Act, the *diara* officer will ascertain the record-of-rights of under-tenants under Reg. VII of 1822 read with sec. 2 of Act XXXI of 1858 The rights of under-tenants ascertained as above will not be affected by the nature of the arrangement made by Government with the proprietor." From this it would appear that where the *diara* officer does not work under Chap. X of the Bengal Tenancy Act, he has been required only to ascertain and record the rights and not to settle the rents payable by under-tenants. In my opinion, therefore, there is no liability on the Defendants to pay the rent settled by the *diara* officer for the lands in dispute. No other ground of liability of the Defendants was alleged by the Plaintiffs nor was any other argument advanced in support of the decree.

The learned Vakil for the Appellants relied on the case of *Assanullah v. Mohini* (1) in support of his third contention that a separate suit for the rent of the lands is not maintainable. It would appear that at any rate, so long as the Plaintiffs are entitled to the lands by virtue of settlement from Government these would not constitute a separate tenure held by the Defendants under the Plaintiffs. But in view of the decision on the second ground it is unnecessary to make any further observations on this point. In the result the Defendants cannot be said to hold any *miras* taluk under the Plaintiffs at the rent claimed. The appeal No. 2499 is decreed and the suit dismissed with costs in all the Courts.

(1) I. L. R. 26 Cal. 769 (1899).

WALMSLEY, J.—I agree.

H. C. S.

REPORTER'S NOTE.—See in this connection the case of *Ashutosh Chakravarti v. Dwarka Nath Mitra*, 27 C. W. N. 121.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 773 OF 1924.

SUHWARWADY, J.

MUKERJI, J.

1924,

7, November.

MAHABIR SINGH and
anr., Petitioners,

v.

GIRIBALA DASSI,
Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 192 (1), 202, 203, 204—If a Magistrate taking cognisance of a case and directing an investigation can after the receipt of the report transfer the case to the file of another Magistrate simply for passing orders only—Jurisdiction of the Magistrate to whom the case is transferred

Sec. 192 (1), Cr. P. C., empowers the Magistrate to transfer a case for inquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under sec. 202, Cr. P. C., which he has himself ordered.

The provisions of sec. 192 or sec. 202 do not entitle a Magistrate, after he has proceeded under the latter section to make an order under the provisions of sec. 192, Cr. P. C., transferring the case for the purpose of being dealt with under sec. 203 or sec. 204 without a fresh investigation as contemplated by sec. 202, Cr. P. C.

This was a Rule issued against an order of the District Magistrate of Howrah, affirming the order of Mr. A. C. Bose, Deputy Magistrate of Howrah, dated the 3rd August 1924.

The facts of the case material to this report will appear from the judgment.

Babu Haradhan Chatterjee for the
Petitioners.

Babu Mritunjoy Chatterjee for the
Opposite Party.

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The JUDGMENT OF THE COURT was as follows :—

The complaint in the present case was filed before Mr. D. Dutt, Deputy Magistrate of Howrah, on the 10th May 1924, and he on examining the complainant was of opinion that it was apparently a petty altercation and he made an order that Babu H. P. Roy Chaudhury, an Honorary Magistrate should enquire into it and submit a report. This order was evidently passed under the provisions of sec. 202, Cr. P. C. In ordinary course on the report of Mr. H. P. Roy Chaudhury being submitted Mr. D. Dutt could have either dismissed the complaint or issued process. Matters, however, took quite a different turn. After several adjournments in consequence of the report not having arrived, Mr. D. Dutt on the 1st August 1924 passed an order which ran as follows :—“The cross-case has been disposed of by Mr. A. C. Bose. This case is therefore sent to him for disposal.” It may be said that there was a cross-case which had in the meantime been disposed of by the Deputy Magistrate Mr. A. C. Bose. On the 2nd August 1924 Mr. A. C. Bose looked into the report of Mr. H. P. Roy Chaudhury, Honorary Magistrate, which it is said had already been submitted before Mr. D. Dutt and which evidently had been sent along with the papers to Mr. A. C. Bose, and finding from the report that there was no case against the accused persons dismissed the complaint under sec. 203, Cr. P. C. In doing so it may be stated Mr. A. C. Bose referred also to the fact that he had disposed of the cross-case. Thereafter the complainant filed a petition for revival, the proceedings in connection with which need not be referred to in detail, with the result that ultimately Mr. A. C. Bose issued summons against the Petitioner.

The validity of the proceedings in connection with their transfer from the file of Mr. D. Dutt to that of Mr. A. C. Bose is challenged on behalf of the Petitioners and it is contended that Mr. A. C. Bose was not properly in seisin of the case and any order issuing process passed by him must accordingly be held to be an order passed without jurisdiction.

We have already stated that Mr. D. Dutt on receipt of the complaint had chosen to proceed under the provisions of sec. 202, Cr. P. C. When he had done so evidently he thought of proceeding under sec. 192 (1), Cr. P. C., as well. That sub-section empowers the Magistrate to transfer a case for enquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under sec. 202, Cr. P. C., which he has himself ordered. In the present case Mr. A. C. Bose did not proceed under sec. 202, Cr. P. C., but all that he did was to act upon the report of the Honorary Magistrate which had been called for under the provisions of sec. 202, Cr. P. C., by Mr. D. Dutt and without examining the complainant he dismissed the complaint under sec. 203, Cr. P. C., as stated above.

We do not think that the provisions of sec. 192 or of sec. 202 entitled a Magistrate after he has proceeded under the latter section to make an order under the provisions of the former section transferring the case for the purpose of being dealt with under sec. 203 or sec. 204, without a fresh investigation as contemplated by sec. 202, Cr. P. C. Mr. A. C. Bose was in our opinion not in proper seisin of the case as the transfer to him at that stage and in the circumstances stated above cannot be justified under any provision of the law. His subsequent order issuing process against the accused must

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accordingly be held to be without jurisdiction.

The Rule, therefore, is made absolute. The order issuing process is set aside, and it is directed that the complaint be put up before a Magistrate competent to deal with it, who on examining the complainant afresh will proceed to pass proper orders in accordance with the provisions of the law.

H. C.

PRIVY COUNCIL.
[APPEAL FROM LAHORE.]

LORD SHAW.

LORD BLANKENBURGH.

SIR JOHN EDGE.

1924,

Heard, 31, January.

& 1, February.

Judgment,

21, February.

NABI BAKHSH and
others, Appellants,

v.

AHMAD KHAN and
others, Respondents.

Division amongst sons by different wives, if abrogates pagwand rule in favour of chundawand—Full-blood and half-blood relations—Preference of former

When a separate entity created by division or partition comes into being, the full range of succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family, and it may quite well be assumed that within that family the generally prevailing system of pagwand was not abandoned.

Properties having been partitioned between the sons by one wife of the owner on the one hand and those by his other wife on the other:

Held, on the death of a descendant of one of these sons, that his cousins descended from his uterine brother succeeded in preference to the descendants in the same degree from the sons by the other wife

and it was not necessary, in order to hold this, that the pagwand rule had been abandoned for the chundawand rule.

Inclusion by the Appellant of unnecessary matter in the paper-book was characterised as an abuse, and the Judicial Committee indicated that they would have disallowed the entire cost of the superfluous printed matter if the judgment had been favourable to the Appellants.

This was an appeal from a decree of the High Court at Lahore, dated the 24th January 1920, reversing a decree of the Court of the Subordinate Judge of Shahpur at Sargodha, dated the 10th July 1915.

The question at issue relates to the succession to a property in the Punjab known as Kot Bai Khan, which until April 1907 had been the property of a certain Bahadur Khan.

The parties are Mekans by caste governed by the customary law of the Punjab and evidence was adduced to show whether in matters of succession they were to be governed by the pagwand or chundawand rule.

The pagwand rule was held applicable by both Indian Courts but was restricted in its application by the High Court.

Shahadat Khan, the common ancestor of the parties, had 2 sons, Khanjar Khan and Bhai Khan, by his first wife, and 2 sons Langar Khan, (the grandfather of the propositus Bahadur Khan) and Sher Khan by his second wife. The Appellants are descendants of Shahadat by his first wife and they claim as collaterals of the half-blood to share with collaterals of the whole-blood, the latter being represented by the Respondents.

The determination of their rights depends to some extent on the construction

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of a deed of partition executed by Shahadat in 1863.

The Subordinate Judge decided that the Appellants were entitled to share in the property but his decree was reversed by the High Court on appeal.

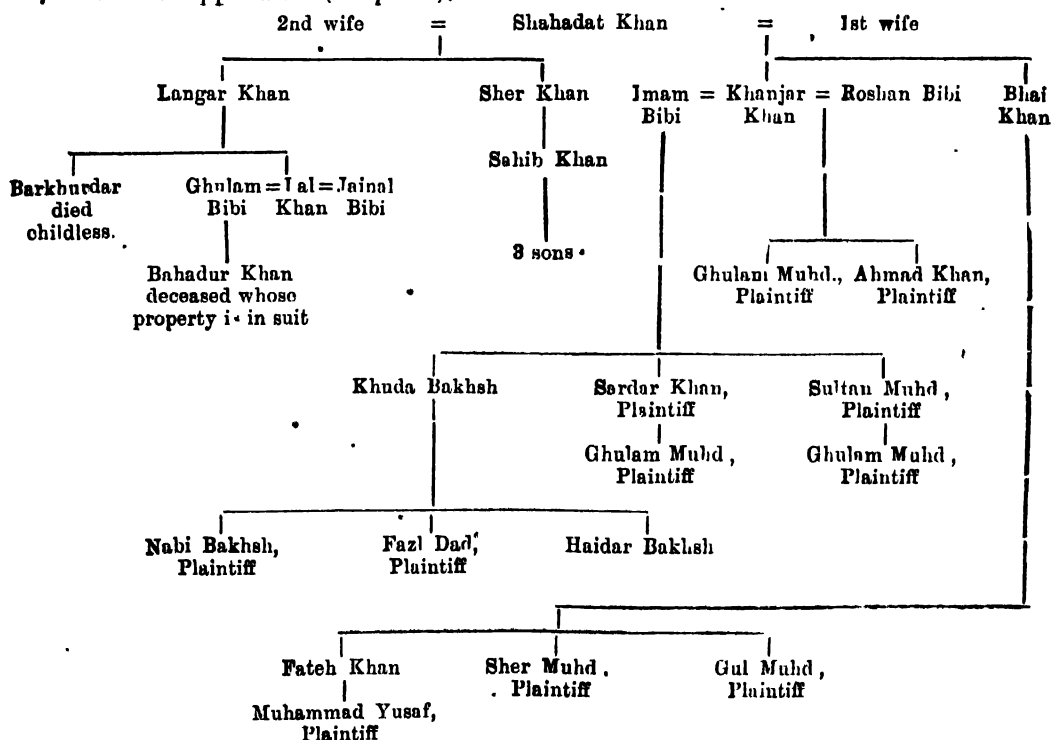
The facts of the case and the findings of the lower Courts are fully dealt with in the judgment of the Judicial Committee.

Messrs. Montgomery, K. C. and A. Majid for the Appellants (*ex parte*).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree of the High Court of the Punjab at Lahore, dated 24th January 1920, reversing a decree of the Court of the Senior Subordinate Judge of Shalpur at Sarogdha, dated 10th July 1915.

The point for determination in the case relates to the succession to the property of a certain Bahadur Khan who died on the 26th April 1907. The pedigree table is as follows:—



The case raises the question whether that property (of Bahadur Khan) devolves on Sahib Khan, son of Sher Khan, or whether it devolves also upon the descendants of Khanjar Khan and Bhai Khan. Reduced to a still simpler form, which, if necessary, can be particularised in the genealogical table, the question in the appeal is,—in the succession of Bahadur Khan, does the full-blood exclude the half-

blood? If it does, then the appeal fails: and Sahib Khan succeeds, he and Bahadur being descendants of Shahadat Khan by his second wife. If it does not, then the Appellants, being descendants of Shahadat by his first wife, come in by right of the half-blood to share in the succession to Bahadur.

It is important to state the matter in this way, apart from committing oneself

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at the outset, on the subject of whether the case is governed by the pagwand rule or by the chundawand rule. This, for a reason to be afterwards specified.

Shahadat Khan, by his first wife, had two sons, namely Khanjar and Bhai. He had also two sons by his second wife, namely, Langar and Sher. He died in the year 1860. In the year 1855, however, he purported to divide the property of Kot Bhai Khan under sanad of date 30th March of that year. from which sanad it clearly appears that the two sons of the first wife obtained certain specified lands and that the two sons of the second wife obtained certain other enumerated lands.

After a year or two, however, differences arose in regard to the payment of certain debts by the descendants of the first wife. On the 27th January 1858, a petition was filed by Shahadat declaring that these two sons, namely, Bhai and Khanjar, had disgraced him and put him to trouble and he accordingly demanded that a *parwana* be issued to the Tahsildar directing him to put the father back into possession and to dispossess these objectionable sons.

An arrangement was speedily come to. In the Court of Pandit Moti Lal, Extra Assistant Collector and Commissioner, there was, on the 16th February 1858, presented an application for partition of the property. Thereafter, on the 10th April 1858, there was executed by Shahadat Khan a deed of partition, the construction of which has been the subject of much discussion. Upon that, and generally upon the whole case, the Board had the advantage of a very able argument by Mr. Montgomery.

It appears to the Board to be clear that the property "previously divided" as the deed narrates (that is to say, in 1855), is

again divided. It may be difficult to identify the names, but there appears to be no doubt that Kot Bhai Khan was again divided by giving to the two sons of the first wife jointly certain named lands or properties on the one hand, and on the other hand by giving certain other named lands or properties for joint possession and ownership by the sons of the second wife.

This phrase, however, occurs, *viz.* :—

"All my four sons shall be the owners in equal shares of the lands situated in the Bar." * * * * * "The property situated at Kot Bhai Khan remains joint among my sons."

This deed, namely, of 1858, is executed as a deed of partition "so that it may serve as an authority in future. After my death my four sons shall act upon this deed of partition."

This deed had appended to it an endorsement of a three-fold character. This question is put :—"whether or not you have any objection to the deed of partition filed by you." That question is put separately and in the first place to the father Shahadat Khan. In the second place it is put to Khanjar and Bhai, the sons of the first wife jointly; and in the third place it is put to Langar and Sher, the sons of the second wife jointly. No objection is tendered, but on the contrary an acceptance is given, first for the sons of the first wife, and second for the sons of the second wife.

From that time, and for the long period of about 60 years, there seems to their Lordships to be little, if no doubt, that as between these two families (or even as between the four sons, a question, however, which it is unnecessary for the purpose of this case to decide), there was a complete separation of the possession and ownership of the properties thus partitioned.

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Their Lordships at this stage think it right to observe on the careful and satisfactory nature of the judgments of the Court below, and they have adopted the narrative as to possession so clearly given in the judgment of the High Court.

The differences of opinion, however, in the Courts below arise in this way. In the Court of first instance, the learned Judge holds it to be proved that in the "village, partition of property takes place according to the pagwand system," and he concludes that, that being so, he is bound to the conclusion that the property in suit, which *de facto* is part of the property partitioned in 1858 which originally belonged to Shahadat Khan, must fall under the rule that the full-blood and the half-blood, as within the family of that propositus, share and share alike, and that accordingly the succession to Bahadur must be regulated upon that footing. The learned Judge is so far confirmed in this that it is established, and it is indeed admitted by the High Court, that the pagwand system did obtain there. But the learned Judge makes no allowance for the true effect of the partition of property which had been made 60 years ago and upon which separate possession had followed. In the opinion of the Board it was necessary to take this carefully into account: and the judgment is erroneous in not having given full and correct effect to that transaction.

The learned Judges of the High Court did not fall into this error. In the opinion of their Lordships they were right in holding that the separate ownership and possession for about 60 years was as stated. But, in so doing, they appeared to be under the impression that the succession to Bahadur's share must not be governed by the pagwand rule, which includes the half-blood, but must be gov-

erned by the chundawand rule, which excludes it. They, therefore, preferred the Respondents—holding, with accuracy, that "in the distribution of 1858 it was intended that thenceforward each group of sons should hold its own portion in the estate independently of the other." But they introduced into their judgment the following sentences:—

" 'Chundawand' and 'pagwand' are, however, rules rather of distribution among heirs entitled than rules of succession, and it was pointed out in 4 P. R. 1891 F. B. (p. 25), that the above presumption could only be made when the existence of an ancestor with issue by at least two wives, and a pagwand or chundawand distribution of his estate, whether before or after his death, had been proved "

If this means that the succession to Bahadur in this case must be regulated by the abandonment of the pagwand rule and as a necessary consequence the adoption of the chundawand rule their Lordships cannot agree. They are not quite sure, from consideration of the judgment, whether the learned Judges affirmatively take up that position. In the result, however, they reach the conclusion with which their Lordships entirely agree, to the effect that in the distribution of the succession to Bahadur the full-blood excludes that half-blood which is claiming in this case.

The truth is that, as the learned Judges of the High Court clearly point out, the question being dealt with is (1) a collateral succession and (2) a collateral succession to property given to a child of a first wife and partitioned off and separated from property given over to the children of the second wife.

The theory of abandoning the pagwand rule for the chundawand rule need not necessarily be put forward. For when the distribution or segregation which

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occurred and has been so long acted on arose, each portion of property thus succeeded to by the children of the first wife became a separate entity; and the rules of succession to it are rules of succession to the owner of it and not to the anterior or ancestral owner to whom, prior to distribution, a much larger entity inclusive of that portion belonged. It is, therefore, possible and it is necessary to decide this case on the simple ground that when the smaller entity thus formed is succeeded to, the pagwand system may still apply, but it applies within the simple family consisting of Shahadat's second wife's children and not within the range of the complex family consisting of the children of his two wives. In short, when a separate entity, created by division or partition, comes into being the full range of the succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family, and it may quite well be assumed that within that simple family, the generally prevailing system of pagwand was not abandoned.

But the partition was a definite, an accomplished and a long recognised fact, and cannot be ignored. And accordingly the ambit of that system is confined to searching for the full-blood and half-blood within the divided and separated area. In that search it is not permissible to undo the distribution and search for the collaterals as if under the succession to the owner of the undivided property.

In affirming accordingly the judgment of the High Court their Lordships are glad to be able to find that in their judgment the law of the Punjab, in this particular, stands as has now been stated upon what in their opinion is the very highest authority, namely, that of the Full Bench of the Punjab and specially of the very

valuable exposition of the law in the case already cited by Plowden, J.

They mention the following passages :—

"That the portion allotted to a group should belong as an entirety to the members, who, for the time being, form or represent the group until the group is extinct, is no departure from the ordinary rule as to the devolution of shares. As to the redistribution of the portion, and devolution of the shares into which the portion is redistributed among the members of a group, that is a matter which concerns them alone, until the group is extinct, exactly as in the case of the share of an individual and his descendants *quod* other sharers and their descendants. On this view, there is not really, at any time, a competition between half-blood and whole-blood, for the sons have been separated once for all, at the original distribution, into several groups, such that all the members of each are related *inter se* by the whole blood, and so far, each group resembles a single family."

In a further passage the same learned Judge further states the question :—

"It is quite intelligible that when, by reason of matters subsequent to a pagwand distribution, the sons of several wives have arrived at a condition not distinguishable from the result of a chundawand distribution among groups of sons, the same customary rule should apply in cases of collateral succession, as applies when there has been a chundawand distribution. But the basis of the preference of the whole blood, when it exists in such a case, clearly is the association of the uterine brothers into distinct groups, the pagwand distribution notwithstanding."

There are other passages in this remarkable judgment which show how clearly the combined issues of a succession which is (1) collateral and (2) to a property after distribution by a common ancestor have been considered. When that ancestor makes a division or partition among the members of his complex family with the result of the creation of a number of single

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families, then among these simple families, the question in instances like the present has solved itself, for there is within that limited ambit no half-blood to compete.

Their Lordships do not conclude this opinion without observing upon the expense incurred. It was agreed that the entire points in the appeal were substantially covered by a reference to a few documents; and accordingly these could have been presented to the High Court in a succinct and business-like paper of a few pages. In the present appeal, however, there was printed in India an elaborate book of 1,163 pages containing, it may be observed, very many inaccuracies. Their Lordships think it right to say that, in their judgment, this mass of printing is an abuse. When the Registrar looked at the case sometime before the hearing, he was of opinion that a large part of the record could not under any circumstances be necessary to put before their Lordships. He, therefore, communicated with the Appellants' solicitors, and the latter, after consultation with their counsel, eliminated more than 540 pages. These were actually taken out of the bound books and were never before the Board. Had the judgment been favourable to the Appellants the entire cost of that printed matter would have been disallowed.

Their Lordships will humbly advise His Majesty that the appeal shall be disallowed.

Solicitors: Messrs. Francis & Harker for the Appellants.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SUMNER.

LORD WRENBURY.

LORD CARSON.

1924,

4, December.

HURNANDRAI FUL-
CHAND
v.
PRAGDAS BUDHSEN.

Privy Council—Practice—Application to Board to interpret previous Orders in Council, if and when may be entertained.

It is no part of the functions of the Judicial Committee, generally speaking, to interpret Orders in Council which have been already made, unless they are brought before them in the ordinary way upon appeal.

But in the peculiar circumstances of the present case, they did so, upon application by a party to the Order.

EX PARTE YARLAGADDA DURGA (1) referred to.

This was a petition by the Respondents in an appeal from the High Court at Bombay for directions as to the interpretation of an Order in Council, dated the 29th January 1923.

The Order in question was made on a Report from the Judicial Committee of the Privy Council on the hearing of an appeal which is reported in 27 C. W. N. 878.

The suit out of which the appeal arose was brought by the Appellant for damages owing to the failure of the Defendants to deliver goods contracted for. The Privy Council decided that there was a breach of contract as to 504 bales and advised "that the case ought to be referred back to the said High Court to assess the damages to which the Appellants are entitled by reason of the breach of contract of the Respondents over and above the sum of Rs. 2,875 awarded to

(1) L. R. 31 I. A. 64 (1903).

HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN.

them by the said decree, dated the 19th day of June 1919."

The suit was originally tried by MacLeod, C. J., who found that there was a breach of contract as regards 23 bales and also found a difference of 4 as. 6 pies between the contract rate and the market rate on the 31st December 1918 and made a decree for Rs. 2,875 on that basis.

There was an appeal to a Division Bench and cross-objections by the Defendants, i.e., the present Petitioner *inter alia* that the trial Judge was wrong in holding a breach of contract as to 23 bales only and in awarding excessive damages.

That appeal and the cross-objections were dismissed and the original Plaintiffs appealed to the Privy Council who held as stated above.

On the case being remitted in conformity with the order in Council the Petitioner sought to give evidence as to market rate. That evidence was refused and Fawcett, J., made a decree on the basis of the rate of damages as assessed by MacLeod, C. J., at the original hearing. The Petitioner now applied for directions that the Report of the Judicial Committee of the 20th December 1922 and the order in Council of the 29th January 1923 were not intended to and did not prevent the Petitioner from adducing further evidence upon the question of the further amount of damages, if any, suffered by the Plaintiff.

Mr. S. L. Porter for the Petitioner contended that the order in Council did not shut out any further evidence as to market rate. He referred to *Ex parte Yarlagaadda Durga* (1) and urged that he was entitled to obtain the interpretation by the Board of the Order in Council.

Messrs. Clauson, K. C. and E. B. Raikes.

(1) L. R., 31 I. A. 64 (1903).

for the Respondents.—The Petitioner was entitled to call evidence as to the measure of damages at the original hearing and on the evidence then adduced, damages were assessed. There is no right to adduce further evidence now, that the case has been decided by the Privy Council and the Order in Council made.

Mr. S. L. Porter replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—In accordance with the authority of the case of *Ex parte Yarlagaadda Durga* (1) which has been cited to their Lordships, their Lordships are willing under the particular circumstances of this case to assist the High Court in Bombay by an expression of their opinion upon the question, which appears to have been mooted before them. They desire, however, to add that it is no part of the functions of their Lordships' Board, generally speaking, to interpret Orders in Council, which have been already made, unless they are brought before them in the ordinary way upon appeal. The present Board, of course, is only able to state the intention of the opinion delivered by them, and of the Order in Council that His Majesty was then pleased to pass thereupon, by reading the language of the opinion and of the Order, and those of their Lordships who were parties to the judgment would hesitate to claim any specific recollection of the facts of the case.

It does not appear to their Lordships, that it was contemplated or could have been contemplated at that time, upon a question, which was essentially one merely of calculating the amount of damages that either party to a commercial dispute in

(1) L. R., 31 I. A. 64 (1903).

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Bombay would have proposed to call evidence long afterwards to contradict evidence which had been allowed to pass at the trial, when the facts were comparatively recent. This consideration and an admission of human frailty must be the Board's excuse for having failed to state, more explicitly in the opinion that was arrived at, what course they anticipated would be pursued in the Court of the trial Judge. They may perhaps be allowed to say that they fail to see what substantial doubt could have arisen upon the question. The course which the trial Judge had taken, the mode in which he assessed the damages, and his decision whatever the grounds may be that he gave for it—not to admit any fresh evidence of the value of the goods, appear to their Lordships to have been in entire accordance with what the Board contemplated would be done upon the question, which it was necessary to remit to the Indian Court because their Lordships were not the proper tribunal to make calculations, and the parties were unable to come to an agreement.

In the result therefore the answer to the petition is unfavourable to the Petitioners and they will have to pay the costs of the petition.

Solicitors : Messrs. T. L. Wilson & Co. for the Appellant.

Solicitors : Messrs. E. F. Turner & Sons for the Respondent (Petitioner).

G. D.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEALS

Nos. 30 AND 31 OF 1923.

MOOKERJEE, J.

RANKIN, J.

1923,

23, November.

RAMA NATH SAUT and
ors., Defendants,
Appellants,

OFFICIAL TRUSTEE OF
BENGAL as Trustee to
the estate of late Manik-
lal Seal, Plaintiff,
Respondent.

Bengal Tenancy Act (VIII of 1885), sec 103B, sub-sec (3), entry in record-of-rights regarding existing rent, if can be rebutted by evidence of matters apparent on the face of the proceedings of the Revenue Officer himself—Sec 102 (e), determination of rent according to instructions of superior officer, legality of.

In determining the existing rent under sec. 102 (e), Bengal Tenancy Act, the Revenue Officer, though he had relevant evidence before him, did not apply his own judgment thereto but applied the principles which had been formulated for his guidance by his superior officer. In some subsequent suits for rent :

Held—That the presumption under sec. 103B (3) may be rebutted by either evidence external to the settlement proceedings or evidence of matters apparent on the face of those proceedings. In the present case the very statement of the Revenue Officer's reasons for determination of the rent showed that he did not determine the existing rent, and did not apply his own judgment to the consideration of the evidence before him but applied the principles which had been formulated for his guidance by his superior officer. In the circumstance the rent that he had determined was not the rent actually payable but an imaginary rent.

BOGHA MOWER v. RAM LAKSHMAN (3) followed.

(3) 27 C. L. J. 107 (1917).

RAMA NATH SAUT v. OFFICIAL TRUSTEE OF BENGAL.

SECRETARY OF STATE v. NITYA SINGH (1), LUCHMI PERSHAD v. EKDESHWAI SINGH (2) and SHEONANDAN PERSHAD SUKUL v. BACHA RAUT (4) referred to.

These were appeals under sec. 15 of the Letters Patent against the decrees of Mr. Justice Newbould, dated the 11th of May 1923, in appeals from Appellate decrees Nos. 1010 and 1006 of 1921, which had been preferred against the decrees of the District Judge of Zillah Midnapur (Mr. Yusuf, Esq.), dated the 3rd December 1920, modifying the decrees of the Munsif at Tamruk (Babu Lalit Mohan Bose), dated the 28th June 1919.

The Plaintiffs-Respondents had brought several rent suits in the Munsif's Court at Tamruk and the question in the suits was whether the Plaintiff was entitled to recover rent at the rates stated in the finally published record-of-rights. The trial Court gave decrees according to the entry in the record-of-rights in some cases and in others according to the admission of the tenants. On appeal, the District Judge of Midnapur held that in none of the suits should the decree be based upon the entry in the record-of-rights. On second appeal to the High Court, Mr. Justice Newbould decreed the suits on the basis of the entry in the record-of-rights and passed the following judgment :—

NEWBOULD, J.—These five appeals are preferred against the decision of the District Judge of Midnapur in appeal against the decision of the Munsif of Tamruk in certain rent suits. The question in each of these appeals is whether the Plaintiff who, is the Appellant before me is entitled to recover rent at the rates stated in the duly published record-of-rights. In three of these second appeals Nos. 1007

to 1009 arising out of suits Nos. 2176, 2232 and 2259 both Courts have held that the entries in the record-of-rights have been rebutted by the decrees in contested rent suits prior to the record-of-rights. On behalf of the Appellant it is contended that if the judgments were read as well as the decrees it would show that the question of the rate of rent was not contested. It is stated that at that time the record-of-rights was being prepared and the Plaintiff was willing to leave the question of the rental to be settled by the Settlement Officer and did not think it necessary to prove the rates claimed by him in the suits. I was asked to admit the judgments at the hearing of these appeals and this I refused to do as it was clearly the duty of the Appellant if he wished to rely on those judgments to have filed them if not in the first Court certainly in the lower Appellate Court. But it appears from the judgment of the Munsif that one of these judgments was filed with the decree relied on. The examination of that judgment does not support the Appellant's contention. I am unable to hold that on the material before them that the lower Courts were wrong in holding that the presumption arising from the entries in the record-of-rights had been rebutted by these decrees.

In appeals Nos. 1006 and 1010 arising out of suits Nos. 2225 and 2231 the evidence of the record-of-rights had been rejected on another ground, and that is, that the mode of calculation adopted by the Revenue Officer in assessing rent was illegal and consequently the entries in the record-of-rights relating to the rate of rent must be held to be incorrect.

It appears that in the draft record-of-rights the rents payable were not entered but the entry was made that the tenants were liable to assessment of rent.

(1) I. L. R. 21 Cal. 38 (1893).

(2) 13 C. W. N. 181 (1908).

(4) 9 C. L. J. 284 (1908).

RAMA NATH SAUT v. OFFICIAL TRUSTEE OF BENGAL.

Thereupon the Plaintiff filed an objection under sec. 103 of the Bengal Tenancy Act asking that rent might be recorded as stated in his petition. In the two cases which I am now considering the tenants first appeared and asked for time for compromise. Time was granted but no compromise was effected. Then the landlord appeared and the tenants did not again appear and the landlord produced certified copies of certain *solenamas* as well as collection papers. The Revenue Officer recorded rents on certain principles which had been laid down by the Settlement Officer in an inspection note. Both the lower Courts have held that the directions of the Settlement Officer were not binding on the Revenue Officer performing the function of a judicial character under the Bengal Tenancy Act and that therefore the Revenue Officer acted illegally and the entries in the record-of-rights cannot be treated as properly made.

In support of this view of the case they relied on the case of *Bogha Mower v. Ram Lakshman Misser* (3). But the facts of that case are clearly distinguishable. In that case the only material on which the rents were recorded was an unregistered document which was inadmissible in evidence, because it ought to have been registered. Here it would appear that there was evidence to support the case made out by the landlord and that evidence was un rebutted. There is no reason to suppose that the rents recorded were higher than the rents claimed by the landlord. If in applying the rule laid down by his superior officer the Revenue Officer recorded rents at a lower rate than the evidence supported the tenant certainly has no cause of complaint and I am

unable to hold his conduct was such as to render the entries in the record-of-rights illegal, or such that the legal presumption of their correctness did not apply. In these two cases no evidence has been given to rebut that presumption or such as has been given has been held by the lower Courts to be insufficient to rebut the presumption. In these two cases I hold that the Plaintiff is entitled to rent at the rate claimed by him.

There is one other small point that has been taken by the Appellant and that is, that in order to prove the ground in which the Revenue Officer recorded the rent in suit No. 2225 it was necessary to depend on a document, Ex. Q, which was filed for the first time in the Court of Appeal. This was necessary in order to show that the Revenue Officer's judgment, Ex. Q, referred to this case as well as to suit No. 2231. Though the learned District Judge did not, as he should have done, record his reason for admitting this document I hold that there were sufficient reasons for allowing it to be admitted. It has been held that the omission to record the reasons does not make such evidence inadmissible. However as I said with regard to this suit No. 2225 the Appellant's case succeeds. It is therefore unnecessary to say more in this point.

The result is that appeals Nos. 1007, 1008 and 1009 are dismissed with costs. Appeals Nos. 1006 and 1010 are decreed with costs and the judgments and decrees of two lower Courts are set aside and the Plaintiff will get decrees in those suits for the full amounts he claimed.

[Against the above decision in respect of S. A. Nos. 1006 and 1010 of 1921, the present appeals under sec. 15 of the Letters Patent were preferred by the Defendants.]

RAMA NATH SAUT v. OFFICIAL TRUSTEE OF BENGAL.

Babu Apurba Chandra Mukherjee for the Appellants.

Babus Gunadū Charan Sen and Santosh Kumar Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These are two appeals under cl. 15 of the Letters Patent from the judgment of Mr. Justice Newbould in two suits for recovery of arrears of rent.

In each suit the question was as to the amount of rent annually payable by the tenant to the landlord. The landlord relied upon the relevant entry in a finally published record-of-rights. The tenant contended that the entry had been rebutted and no reliance should be placed thereon. The primary Court took divergent views in the two suits. In one instance, it was held that the decree should be based on the entry, while in the other it was ruled that the decree should be in accordance with the admission of the tenant. There were appeals to the District Judge in both the cases. He came to the conclusion that in neither suit should the decree be based upon the entry in the record-of-rights. In second appeal to this Court, Mr. Justice Newbould has reversed the decision of the District Judge and has directed that the decree in each case be entered in favour of the landlord on the basis of the entry in the record-of-rights. The substantial question in controversy consequently is, whether the entry in the record-of-rights has been effectively rebutted.

Under sec. 102, cl. (e) of the Bengal Tenancy Act, the Revenue Officer is required to record the rent payable at the time the record-of-rights is being prepared. As pointed out in *Secretary of State v. Nitya Singh* (1) and *Luchmi Pershad*

(1) 1. L. R. 21 Cal. 38 (1893).

v. Ekdeshwal Singh (2), this provision requires the Revenue Officer to determine the existing rent and not to settle a fair rent in respect of the tenancy. After the record-of-rights has been finally published, sec. 103B comes into operation. Subsec. (3) of that section provides that every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect. Consequently, after final publication the presumption arises that the entry is correct; in other words, in respect of an entry of rent, the presumption arises that what has been recorded is a correct statement of the existing rent. This presumption may be rebutted, and the entry may be proved by evidence to be incorrect. This evidence, as was explained in the case of *Bogha Mower v. Ram Lakshman Misser* (3) may be either evidence external to the settlement proceedings or evidence of matters apparent on the face of those proceedings. To take one illustration, in the case of *Sheonandan Pershad Sukul v. Bacha Raut* (4) evidence was produced to show that the rent actually payable at the time of the preparation of the record-of-rights was different from the rent entered in the record-of-rights. This evidence may be either anterior in point of time or subsequent in date to the record-of-rights. To take another illustration, as pointed out in the case of *Bogha Mower v. Ram Lakshman Misser* (3), it may appear on the face of the proceedings of the Revenue Officer that the entry is erroneous. The case before us is of the latter description.

The Revenue Officer had to determine the existing rent in respect of each of

(2) 13 C. W. N. 18 (1908).

(3) 27 C. L. J. 197 (1917).

(4) 9 C. L. J. 284 (1908).

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these tenancies. But the very statement of his reasons for his conclusions which are set out in his order, dated the 9th December 1916, shows that he did not determine the existing rent. He had, indeed, relevant evidence before him; but in the consideration of that evidence, he did not apply his own judgment; on the other hand, he applied the principles which had been formulated for his guidance by his superior officer. It is plain that what he has determined is not the rent actually payable, but an imaginary rent. Whether that is fair rent it is impossible to determine; but this much is plain that it is not the existing rent in respect of either of these tenancies. In such circumstances, the conclusion is inevitable that the entry has been rebutted by evidence, namely, by such evidence as appears on the face of the proceedings of the Revenue Officer himself. We have consequently no doubt that the entry must be deemed to have been proved incorrect. This leads to the position that the landlord has failed to establish the rate of rent as alleged by him, and the only course open to the Court is to make a decree on the basis of the admission of the tenants.

We have been pressed by the landlord to remand the case to the Court of first instance in order that the suit may be retried; but we are clearly of opinion that we should not accede to this request. We cannot ignore the fact that the litigation has already lasted for more than five years in four Courts; and the circumstance that the decree will be made on the basis of the admission made by the tenants will not preclude an enquiry by the Court as to the actual contract rate of rent in a subsequent suit.

The result is that these appeals are allowed, the decrees of Mr. Justice Newbould set aside and those of the District

Judge restored with costs of two hearings in this Court.

J. N. R.

(CIVIL APPELLATE JURISDICTION.)

Ref. No. 6 of 1924.

SUHRAWARDY, J.

DUVAL, J.

1924,

Heard,

4, August.

Judgment,

8, August.

D. TANORED and ors.

v.

D. N. MULLIK.

Civil Procedure Code (Act V of 1908), Or. XLVI, r. 1—Reference to High Court, if can be made by Rent Controller of Calcutta

The Rent Controller of Calcutta is not competent to make a Reference to the High Court under Or. XLVI, r. 1 of the Code of Civil Procedure.

This was a Reference under Or. XLVI, r. 1, C. P. C., made by the Rent Controller, Calcutta (Babu Bijay Kumar Ganguly), dated the 31st May 1924.

The facts of the case will appear from the judgment.

Babus Ajendra Nath Datta and Krishna Kishore Basak for the Petitioner.

Babus Mohendra Nath Roy and Promode Kumar Ghose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference under Or. XLVI, Code of Civil Procedure, by the Rent Controller of Calcutta on an application by the tenant for standardisation of rent in respect of a suite of rooms in premises No. 109E, Ripon Street. A preliminary objection has been taken on behalf of the landlord to the jurisdiction of this Court to hear the Reference on the ground that the Rent Controller is not competent to

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make it under Or. XLVI, r. 1 of the Civil Procedure Code.

Two fundamental conditions are necessary under the above rule to entitle a Court to make a Reference under that order. The Court making the Reference must be a Court of Civil Jurisdiction and that Reference must be made in a suit, appeal or execution proceeding. The Court of the Rent Controller is in certain respects a Court of Civil Jurisdiction. *H. D. Chatterjee v. L. B. Tribedo* (1) and *Re Allen Bros. & Co. v. Bando & Co.* (2). The only question that remains therefore for discussion is whether the proceeding before the Rent Controller is a suit within the meaning of Or. XLVI, r. 1. The application is made by the tenant before the Rent Controller for standardisation of rent under sec. 15 of the Calcutta Rent Act. The procedure to be followed by the Rent Controller is indicated in that section and certain powers are conferred upon him by secs. 16 and 17. In the last mentioned section, as in all other parts of the Rent Act, the proceeding before the Rent Controller is called an "enquiry." The expression "suit" is nowhere used in the Rent Act with reference to proceedings before the Rent Controller. Sec. 23 of the Rent Act confers on the Local Government power to make rules to carry on the purposes of the Act and under cl. (c) to regulate among other matters the procedure to be followed in enquiries by the Controller. It is worthy of note that the term "enquiries" is used in cl. (c) of sec. 23. Under the power thus conferred upon the Local Government it has framed and published a body of rules of which r. 24 is in these words:—"In all proceedings before him under the Act the Controller

and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suit." The question then arises as to whether this rule converts an enquiry before the Controller into a suit. In our judgment it does not. There are generally two characteristics of a suit. It either is or is not subject to appeal. The Act does not make any provision for or against the appeal from the order of the Controller but his decision is subject to revision by the President of the Tribunal in the town of Calcutta under sec. 18 of the Act. The second criterion of a suit is that the decision is usually followed by a decree. Under sec. 15 of the Act, the Rent Controller is to pass an order only and under sec. 18 a copy of such order is to be filed with the petition of revision.

Reference in this connection may be made to sec. 24 of the Act which provides that in revising the decision of the Controller the President of the Tribunal shall follow the procedure laid down in the Code of Civil Procedure for the regular trial of suits. The order of the Controller is here also described as "the decision." The procedure before the President will be as adopted in regular suits. From this it does not necessarily follow that the proceeding before him will also be a suit. To the same effect is r. 4 of the rules framed by the Local Government under the Rent Act.

It is argued, however, that sec. 141, Civil Procedure Code, which provides that the general procedure in suits applies in miscellaneous proceedings will attract to it the power to make a Reference under Or. XLVI, r. 1. We cannot accept this contention and would only refer to the cases of *Md. Hazi Zakaria v. Ahmedbhai Habibhai* (3) and *Damodara Menon v.*

(1) 26 C. W. N. 78 (1921).

(2) 26 C. W. N. 845 (1922).

(3) I. L. B. 25 Bom. 327 (1900).

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Kittappa Menon (4), which show that even a District Judge cannot make a Reference in a miscellaneous proceeding.

For all the foregoing reasons we hold that the enquiry before the Rent Controller is not a suit within the meaning of Or. XLVI, r. 1, and that order does not apply to miscellaneous proceedings. He is not therefore competent to make a Reference to this Court under that order. This Reference must therefore be returned unanswered. We make no order as to costs.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 648 AND 649 OF 1924.

SUBRAWARDY, J.	{	
MUKERJI, J.		PRAMATHA NATH
1924,		SANYAL, Petitioner,
Heard,		v
25, October.		KALI KUMAR DUTT,
Judgment,		Opposite Party.
3, November.		

Indian Companies Act (VII of 1913), sec. 2, cl. (14), sec. 92, cl. (5)—Advertisement offering for sale to the public shares of a Company, if comes within the definition of prospectus—Omission to file copy of such advertisement with Registrar of Joint Stock Companies before publication, if offence.

The Petitioner as the representative and Secretary of a limited Company, registered under the Indian Companies Act, the prospectus whereof had already been filed with the Registrar of Joint Stock Companies, published an advertisement in a newspaper offering to the public some shares of the Company for sale:

Held—That the advertisement came within the definition of "prospectus" as contained in sec. 2, cl. (14) of the Act and the omission to file a copy thereof with the Registrar of Joint Stock Com-

panies for registration before issuing it was an offence under sec. 92, cl. (5).

These Rules were granted on the 28th July 1924 against the order of the Additional Chief Presidency Magistrate, Calcutta (A. Z. Khan, Esq.), dated 7th July 1924.

The facts of the case will appear from the judgment.

Babu Narendra Kumar Bose for the Petitioner.

Mr. Khundkar, Counsel, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—These two Rules relate to convictions under sec. 92 (5) of the Indian Companies Act (VII of 1913).

In No. 648 the Petitioner as representing the Bengal Miscellany, Ltd., a Company registered under the Act, and in No. 649 the Petitioner as Secretary thereof, has been so convicted for issuing an advertisement in a daily newspaper named "Forward" on the 24th June 1924 without filing a copy thereof with the Registrar of Joint Stock Companies for registration on or before the date of its publication, as required by the Act.

The ground upon which the convictions are challenged, put shortly, is that the advertisement in question is not a prospectus within the meaning of the Act but specifically refers to a prospectus, copy whereof had admittedly been already filed with the Registrar of Joint Stock Companies. It is urged that if the prospectus of the Company has already been filed with the Registrar as it has been on the 2nd September 1921, and the advertisement already refers to the prospectus and states the fact that it has been so filed, it is not necessary under the law to file a copy of the advertisement with the Registrar for there would be no object in doing so; and it is

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further urged that if a copy of this advertisement had been attempted to be filed it would not have been accepted as it does not contain the particulars necessary under sec. 93 of the Act.

The offending matter in this case is an advertisement offering to the public some shares of the Company for sale. It therefore clearly comes within the definition of "prospectus" as contained in sec. 2, cl. (14) of the Act. The definition runs thus: "Prospectus means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase of any shares or debentures of a Company." Then under sec. 92 the filing of a prospectus is obligatory and the particulars to be set out therein are given in detail in the said section as also in sec. 93. A reference to the different sections of the Act makes it abundantly clear that the provisions relating to a prospectus are most stringent and the duty of preparing it and filing it in accordance with law is extremely onerous. Upon the plain words of the statute I can see nothing which relieves the Company from filing a copy of an advertisement of this nature with the Registrar before issuing it.

At first sight, however, the Petitioner's contentions seem plausible and it seems superfluous and unnecessary that a copy of the advertisement should be filed when the prospectus itself has already been filed. It strikes me as meaningless that a Company should be required to file a copy of every advertisement that it issues in the newspapers inviting the purchase of its shares when the advertisement specifically refers to a prospectus, copy of which, it says, is available to an intending purchaser of shares on application, and copy of which, it says, has been duly filed; and furthermore if the Company had filed

a copy of the advertisement in the shape in which it was issued it could not have been accepted by the Registrar. The policy of the law, however, is entirely different, and on a careful study of it I am satisfied that it is neither unreasonable nor unjust.

The obligation of persons who cause a prospectus to be issued was laid down by Kindersley, V. C., in the case of *The New Brunswick & Canada Ry. Co. v. Muggeridye* (1) in these words: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares, on the faith of the representations therein contained, are bound to state everything with strict and superfluous accuracy and not only to abstain from stating as fact that which is not so, but omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducement to take shares." In the case of *Henderson v. Lacon* (2), Page Wood, V. C., observed thus with reference to the dictum above quoted: "I must say I think the result of all the cases which have occurred shows the great value of that golden legacy, if I may so term it, which has been left to us by Sir Richard Kindersley, who has condensed in few words the whole doctrine as to the rule of conduct between shareholders and their directors, in the case of *The New Brunswick & Canada Ry. Co. v. Muggeridye* (1), a case cited with approbation in the case of *The Central Ry. Co. of Venezuela v. Kish* (3), in the House of Lords."

(1) 1 Dr. & Sm. 368 (1880).

(2) [1887] 5 Eq. 249.

(3) L. R. 2 H. L. 113 (1887).

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Where there is deviation from this rule complications arise and give rise to actions of deceit or actions to obtain rescission on the ground of misrepresentation, instances of which the books abound in. To avoid these complications, and to safeguard the interest of the Company as also of those who choose to deal with it, the legislature has made provisions for the full disclosure of all material facts and laid down certain statutory particulars which have got to be disclosed.

It is obvious that the preparation of a prospectus necessitates the greatest care; while an attractive statement of the advantages offered is justly permissible, every statement made should be an honest one, no ambiguous phraseology, unfair reservation or half truths should be allowed to be used or to creep in. On a reference to the sections mentioned above, together with some of the other sections of the Act, *e.g.*, secs. 84 and 100, it is clear that one of the chief aims of the legislature has been to secure the fullest disclosure of all material and essential particulars as to the state of affairs of a Company and lay the same in full view of all intending purchasers of its shares or participation in its profits. With that object the legislature has provided that any invitation to the public for that purpose should be subject to the scrutiny of the authorities. It has therefore been enacted in sec. 92 of the Act that an advertisement of the nature which forms the subject-matter of the present cases should be placed before the Registrar by filing a copy of it before it is issued—and it has also provided that in order to be so filed it must contain essential particulars such as are mentioned in sec. 93. That this is so also appears from sub-sec. (2) of sec. 93 which makes some exemptions in case of newspaper advertisements, and sub-sec. (8) of that section which makes the sec-

tion inapplicable to a circular or notice inviting existing members or debenture-holders of a Company to subscribe either for shares or for debentures. It is clear that an advertisement in the shape in which it has been published would not have been accepted by the Registrar as satisfying the requirements of sec. 93: but that only means that it should not have been issued.

Our attention has been drawn to a passage in Stiebel's Company Law and Precedents, Second Edition, Vol. I, p. 258 foot-note, which is in these words:—"Sometimes one sees in newspapers advertisements issued by companies which propose to issue shares, which do not contain the statutory requirements and state that the publication is for information only and that applicants must apply to the Company for the full prospectus: such advertisements should never contain an application form, but do not appear to be contrary to the Act." No authority is cited in favour of this proposition; and in any case the present prospectus does not fall within that category, for it does not state that the publication is for information only, nor does it say that the applicants must apply to the Company for the full prospectus, but only that the prospectus may be obtained on application.

I am accordingly of opinion that the convictions are correct and the Rules should be discharged.

SUHRWARDY, J.—I agree.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP NO. 276 OF 1924.

NEWBOLD, J.

MUKERJI, J.

1924,

Heard, 17, 18 and

19, December.

1925,

Judgment,

8, January.

JESSARAT and ORS.,

Appellants,

v.

KING-EMPEROR.

*Jury, charge to—Proper summing up, what is—
Misdirection in charge to jury, vitiating verdict—
Criminal Procedure Code (Act V of 1898), sec
360—Deposition read by witness himself and ex-
plained by Judge to accused though not in the
presence of witness—Section, if sufficiently com-
plied with*

The summing up by the Judge in his charge to the jury as contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it as a sound judicial discretion would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration and collate the evidence pro and con bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have deposed at the trial and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination instead of aiding the jury only confuses them.

Where the Judge's charge to the jury did not fulfil the aforesaid conditions, it was held that the verdict was vitiated.

Semhle.—It is not a sufficient compliance with sec. 360 of the Code of Criminal Procedure where the deposition is read by a witness himself and it is explain-

ed by the Sessions Judge to the accused though not in the presence of the witness.

This was an appeal preferred on the 4th July 1924 against an order of the Sessions Judge of Rungpur (P. K. Mukerji, Esq.), dated the 8th March 1924..

The facts of the case will appear from the judgment.

M. Wahed Hossein, Babus Promotho Lal Dutt and Sishir Kumar Banerjee for the Appellants.

Mr. S. R. Das, Advocate-General, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—This appeal has been preferred by nine persons, Chota Jessarat, Baro Jessarat, Tazer, Gendla, Mazarulla Mistri, Kasim, Genda Fakir, Mohorulla and Amanulla Gachua, who were tried by the Sessions Judge of Rangpur with the aid of a jury. The jury brought in a unanimous verdict of guilty against all the accused under secs. 147 and 366, I. P. C., and against Chota Jessarat, Tazer, Gendla, Kasim, Genda Fakir and Mohorulla under sec. 457, I. P. C., and against Baro Jessarat, Mazarulla Mistri and Amanulla Gachua under sec. 457/149, I. P. C. The learned Judge agreeing with and accepting the said verdict convicted the accused in respect of the offences of which they were found guilty by the jury, and sentenced them only under sec. 336, I. P. C., the accused Chota Jessarat, Tazer and Gendla being each sentenced to undergo rigorous imprisonment for 7 years, and the accused Baro Jessarat, Mazarulla Mistri, Kasim, Genda Fakir, Mohorulla and Amanulla Gachua being each sentenced to undergo rigorous imprisonment for 6 years.

The Appellant Kasim died in jail during the pendency of the appeal, and his case is not before us now.

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Of the grounds urged in support of the appeal it is necessary to notice only a few inasmuch as the others either relate to the sufficiency or insufficiency of evidence as supporting a particular finding on a question of fact, or to omissions on the part of the learned Judge to deal specifically with some conflicts or discrepancies in the evidence—grounds which, even if made out, would not entitle us to interfere with the verdict of the jury.

One of the objections worth noticing relates to the constitution of the jury who sat at the trial. What happened with regard to this matter was this. A jury consisting of five persons was chosen by lot. Of these one was objected to on behalf of the defence; he was eliminated and another gentleman was chosen by lot from amongst the persons present. The jurors so chosen then elected their foreman and were sworn. Thereafter two petitions were filed on behalf of the accused, one praying for a trial by a mixed jury of Hindus and Mahomedans based upon the ground that as the case was one relating to the alleged abduction of a Hindu girl by the accused who are all Mahomedans and as the Hindus "bear a sort of instinctive hatred or prejudice against the accused in a case of this nature the accused would not get a fair trial before a jury composed entirely of Hindus," and the other objecting to one of the jurors Babu Nalini Kumar Chakravarti, said to be "the Head Master of the Ulipur School of the Maharajah Bahadur" and "an acquaintance of the Public Prosecutor who is a retained pleader and ammuhtear of the estate of the said Maharajah Bahadur." The learned Judge rejected both the petitions and proceeded with the trial. I may say at once that so far as the second of the aforesaid two petitions is concerned the ground on which it is based is frivolous.

As for the first one, it is sufficient to say that the law does not provide for a mixed jury of this character, and the accused were not entitled to get what they asked for. The reason on which this petition was based, however, has some force: and if the matter had been properly represented to the learned Judge before the jurors were summoned, it would perhaps have been considered by him and arrangements made to secure a mixed panel. Having regard, however, to the stage at which the application was made no grievance can legitimately be made of its rejection. All this took place on the 6th February 1924 and the trial then commenced. On the next day Baroda Sundari was examined-in-chief and partly cross-examined and on the day after, that is to say, on the 8th February 1924, an application was filed on behalf of the defence, the order passed on which forms the subject-matter of the next ground of objection. It was alleged in that petition that one of the jurors Babu Basanta Kumar Singha Roy has stated to a pleader Babu Jalindra Nath Sen that he had already formed his opinion regarding the case and it was prayed that evidence might be taken on the point and the jury discharged and the trial recommenced with a fresh jury. The learned Judge heard the pleader who filed the application and recorded the following order on the order-sheet:—

"This is an application for changing one of the jurors and calling another juror in his place. I heard the pleader who filed this application. The complainant has not been cross-examined as yet and the whole of the evidence is not before the Court now. Under such circumstances I do not think that the juror has formed any opinion. The juror named in the petition is a highly educated man and is the Professor of the Carmichael College,

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Rangpur. I have no doubt that he will give his opinion after hearing both parties and the charge of the Court. The petition of the accused is rejected."

It is contended on behalf of the Appellants that the rejection of the aforesaid petition was improper, and reliance is placed on their behalf on the cases of *Ramadge v. Ryan* (1) and *Allum v. Boulton* (2). Reference has also been made to the cases of *In the matter of Bonomali Gupta* (3) and *Beni Madhub Kundu v. Emperor* (4). It is urged that the verdict is fit to be set aside as the juror aforesaid formed his opinion and expressed it in the midst of the case and before hearing all the evidence. The learned Advocate-General appearing on behalf of the Crown contends that the statement contained in the aforesaid petition is too vague to deserve an enquiry that it is at variance with what is to be found in the affidavit filed in support of it in this Court and that the mere expression of opinion by a juror in the middle of a case is no ground for ordering a retrial. He seeks to distinguish the cases relied upon by the learned Vakil for the Appellants and refers to the case of *Campbell v. The Hackney Furnishing Co., Ltd.* (5).

In my opinion the learned Judge was right in rejecting the petition. It was not supported by any affidavit. It only alleged that the juror told the pleader that he had already formed his opinion regarding the case, without mentioning any details. The details, such as they are, are to be found in the affidavit which has been

filed in this Court, and that only a few days before the hearing of the appeal. The contents of the affidavit are said to be true to the information and belief of the deponent who happens to be a relation of one of the accused, and no disclosure has been made as to the source of the information. What is stated is that one morning before the juror took his seat the said juror and the said pleader were standing in the verandah attached to the Court room, and while they were talking the juror told the pleader, "I have already formed my opinion regarding the case." No details are given, nor any circumstance mentioned as to why the juror felt it necessary to communicate the matter to the pleader, and the statement is singularly devoid of all features that might guarantee its truth. If this was the way in which it was put before the learned Judge, and I have no reason to think that it was put before him in any other form, the learned Judge was perfectly right in not believing that the juror had actually formed any opinion and in refusing to take any notice of such a casual remark as the juror may have happened to make, assuming that he did make it. As for the cases cited at the bar, it is sufficient to say that they are all distinguishable. An inherent power in a Court to discharge a jury on the ground of misconduct or necessity has been recognised in the cases of *King-Emperor v. Nazarali Beg* (6) and *Mamfru Chowdhury v. Emperor* (7), but no facts have been established in this case as would have justified such a course. This objection therefore fails.

The next ground of objection relates to the non-compliance with the provisions of sec. 360, Cr. P. C. In support of this ground an affidavit was filed on behalf of

(1) 9 Bing. 333 (1832).

(2) 9 Exch. 738 (1854).

(3) I. L. R. 44 Cal. 728: s. c. 21 C. W. N. 167 (1916).

(4) I. L. R. 46 Cal. 207: s. c. 23 C. W. N. 94 (1918).

(5) 22 T. L. R. 318 (1906).

(6) 25 C. W. N. 240 (1920).

(7) I. L. R. 51 Cal. 418 (1922).

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the Appellants, paras. 2, 3 and 4 of which run as follows :—

Para. 2. " That I was present in the Sessions Court when the following witnesses deposed at the trial, *viz.*, P. W. No. 25 Babu Baroda Govinda Chaki, pleader, and Court witnesses Nos. 1 and 2 Babu Hem Chandra Sen Gupta, Inspector and Rukunuddin Ahmed, Sub-Inspector."

Para. 3. " That after recording the evidence of the above witnesses the record of their depositions was handed over to them and the said witnesses seemed to have read their deposition themselves."

Para. 4. " That the learned Sessions Judge did not read over their depositions to the said witnesses in the presence of the accused or their pleaders."

On behalf of the Crown has been filed an affidavit sworn to by one Akshay Kumar Pal, who was the Sessions clerk at Rangpur during the trial of the present case. While not denying the statements contained in the affidavit filed on behalf of the Appellants, the deponent states in paras. 3 and 4 of his affidavit as follows :—

Para. 3. " That in the presence of the accused I read over and explained in Bengali the depositions of the prosecution witness Babu Baroda Gobinda Chaki and Court witnesses Babu Hem Chandra Sen and Moulvi Rukunuddin Ahmed."

Para. 4. " That the depositions as recorded by the Judge were admitted correct by the witnesses and none of the accused raised any objection as to the correctness of the record."

On a perusal of the two affidavits it is rather difficult to make out what exactly happened. It will be observed that in the first affidavit it is stated only that the witnesses in question seemed to have read their depositions themselves and that the learned Judge did not read over the de-

positions to them in the presence of the accused or their pleaders, and that while in the second affidavit all that is not denied, it is asserted that the deponent read over and explained the depositions of the said witnesses in the presence of the accused, but it is not stated that their depositions were read over and explained to the witnesses themselves. Under the circumstances we are entitled, I think, to assume that both the affidavits are true; and if that is so, then what happened was this: The records of the depositions were made over to the witnesses who seemed to read them and the Sessions clerk also read over and explained the depositions in the presence of the accused, though not in the presence of the witnesses. If this was what was done it was only a colourable compliance with the provisions of the law. I am, however, by no means sure that this double procedure was adopted. The learned Advocate-General assures us that the omission to deny the allegations contained in the first petition was due to the fact that a copy of it was not before the deponent Akshay Kumar Pal when he swore to his affidavit, and the omission to state that the depositions were read over and explained to the witnesses was purely accidental. He says that if we are not satisfied on this point we should give the Crown a further opportunity to put in a further affidavit on fuller materials. In view of the opinion which I have formed on some of the other points urged on behalf of the Appellants, I do not think it necessary to adopt that course.

An objection of a far more serious nature has been taken, and that relates to the omission on the part of the learned Judge to present in his summing up to the jury the first information in the case in its true perspective. This omission

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affects at once the complicity of the different accused persons as also the credibility of the evidence given by such of the witnesses examined in the case as profess to have seen a part of the occurrence and recognised the culprits. The occurrence is alleged to have taken place at about one and a half *prohar* of the night of the 20th March 1928 and the first information was lodged at the thana, 5 miles distant, by Keshab Chandra Bairagi, the husband of Baroda Sundari, at 10 A.M., the next day. In this information Keshab Chandra Bairagi named five accused persons and alleged that there were some 20 or 25 others unknown. This is what appears in the column provided for recording the names of the accused persons. He arrived at the thana accompanied by chowkidar Maharaj Tatwa and Duffadar Elahi Bux Sheikh. He stated in the information that when he was assaulted and wounded in the course of the occurrence he cried very loud and on hearing his cries the neighbours came but he did not see that then. He stated that he heard afterwards that Kalis Bairagi Barkandaz, and a master who lives in a Thakurbari and an Azala named Nitya Malakar came at the time of the occurrence and witnessed the occurrence, and that he did not ascertain whether any one else came or not. He also stated that after the occurrence, and after the accused had left, Pranbondhu Deb Doctor, Natobar Doctor, Bipin Sonar and many other persons came and to them he narrated the occurrence in detail. From the information, therefore, it would appear that he classified the persons whom he named, as having come to this place into two groups: the first group consisting of Kalidas Bairagi, the master, and Nitya Malakar who came and saw a part of the occurrence, and the second group consisting of Pranbondhu Deb, Natobar Doctor,

Bipin Sonar and others who came after the occurrence was over.

As already stated Keshab in his first information named only five persons as accused, *viz.*, Chota Jessarat, Kasim, Tazer, Genda Fakir and Mohorulla. Almost all the witnesses who have been examined as eye witnesses deposed to having gone to Keshab's house during or shortly after the occurrence and not only heard from Keshab about the persons whom he had recognised but also gave out to the people assembled there the names of the accused persons whom they themselves had been able to recognise, and in point of fact some of the accused persons whom they profess to have recognised are persons other than the five mentioned by Keshab in his first information. Then there is the fact that several witnesses have been examined as eye witnesses who alleged to have seen some part or other of the occurrence and came to Keshab's house and gave out that they had done so, and yet their names are not to be found in the first information. Nextly there is the fact that in spite of the clear distinction made by Keshab in his first information as between the two classes of witnesses, Bipin Sonar who is classed there in the same category as Pranbondhu Deb, claims to have seen a part of the occurrence and recognised some of the accused persons, while Pranbondhu Deb speaks only to have come to the place after the occurrence was over and does not profess to have seen any part of it. These are matters of considerable importance and their bearing on the question of the credibility of the witnesses and the complicity of the accused cannot be over estimated. Omission to place such important matters having a material bearing on the case constitutes serious misdirection sufficient to vitiate the verdict of the jury.

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The next objection of importance relates to the evidence which was adduced in the case for the purpose of impugning the conduct of the investigating Police Officers and thereby discrediting the record of the police investigation as also the record of the statements alleged to have been made by the witnesses in the course of the said investigation. It is not necessary to set out what the charges against the police are that the prosecution prefer against them; they are set out at length and in sufficient detail in the learned Judge's elaborate summing up. There are two points, however, in connection with this matter which deserved specific mention and omission to refer to which must necessarily have prejudiced the Appellants. In the first place the evidence that has been adduced with regard to this matter, although relevant for the particular purpose of showing how the police dealt with the case, and thereby impugning the correctness of the police records, inevitably carries with it a certain amount of prejudice against the accused persons in whose interest the police are charged with behaving in the way they are said to have done.

In fact in one of the petitions filed on behalf of the Crown and which is to be found in the record there is reference to sec. 10 of the Indian Evidence Act, as justifying the reception of that evidence. It is hardly necessary to point out that the Police Officers were not parties to the conspiracy which the accused persons might have been members of and the object of which was to commit the offences for which they were tried and so sec. 10 of the Indian Evidence Act can possibly have no application in the matter. It is gratifying to note that the learned Judge did not ask the jury to use the evidence in that way. It is, however, to be noticed that no directions were given by the learn-

ed Judge as to how that evidence was to be treated, and nothing was said by him to remove from the minds of the jury the prejudice which the admission of that evidence must necessarily have caused, and no warning administered to them to use the evidence for the limited purpose for which it can legitimately be taken into consideration. There is also a very important matter in this connection which should have been prominently brought to the notice of the jury. Even if all that were urged against the police were found to be true—that would not touch the first information lodged by Keshab, and the contents of the said document were still to be regarded as the statement of Keshab truly and correctly recorded by the police, whatever might be the subsequent conduct of the investigating Police Officers. It is to be noticed also that under the guise of evidence adduced on this head, a mass of matter wholly inadmissible and of purely hearsay character has also been let in, the effect of which could not but have been highly prejudicial to the accused persons.

The charge of the learned Judge though a very lengthy one is far from satisfactory and is defective in more respects than one. The summing up contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration, and collate the evidence *pro* and *con* bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have

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deposed at the trial, and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the jury, only confuse them.

It is unnecessary to go further into detail in this matter in order to examine some of the inaccuracies that have been pointed out to us for in my opinion the jury upon such a charge as was delivered to them in the present case had no assistance rendered to them in order to find out what were the questions of fact which they had to determine and what was the evidence that bore upon those questions. The effect left upon their minds must have been that if they found the police papers to be unworthy of reliance they were to find the case against the accused, all of them, proved. It was scarcely desirable to tell the jury as the learned Judge did that he had set aside the order of discharge passed in favour of three of the accused persons. Nor was the learned Judge right in telling the jury that the way in which the girl pointed out the various houses and described the contents of the same or in other words the verification was a substantial corroboration of her story, without at the same time warning them that in spite of all that the jury were not relieved from the task of weighing the evidence of the girl as to identification with every care and scrutiny. There has been no real attempt made by the learned Judge to deal with the evidence pointing to the complicities of the different accused persons, except by merely differentiating the cases against them by reference to the number of witnesses who spoke about the different accused persons, in other words, the strength or weakness of the evidence of the witnesses as against each accused

individually does not appear to have been pointed out to the jury. It cannot be disputed that the evidence as against some of the accused persons is not quite so strong as against the others. The defences of the different accused persons and the statements made by them were no doubt placed before the jury; but the evidence, such as it is on the record supporting the said defences or portions of them were not brought to their notice. Facts and circumstances have been elicited in the cross-examination of the prosecution witnesses which do assist some of the accused persons to a certain extent. In short the learned Judge's charge to the jury is not that intelligent summing up which the law requires and aims at.

The verdict of the jury in the present case therefore cannot be upheld. Consequently the appeal must be allowed and the said verdict set aside.

I have carefully considered the question as to whether the order for retrial which will have to be made should be made in respect of all or only some of the accused persons. The evidence against some of the accused persons is no doubt distinctly weak and not absolutely free from infirmities, but in the case of none of them can it be said that it is of such a character as would justify us in withholding the case from a jury.

I am therefore of opinion that all the Appellants with the exception of course of Kasim who is dead, should be retried in accordance with law.

The Appellants will be released on bail to the satisfaction of the District Magistrate pending the retrial ordered.

Let the order with the records be sent down at once.

NEWBOULD, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
OF OUDH.]

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
1924,
Heard, 20, June.
Judgment, 1, July.

MITRA SEN SINGH
and ors., Appellants,
v.
MUSAMMAT JANKI
KUAR and ors.,
Respondents.

Evidence Act (I of 1872), sec. 115—Estoppel—Taking of rent from person not entitled to possess as tenant—Estoppel, how far operative—Recovery of possession, if barred—Mesne profits, claim to, if barred—Onus to establish estoppel.

Under a compromise made in 1878, the widow of the late owner D was to remain in possession of certain villages as under-proprietor for her life-time without power of alienation and after her death the wife of her son was similarly to remain in possession for her life without power of alienation. The two ladies died in 1901 and 1905 respectively. At that time the son had no other wife but he married again a second wife J in 1906, having previously sold the reversion which belonged to him as the son and heir of D to the Court of Wards. J entered into possession of the villages and got her name recorded in the under-proprietary registry as a pukhtadar without any title and the Court of Wards without enquiry into the facts went on taking rent from her but later on discovering their mistake brought a suit for recovery with mesne profits:

Held—That the taking of rent from J estopped the Court of Wards from claiming mesne profits during the particular years for which rent was received, but it did not estop the Court of Wards from claiming recovery of possession, sec. 115 of the Evidence Act having no application to the matter.

The onus of establishing the facts and

circumstances from which estoppel arises rests upon the person pleading it.

This was an appeal from a decree, dated the 10th March 1919, of the Court of the Judicial Commissioner of Oudh, which reversed a decree, dated the 26th April 1916, of the Subordinate Judge of Fyzabad.

The Appellants sued for possession of certain villages with mesne profits from the Respondent who claimed to hold them as under-proprietor. The villages in suit were the absolute property of Dhup Narain Singh. On his death his wife Rajau Kuar claimed to be in possession of the villages as pukhtadar. Litigation ensued and a compromise was entered into whereby it was agreed that Rajau Kuar should remain in possession of the villages as under-proprietor during her life-time without the power of transfer and sale and that on her death Sunder Kuar, her daughter-in-law, should have similar possession. On the death of Sunder Kuar the present Respondent, a subsequent wife of Rajau Kuar's son, obtained possession of the villages and remained in possession for a period of 8 years and paid rent therefor.

In February 1914 the Court of Wards on behalf of the present Appellants instituted this suit against Janki Kuar and her mortgagees.

The Respondent claimed to hold the villages in pukhtadari right and urged that the Plaintiffs were barred by estoppel from denying it.

The Subordinate Judge decreed the suit but disallowed the claim for mesne profits.

The Court of the Judicial Commissioner (Kanhaiya Lal and Daniels, J. C. C.) dismissed the suit and upheld the plea of estoppel.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellants.—There was no evidence of any declaration, act or omis-

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sion by the Appellants which could cause an estoppel within the meaning of sec. 115 of the Indian Evidence Act, I of 1872, and there was no evidence that the Respondent had acted on any representation made by the Appellants.

The Defendant herself has failed to give evidence and there is no evidence on the record of the discharge by her of incumbrances as alleged in the pleadings.

Mr. Dubé for the 1st Respondent.—Janki Kuar was recorded as under-proprietor on the death of Sunder Kuar and that position was accepted by the Appellants.

They also received rent from her.

The combination of circumstances induced in her a belief that she was a pukhtadar and the Appellants were instrumental in founding that belief.

He referred to *Governors of Magdalen Hospital v. Knotts* (1) and *Beni Pershad Koeri v. Dudh Nath Roy* (2).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree, dated the 10th March 1919, of the Court of the Judicial Commissioner of Oudh, which reversed the decree, dated the 25th April 1916, of the Subordinate Judge of Fyzabad.

The Appellants are the Plaintiffs in a suit for possession of certain villages. They also claimed mesne profits, a claim which was rightly disallowed and of which no more need be said. What remains is the suit for possession itself. Both the Courts before whom the suit came in India held that the Plaintiffs' title to the villages was proved. Their Lordships are in entire agreement with that conclusion.

The trial Judge decreed the suit for

(1) 4 A. C. 824 (1879).

(2) L. R. 26 I. A. 216; s. c. I. L. R. 27 Cal. 156; 4 C. W. N. 274 (1899).

possession. The Appellate Court dismissed it on the ground that the Appellants were estopped from denying all claim of the first Respondent to hold the villages for life as an under-proprietor without power of alienation. The only question in the appeal is whether the Appellants' suit fails by reason of this alleged estoppel. In the opinion of the Board it does not so fail, and the Appellants are not estopped.

The villages are in the Fyzabad District and were the absolute property of one Dhup Narain Singh. He was the owner of the talukh which embraced them. On his death his wife, Rajau Kuar, claimed to be in possession of these villages as pukhtadar. Had she been so she would have been an under-proprietor with a right both heritable and transferable. In May 1878, this question, having been raised in Court, was settled by a compromise; and it is to the terms of that compromise that both parties refer. These terms are as follows:—

"In the case noted above I, the Plaintiff, have claimed an under-proprietary right in 10-biswas share in village Mendhi Salimpur. We, the parties, have agreed to these terms, that in village Mendhi Salimpur I, the Plaintiff, shall remain in possession of the Defendant's share as under-proprietor during my life-time without the power of transfer and sale; that after my (the Plaintiff's) death the wife of Babu Kalka Bakhsh Singh, my son, shall also enter into possession without the power of alienation and sale and any person other shall have nothing to do with it; that I shall continue to pay the Government land revenue and 15 per cent. of the profits to the Taluqdar Defendant."

Rajau Kuar had possession of the villages under the agreement of May 1878, till her death in 1901, when her rights of course came to an end. Musammat Sunder Kuar, the wife of Kalka Bakhsh Singh, under the terms of the

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agreement of compromise thereafter possessed the villages, but her rights ceased with her death in 1905.

As the Judicial Commissioner properly observes in his judgment "Kalka Bakhsh Singh is not shown to have had any other wife then alive. The limited rights created by the compromise, therefore, came to an end on the expiry of the above life estates; and the property, which was the subject of these rights, subsequently reverted to the heir and successor in interest of the grantee then in existence. As Kalka Bakhsh Singh, the son and successor of the grantor, had sold his entire right, title and interest in the property in dispute to the Court of Wards. . . . the vested interest he held in the reversion passed by the sale to the Court of Wards, who became entitled to that reversion on her death."

In 1906 Kalka Bakhsh Singh married a second wife and there is no doubt of the fact that she remained in possession for a period of about eight years. Further, there is no doubt that she obtained a mutation of names, and that she paid rent with 15 per cent. for collection to the talukhdar, that is to say, to the Court of Wards. It is upon these facts that the claim of estoppel arises.

The assertion made when mutation of names was obtained was of course erroneous and must have been so to her knowledge. Musammat Janki Kuar was entitled neither to be entered in the underproprietary registry as a pukhtadar, nor had she under the compromise agreement, which was the sole basis of title which could be founded upon, any rights whatsoever to possession of the villages. Very possibly what happened was simply that the Collector and the officials charged with the mutation record assumed that she, another wife of Kalka Bakhsh Singh,

was possessing the same villages on the same title as her predecessor. Two officials are examined (one a translator and petition-writer in the Civil Court who identifies the signatures of the Zilladars, the other the Zilladar and collector of rates) and they gave evidence that the Court of Wards made no enquiries about the status of the persons to whom the receipts were issued or whether the Defendant was in truth the pukhtadar.

The Court of Wards, however, has discovered the mistake which has been made and the fact that Musammat Janki Kuar had no title whatsoever to the pukhtadari rights; and the present suit has been brought.

With all respect to the Court of the Judicial Commissioner it is difficult to understand how the doctrine of estoppel applies to a case of this character. There is no peculiarity in the law of India as distinguished from that of England which would justify such an application. The law of India is compendiously set forth in sec. 115 of the Indian Evidence Act, Act I of 1872. It will save a long statement by simply stating that section, which is as follows:—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

There seems no place upon the facts for the suggestion that the Court of Wards has intentionally caused or permitted Janki Kuar to believe it to be true and to act upon the belief that she was a talukdar or that she had any right of possession under the compromise agreement already alluded to. That point might be quite sufficient to dispose of the case.

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But the Court of the Judicial Commissioner goes so far as to declare that what has happened is "tantamount to a waiver for the time being of the right of reversion," and that "the Court of Wards has thus been committed to recognition of the right of Musammat Janki Kuar to succeed to the pukhtadari rights under the compromise as if she had been the wife of Kalka Bakhsh Singh when Musammat Sunder Kuar died." Their Lordships fail to understand how the doctrine of estoppel could ever be founded upon for the purposes of the recognition of any such claim or the rearing up of any such right. The whole of this doctrine appears to be founded simply upon the transaction of taking rent each year, but the taking of a rent each year may, and as the Courts have properly held, did, bar by estoppel the Court of Wards from any claim for mesne profits during the particular year or years for which such rent was received. It estopped the Court of Wards from maintaining that the lady possessed the property with a liability to account or possess on any other or further terms than on payment of the rent made and taken.

But there estoppel stops and it can never be reared up into the creation of a pukhtadari right of a proprietary, heritable and transferable character, nor can it ever create a right of possession of the property for life under the same terms as some other person had previously possessed it upon. Such foundations of title are unknown and they can never be created in such a manner.

At their Lordships' Bar Mr. Dubé ingeniously argued that there were, however, other circumstances which might be founded upon for the purpose of producing such rights either of permanent ownership or possession for life. Even were such a thing legally possible, it need only

be remarked that in cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. No facts and circumstances whatsoever, apart from the occupation, appear to the Board to have been established in this case. Their Lordships must decline to accept statements made in another suit (one which was dismissed) on the subject of the payment of mortgages resting upon properties. It is nowhere established that this lady ever disbursed any payments of the kind, and it has to be remarked, in conclusion, that she herself, who knew all the facts and the circumstances of the situation, did not give evidence in the case. On examination accordingly the case for estoppel seems to be ill-founded in law, and if it were well-founded in law seems to be quite unsubstantiated in fact.

The decision in the case of *Governors of Magdalen Hospital v. Knotts* (1), which was referred to in discussion, afforded no help to the Respondents because, as observed by Lord Selborne, a long term was "attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitations could not have run."

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the decree of the trial Judge be restored with costs since that date in the Courts below, and with the costs of this appeal.

Solicitors: *Messrs. Watkins & Hunter* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the 1st Respondent.

G. D. M.

(1) 4 A. C. 324 (1879).

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD ATKINSON.	}	MARWADI RAMJIVAN
LORD WRENBURY.		NEVATIA, a firm,
LORD PHILLIMORE.		Appellants,
1924;		v.
Heard,		H. BHIKAJI & Co.,
1, February.		Respondents.
Judgment,		
1, February.		

Marks on bales of cloth, if a warranty of quality or description—True significance.

The first purchaser of bales of cloth from mills can get any number put upon them he pleases, and the numbers indicate really nothing except the fact that the purchaser has purchased the goods. The numbers do not give any warranty or indication of the quality or description.

This was an appeal from a decree, dated the 1st July 1921, of the High Court of Bombay, reversing a decree of the said Court in its Original Civil Jurisdiction, dated the 16th August 1920.

The question in this appeal was whether the Appellants, as buyers of certain longcloth, were entitled to reject bales tendered to them of the quality contracted for because there was a clerical mistake in the contract as to the numbers put on the cloth by the mill for the merchant for whom they were made, though those numbers had no significance in the market.

The contract between the parties was contained in a writing which was translated as follows:—

“Debited to the account of Marwadi Ramjivan Nevatia through broker Ratanseybhai Asad Vad 9th S. 1974 Thursday.

Dr.

15 bales Pieces No. 732 weight 5 lbs. 14 oz. per piece
29 bales Pieces No. 736 weight 6 lbs. 11 oz. per piece
10 bales Pieces No. 139 weight 7 lbs. 4 oz. per piece
33 bales Pieces No. 141 weight 7 lbs. 10 oz. per piece

In all 92 bales, the ‘banto mal’ of the Hinghanghat Rekchand Mill, of August to October 1918 delivery. The

goods to be taken delivery of as they are manufactured and arrive. These goods are sold to you on the conditions contained in the contract with the merchant from whom we have bought the same. If these goods arrive a month or so earlier or later then no objection is to be taken. The price of the goods is Rs. 2-3 annas per lb. (two rupees three annas per lb.) Sahi Re. 1 per 1 bale.”

The numbers 139 and 141 for the 10 and 38 bales respectively were written in the contract by mistake for the numbers 739 and 741.

The contract was on the fifth re-sale of the bales specified in it and the Appellants again re-sold the bales at a profit.

On the 22nd October the Appellants took delivery of 11 bales one of which bore the number 741 and the Respondents' case was that the Appellants' manager raised the question of the numbers and was satisfied that the numbers 141 and 139 in the contract were there by mistake and that there was no longcloth made bearing those numbers.

On the 9th November 1918 (the market having fallen with the general hope of peace) Respondents sent a delivery order for 32 bales, but the Appellants did not take delivery of the goods. The Respondents wrote to the Appellants on the 21st November calling on them to take delivery. On the 28th November the Respondents sent the Appellants a delivery order for the remaining 17 bales of the contract, but the Appellants (the market having fallen further) failed to take delivery, and on the 29th of November wrote declining to take any bales containing the numbers 739 or 741.

After further correspondence the Respondents sold the bales on Appellants' account and brought on the 6th February 1919 the present suit.

The Appellants put in a written state-

MARWADI RAMJIVAN NEVATIA v. H. BHIKAJI & Co.

ment and an issue was raised "whether the Defendants (Appellants) are bound to take delivery of 10 bales bearing No. 739 and 38 bales bearing No. 741."

The evidence given at the trial proved that the mills stamped on longcloth any number for which the merchant who ordered it asked and that Ghya, the merchant who had ordered the goods in question, always had the number "7" put on the goods of this particular mill followed by two numbers which conveyed to him the width of the pieces in the particular bale and that he entered them by these numbers in his books. There was no suggestion that the numbers had any meaning to anyone except Ghya or that the goods were known by the numbers in the market. The five previous contracts for these goods were proved, in each of which the bales in question had the numbers 739 and 741. Three witnesses deposed that on the 22nd of October it was proved to the satisfaction of Appellants' manager that the numbers 139 and 141 were put on the goods by mistake and that an offer was made to him to get those numbers stamped on the bales by the mill. This was only met by a blank denial by Moonim against which it was proved that in the Appellants' books the bale taken delivery of on the 22nd October was entered as bearing the number 741.

The trial Judge (Kajiji, J.) held that the goods tendered were not the contract goods. The reasoning which led him to this conclusion was as follows:—

"To my mind, there must be some importance attached to these numbers. They are not there merely to signify to the original purchasers from the mill, Messrs. Ghya & Co., that No. 739 has reference only to the width of the longcloth and that the last two digits have no

reference to the width or length. None of these witnesses could say what they were there for. All of these witnesses were, however, bound to admit that if anybody asked for longcloth of a particular number, then they would ask him of what mills and this itself shows that these numbers had some significance and therefore were descriptive of the quality of the goods. To my mind it is really too absurd, if I may be allowed to say so, that these numbers have no bearing at all in the market. They do have some bearing—perhaps very little. It is after all really descriptive of the goods and to a certain extent of the quality of the goods; because it is admitted that longcloth of this very mill of the same size in width and length but bearing different numbers could be of the same quality and *vice versa* and it could also be of different quality. If that is so then Nos. 139 and 141 and any other number would be really descriptive of the goods."

He refused to accept the evidence as to the explanation and offer of the 22nd October because he thought it impossible that Appellant Moonim should have agreed to accept the goods without consulting with his sub-purchaser. He accordingly dismissed the suit on the 16th August 1920.

The appeal Court (Macleod, C. J. and Shah, J.) on the 1st July 1921 set aside this decree and passed a decree in favour of the Respondents.

As to the interview of the 22nd October they pointed out that Appellants' sub-purchaser took delivery of one bale bearing No. 741 on the 22nd October under a delivery order with that number on it and that he raised no objection to that bale till the 29th November when the market value had fallen very much and then stated that he had just ascertained the

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variance in the numbers. They quoted the passage already set out from the judgment of the trial Judge but thought that the logical conclusion from his premises was that the numbers were not descriptive. They held it was not an essential part of the contract that the bales should bear the numbers 139 and 141.

From this decree the Appellants appealed to His Majesty in Council.

Messrs. Dunne, K. C. and M. R. Jardine for the Appellants.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—Their Lordships have carefully considered this case during the adjournment and they do not think it necessary to call upon Counsel for the Respondents. They think it is clear upon the facts that the first purchaser of these goods can get any number put upon them which he pleases, that is to say, that the owner of goods in the hands of a mill-owner can have this done. When the numbers are attached to the goods in that way, the view their Lordships entertain is correctly expressed in the judgment of the High Court.

"The numbers put by the mills on the bales at the request of the original purchasers would convey no meaning to an outsider. To Ghya and Company they indicated the width of the pieces in each bale. When the bales passed out of their hands they were merely reference numbers. It would have been just the same if the numbers had been 501 and 502. There was no evidence that it was recognised in the market that the last two digits in the number of a bale would indicate the width of each piece."

In their Lordships' view the numbers when so put on indicate really nothing except the fact that the purchaser has pur-

chased these particular goods. They do not give any warranty or indication of the quality or description.

Their Lordships will therefore humbly advise His Majesty that the appeal fails; that the decree of the High Court should be affirmed and this appeal dismissed with costs.

Solicitors: *Messrs. Hallows & Carter* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 91 of 1924.

SANDERSON, (C. J.)	} MONMOTHO NATH MUKERJEE and ORS., Plaintiffs, Appellants, v. PURAN CHAND NAHATTA, Defendant, Respondent.
RANKIN, J.	
1925,	
Heard,	
12, February.	
Judgment,	
13, February.	

Registration Act (XVI of 1908), secs. 34, 35—Registration, if void, of a conveyance executed by a constituted attorney of a vendor (power not produced) and execution thereof by the vendor admitted before the Registrar of Assurances by another constituted attorney of the said vendor under another power—Registrar, duty of—Conveyance, if properly executed—Jurisdiction to register the same—Executant, meaning of—Bakalim signature, what is—The conveyance, if a good title.

A conveyance, dated 2nd September 1890, was executed by A by his constituted attorney B under a power, dated 20th June 1889. This power was not produced. When the conveyance was registered, the execution thereof by A was admitted before the Registrar of Assurances by C as an attorney for A under a power, dated 2nd May 1891:

Held per SANDERSON, C. J.—That, in the circumstances, the presumption was that the deed was executed by B, the

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attorney of A, by whom it purported to have been executed, and that B was the duly authorised agent of A to execute the deed on A's behalf.

That as the appearance of A to admit the execution would have been sufficient, it was competent to A to authorise some person to appear on his behalf before the Registrar and to admit the execution. The conveyance itself and the Registrar's certificate showing that a power, dated 2nd May 1891, duly executed by A in favour of C was produced by C at the Registrar's office and was authenticated by the Registrar and that C admitted execution of the conveyance by A, the admission of execution by C was as valid and effective as if A himself had appeared before the Registrar on the day of registration and had admitted the execution of the deed. It was part of the duty and within the powers of the Registrar to satisfy himself as to the authenticity of the power-of-attorney which was produced to him and the provisions of sec. 35 of the Registration Act had been complied with.

Held per RANKIN, J.—Executing means signing a document as a consenting party thereto. The man whose name has been put to the document as evidencing his assent thereto is the "executant" for the purpose of the section.

In case of bakalam signature a person whose name is put with his authority in evidence of his assent to a document is executant "within the meaning of sec. 35.

MUHAIED EWAZ v. BRIJLAL (2),
BISSENDQYAL v. F. SCHLAEPFER (3),
KESHO DEO v. HARI DAS (4), IN THE

(2) L. R. 4 I. A. 166: s. c. I. L. R. 1 All.
405 (1877).

(3) 29 W. R. 68 (1874).

(4) I. L. R. 21 All. 281 (F. B.) (1896).

MATTER OF RAM CHUNDER BISWAS (5), RAJ LAKHI GHOSE v. DEBENDRA CHANDER MAJUMDAR (6) and KANHAYA LAI v. SARDAR SINGH (7) discussed.

This was an appeal against the order of Ghose, J., whereby he discharged the exceptions taken by the Appellants to the report of the Official Referee and confirmed the same. The Plaintiffs instituted this suit against the Defendant-Respondent for a decree for specific performance of a contract for sale of premises No. 13, Marsden Street, Calcutta, pursuant to an agreement, dated 20th February 1920, by which the Defendant-Respondent had agreed to purchase the said premises. There was a decree by consent on 29th February 1923 and by that decree it was referred to the Official Referee to enquire and report whether the title of the Plaintiffs-Appellants to the said property was good.

A conveyance, dated 2nd September 1890, was produced by the Plaintiffs-Appellants which was endorsed as follows:—

"In witness whereof the said parties of the first and second parts to these presents have hereunto set and subscribed their respective hands and seals the day and year first above written.

Signed sealed and delivered by the within-named Sreemutty Nobin Kissory Dasse on the 2nd September 1890 at Calcutta in the presence of—

Upendra Nath Bose.

(seal)

Mohendra Nath Bonnerjee, Attorney-at-Law, Calcutta, Projonath Sircar by his constituted Attorney (seal)

Nagendra Nath Chatterjee, Attorney-at-Law, Calcutta, Joy Krishna Bose under a power dated 20th June 1889.

(5) 16 W. R. 180 (1871).

(6) I. L. R. 24 Cal. 688 (1897).

(7) I. L. R. 29 All. 284 (1907).

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Explained to

Sreemutty Nobin Kissory Dasseo, Sreemutty Nobin Kissory Dasseo (in Bengali).

by me,

Nagendro Nath Chatterjee,

Sreemutty Nobin Kissory Dasseo Radha Nath Sircar. (seal)
Gopi Nath Sircar. (seal)

was identified by me,

Akshoy Kumar

Chattopadhyaya.

Signed sealed and delivered by Gopeenath Sircar at Calcutta this 3rd day of September 1890 before me,

Obhoy Charan Mukerjee, clerk to Babu Kalli Nath Mitter.

Signed sealed and delivered by the within-named Woopendra Nath Bose at Calcutta this 8th day of September 1890 before me,

Surendra Ohandra Ghosh, Articled Clerk to Babu Woomesh Ohandra Banerjee.

Signed sealed and delivered at Calcutta this 8th day of September 1890 by Joykrishna Bose as the duly constituted attorney for and as the act and deed of the within-named Brojonath Sircar under a power dated the 20th day of June 1889 in the presence of Surendra Ohandra Ghose, Articled Clerk to Babu Woomesh Ohandra Banerjee.

Signed sealed and delivered by the within-named Radhanath Sircar at Calcutta this 20th day of September 1890.

Before me,

Surendra Ohandra Ghose,

Articled Clerk to—

Babu Woomesh Ohandra Banerjee.

X

40

R 417 I 1812 25-8 179 to 194

Presented for registration between the

hours of 12 A.M. and 1 P.M. on the 20th day of September 1890 at the Calcutta Registry Office by Radhanath Sircar, son of Gopal Chandra Sircar, deceased, Kayestha, of 75, Chunam Guli, Calcutta, by occupation Nil, Executant.

Radhanath Sircar.

P. Ghosha,

Registrar,

20-9-90.

Execution was admitted by the aforesaid executant who was identified by Surendra Chunder Ghose of Calcutta, by occupation Articled Clerk to W. C. Bonerji.

Surendra Chunder Ghose.

Radhanath Sircar.

P. Ghosha,

Registrar,

20-9-90.

Execution was also admitted this the 30th day of September 1890 at the Calcutta Registry Office of (by?) Gopinath Sircar, son of Gopal Chandra Sircar deceased of 75, Phear Lane, Calcutta, executant who was identified by Atul Chunder Ghose, Articled Clerk to Kalinath Mitra.

Gopinath Sircar,

P. Ghosha,

Registrar,

30-9-90.

Identified by

Atul Chunder Ghose.

Execution was also admitted this the eighth day of January 1891 at the Calcutta Registry Office by Upendranath Basu, son of Rama Gopala Basu of 22, Krishna Sinhee's Lane, Calcutta, executant personally known to me.

Upendranath Bose,

P. Ghosha,

Registrar,

8-1-91.

Execution was also admitted this the ninth day of January 1891 between the hours of three and four P.M. at 75, Chuna

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Guli by Novinkishari Dasi, widow of Madhu Sudan Sircar, deceased, Kayastha, executant who was identified by Benoykrishna Mitter, son of Kedarnath Mitter of aforesaid place, Cashier Arrakans Co.

নবীন কিশোরী দাসী।

Benoykrishna Mitter. P. Ghosha,
Registrar,
9-1-91.

Execution was also admitted this the sixth day of May 1891 at the Calcutta Registry Office by Bepinbihari Banerji, son of Umesh Chunder Banerji of Calcutta, Solicitor, personally known to me as Attorney for Braja Nath Sircar under power authenticated by me on the 2nd day of May 1891 and recorded as No. 373 for 1891.

Bepinbihari Banerji.

P. Ghosha,
Registrar,
6-5-91.

Registered
in Book I,
Vol. 40,
Pages 179 to 194,
being No. 1312
for 1891.

(The Seal of the Registrar of Calcutta).

P. Ghosha,
Registrar,
Calcutta,
9-5-91."

The Official Referee found that the Plaintiffs had failed to make out a good title to the said premises and in his report observed:—

"From the conveyance it appears that one Bipin Behary Banerjee, constituted attorney of Brojo Nath Sircar, not the constituted attorney who executed the document or his attorney, appeared before the Registrar and admitted execution. He had not right to do this under sec. 34 (1) and sec. 35 of the Registration Act and

therefore all the persons executing the document could not be said to have appeared and admitted the execution. In my opinion the requirements of the Registration Act would not be complied with and the registration was illegal and *ultra vires*. The result is that the title of the Plaintiffs has not been perfected by a deed executed and registered according to statutory requirements.

As regards adverse possession although it has been held that under certain circumstances title accrues to the person in possession it is a matter of evidence which has to be strictly proved. There is no evidence on this point before me on which I can hold that the Plaintiffs have good title by adverse possession.

It has also been contended by learned Counsel for the Plaintiffs that the conveyance is more than 30 years old and that the presumption arises as to the validity of the execution. The presumption under the Evidence Act, with regard to ancient documents, is only as to the execution and the attestation. The power-of-attorney in favour of Joy Krishna who executed the conveyance on behalf of Brojo Nath has not been produced. There does not arise any presumption as to the contents of that power. Learned Counsel for the Defendant has in this connection referred me to Halsbury's Laws of England, Vol. 20, *Moharam Chaprasi v. Telamuddin* (9) and *Kashinath v. Jagat Kishore* (10) and to Mr. Justice Woodroffe's book on Evidence (4th Ed., p. 443). In my opinion there is no presumption under the Evidence Act, that Joy Krishna had power to execute the conveyance on behalf of Brojo Nath. After a careful consideration of the facts and the authorities cited before me I have come to the conclusion that the Plaintiffs

(9) 16 C. W. N. 567 (1911).

(10) 20 C. W. N. 648 (1915).

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have not made out a good or marketable title."

When the matter came before Ghose, J., on exceptions to report, he observed as follows :—

" Two points have been argued before me on behalf of the Plaintiffs, (1) that the mortgage of the 27th March 1886 by Radhanath Sircar did not in any way affect the Plaintiffs' title to the property in question, and (2) that the conveyance of the 2nd September 1890, was properly executed and registered.

This mortgage is still outstanding, but Mr. Chakravarti, who appeared for the Plaintiffs, argued that Radhanath Sircar was not entitled to mortgage his share of the said surplus income and his said right, title and interest in the manner in which he did and that inasmuch as there was pending at the time a suit for partition, the transferee of Radhanath's share must be taken to have had the mortgage subject to any disposition which might be made in due course of partition and that, secondly, the mortgage not being an English mortgage, the right to enforce the same was gone and that therefore the mortgage was in no way an encumbrance affecting the premises in suit so as to make the title of the Plaintiffs defective.

It is perfectly true that a purchaser cannot be compelled to buy a ' law suit.' But on the facts of this particular case I am inclined to agree with Mr. Chakravarti that the mortgage of the 27th March 1886, by Radhanath Sircar, did not in any way operate as an encumbrance affecting the premises in suit. The mortgagee took the mortgage subject to any disposition which might be made in due course of the partition proceedings : [see in this connection *Chutturput Sing v. Maharaja*

Bahadur (1)] and the properties were liable to be sold to meet the costs of the suit which had been started by Sreemutty Nabin Kishoree Dasi. This Court by its order, dated the 10th March 1887, and by its decree, dated the 18th August 1887, directed the sale of, among others, the premises in suit for the purpose of meeting the costs of the said suit and in my opinion the sale of the premises in suit by the Registrar on the 12th September 1888, was free of the mortgage referred to above. But assuming that the mortgage was a valid one, it could only have attached to such properties as were actually allotted to the mortgagor Radhanath Sircar, as a result of the said suit for partition and not to the premises in suit which were ordered by this Court to be sold in the course of the partition proceedings for the purpose of meeting the said costs and before partition and allotment of the various properties. In my view, therefore, the title of the Plaintiffs was not made defective by reason of the said mortgage being allowed to remain outstanding. Such being my view, it is unnecessary to go into the question as to whether or not any suit for the purpose of enforcing the said mortgage would be barred by limitation.

I now turn to the second question which was argued before me, namely, whether the conveyance of the 2nd September 1890 was properly executed and registered. It appears that the said conveyance was executed by Brojo Nath Sircar by his constituted attorney Joy Krishna Bose, under a power dated the 20th June 1889. This power has not been produced and it has been contended that the authority to execute the conveyance on behalf of Brojo Nath Sircar has not been proved. It further appears that when the conveyance

(1) L. R. 32 I. A. 1; s. c. I. L. R. 32 Cal. 198; 9 C. W. N. 225 (1904).

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was registered, execution thereof by Brojo Nath Sircar was admitted before the Registrar of Assurances by one Bepin Behari Bannerjee as attorney for Brojo Nath Sircar under a power, dated the 2nd May 1891. The Defendant contends that the conveyance was registered in contravention of the provisions of the Registration Act and that, therefore, it did not confer any title. Mr. Chakravarti has drawn my attention to the case of *Ganga Moyee Devi v. Trailokya Nath Chowdhury* (11) and has argued that the registration of the conveyance of the 2nd September 1890, having been verified by the signature of the Registrar of Assurances, it ought to be presumed that all things required to be done had been done duly and in order. The passage in the judgment of their Lordships of the Judicial Committee on which stress has been laid by Mr. Chakravarti is as follows:—‘The registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar whose duty is to attend to the parties during registration and see that the proper persons are present, are competent to act and are identified to his satisfaction; and all things done before him in his official capacity and verified by signature will be presumed to be done duly and in order.’

If I may respectfully say so, I assent to every word of what was stated by Sir Ford North in the above quotation, but the real point is whether the donee of power from Brojo Nath Sircar, dated the 20th June 1889, had authority to execute the conveyance of the 2nd September 1890. This power has not been produced and in the absence of this power the Defendants are justified in refusing to accept the title. But assuming that the conveyance was

properly executed by Brojo Nath Sircar by his constituted attorney, Joy Krishna Bose, under the said power, the question arises as to whether the document was properly registered in accordance with the provisions of the Registration Act. It is to be noticed that the constituted attorney who executed the conveyance was not the person who admitted the execution before the Registrar of Assurances as has been pointed out above, execution was admitted before the Registrar of Assurances by another constituted attorney of Brojo Nath Sircar, named Bepin Behari Bannerjee. The question depends upon secs. 34 and 35 of the Registration Act. In sec. 34 the persons described are the persons executing the documents, not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it. Then there is power to enlarge the time and there is provision that the appearances may be simultaneous or at different times. Then ‘the Registering Officer shall thereupon enquire whether or not such document was executed by the persons by whom it purports to have been executed,’ and ‘satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such persons so to appear.’ It is the actual executors of the document who are required to appear and the law nowhere requires for the purposes of registration the appearance of persons on behalf of whom a document purports to have been executed. This view is supported by the cases of *Muhammed Ewaz v. Brijlal* (2) and

(11) I. L. R. 33 Cal. 537: s. c. 10 C. W. N. 522 (P. C.) (1906).

(2) L. R. 4 I. A. 166: s. c. I. L. R. 1 All. 465 (1877).

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Kesho Deo v. Hari Das (4). It follows, therefore, that execution of the document in question not having been admitted by the actual executant, namely, Joy Krishna Bose, the Registrar of Assurances had no jurisdiction to register the document.

The result, therefore,* is that in my opinion the title of the Plaintiffs has not been perfected by a deed executed and registered in accordance with law. The Plaintiffs, therefore, in my opinion, are unable to make out a good title to the properties in question and the Defendants are justified in refusing to accept the title.

One last point has been argued by Mr. Chakravarti, namely, that the Plaintiffs have acquired good title by adverse possession. On this point there is really no evidence which can entitle me to found my judgment in favour of the Plaintiffs. The result, therefore, is that except as stated above, I must discharge the present exceptions and confirm the report of the Official Referee. The applicants must pay the costs of this application and the costs of the Reference."

Mr. B. Chakravarti (with *Mr. A. N. Sen*) for the Appellants.

Sir Benode Mitter (with *Messrs. N. N. Sircar and A. K. Deb*) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Plaintiffs against the decision of my learned brother Mr. Justice C. C. Ghose which was delivered on the 12th of March 1924. That judgment was given with respect to exceptions which were taken to a report which had been made by the Official Referee with respect to the title of certain premises, namely, No. 13, Marsden Street, Calcutta, which the Defendant had agreed to purchase from the

Plaintiffs by an agreement, dated the 20th of February 1920.

The Official Referee reported that the Plaintiffs had failed to make out a good or marketable title to the premises in question.

The Plaintiffs filed exceptions to that report; and the learned Judge came to the conclusion that the exceptions should be discharged and in effect he affirmed the report of the Official Referee and declared that the Plaintiffs had failed to make a good title to the premises.

The facts which it is necessary for me to state for the purpose of my judgment are as follows: One Hari Mohan Sircar, who was the owner of the property in question and other properties, executed a deed of trust, dated the 29th of April 1853. It is not necessary for me to deal in detail with the provisions of the trust.

On the 19th of May 1879 a suit was brought by Srimati Nabin Kishori Dasi, which was No. 342 of 1879, against several persons including one Radha Nath Sircar for the construction of the deed of 1853 and for the ascertainment of the rights of all parties thereunder, for the execution of the trusts which might be found to be valid and for partition.

The result of that litigation was that a decree was passed by the Court of Appeal on the 31st of August 1885, by which it was declared that the religious trusts created by the indenture were good and valid in law and were a first charge on the income of the trust properties so far as might be necessary for the worship of the idol and for the performing of certain religious ceremonies; and it was declared that Nabin Kishori, the widow, was entitled to half the surplus income of the trust property other than the family dwelling-house and that the Defendants Brojo Nath Sircar, Radha Nath Sircar and Gopi Nath

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Sircar, the sons and heirs of Gopal Chandra Sircar, were each entitled to 1/6th part or share thereof. After certain other provisions it was declared that a partition should be made of the family dwelling-house into six equal parts or shares among the said parties.

On the 10th of March 1887, an order was made in the suit for the sale of such portion of the properties including that now in question, as might be necessary for the purpose of paying the costs payable under the decree and it was ordered that the trustees Upendra Nath Bose and Brojo Nath Sircar should convey to the purchaser the properties to be sold by the Registrar.

On the 18th of August 1887 the final decree in the suit was made and the order for sale was confirmed. On the 13th of September 1888 the sale was held and the father of the Plaintiffs bought the premises which are now in question. A conveyance, dated the 2nd of September 1890, was executed in pursuance of the order of the Court, and it was subsequently registered.

On the 20th of February 1920 as I have already stated the Plaintiffs agreed to sell the property to the Defendant. In June 1920 this suit was instituted and on the 29th of January 1923 a consent decree was made, the material part of which is as follows: "There will be consent decree for specific performance of the agreement, dated 20th day of February annexed to the plaint for sale of the premises No. 13, Marsden Street in the town of Calcutta measuring 1 bigha and 10 cottahs less 2 cottahs 5 chittacks 8 square feet being the portion acquired by the Municipality for the consideration of Rs. 92,000 subject to the title of the Plaintiffs being found to be good upon enquiry to be held by the Registrar."

I understand that the reference to the Registrar was transferred to the Official Referee who made the report to which I have already referred. It appears that on the 27th of March 1886 Radha Nath Sircar who was one of the parties to the suit No. 342 of 1879 executed a mortgage of his 1/6th "share of the income of the said hereditaments and premises in the said Sch. 'A' save and except the said family dwelling-house and all the right, title and interest of him the said Radha Nath Sircar in the said moneys and premises." The mortgage was in favour of Jogendra Kumar Bose and his heirs.

One of the points upon which the learned Counsel for the Defendant relied was that it had not been proved that the mortgage in favour of Jogendra Kumar Bose had been satisfied or paid off.

The learned Judge found in favour of the Plaintiffs in respect of this point: and I am of opinion that the learned Judge's decision was correct. The ground of my decision is shortly this that the estate of Hari Mohan Sircar was in the course of being administered by the Court, and the mortgagee's right would be subject to any disposition which had been or might be made of the deceased man's estate in due course of administration.

The principle was stated by the Judicial Committee of the Privy Council in *Chutterput Singh v. Moharaj Bahadur* (1). The passage to which I desire to refer is to be found in Lord Davey's judgment at p. 16 and is as follows—"When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In

(1) L. R. 32 I. A. 1: s. c. I. L. R. 32 Cal. 139; 2 C. W. N. 225 (1904).

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fact the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied."

The sale in this case was ordered by the Court for the purposes of paying the costs in the suit.

In my judgment the learned Judge was correct in his conclusion when he said that the mortgagee took the mortgage subject to any disposition which might be made in due course of the partition proceedings: consequently, even though the mortgagee's right may not be barred by the Act of Limitation, as to which I express no opinion, it is clear that there is no cloud upon the title by reason of the mortgage in question.

The next point upon which the learned Counsel relied was one with regard to the execution of the conveyance of the 2nd of September 1890.

The order of the Court was that the deed should be executed by Upendra Nath Bose and Brojo Nath Sircar who were the trustees under the settlement of Hari Mohan Sircar.

It appears from the conveyance that Upendra Nath Bose himself executed it on the 8th of September 1890, Brojo Nath Sircar executed the deed by his constituted attorney: and there is an endorsement in the deed to this effect, "Signed sealed and delivered at Calcutta this 8th day of September 1890 by Joykrishna Bose as the duly constituted attorney for and as the act and deed of the within-named Brojonath Sircar under a power dated the 20th day of June 1889 in the presence of Surendra Chandra Ghose, Articled Clerk to Babu Woomesh Chandra Banerjee."

The learned Counsel's argument in the first place was that there was no proof

that Joy Krishna Bose was duly authorised to execute the deed on behalf of Brojo Nath Sircar. It was contended that in order to complete the title the power-of-attorney, dated the 20th of June 1889, should have been produced.

It was admitted by reason of sec. 90 of the Evidence Act and having regard to the date of the deed and the custody from which the deed was produced that the Court would be entitled to presume that every signature and every other part of such document which purported to be in the hand-writing of any particular person was in that person's hand-writing and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purported to be executed and attested. But the learned Counsel argued that the Court ought not to presume that Joy Krishna Bose was duly authorised to execute the deed in the absence of the power-of-attorney.

I am unable to accept that argument. It was pointed out by the learned Counsel who appeared for the Plaintiffs that the sale was directed by the Court and that Brojo Nath Sircar being one of the trustees was one of the persons who was directed by the Court to carry out the sale and execute the conveyance. In my judgment it is only reasonable to presume that Brojo Nath Sircar obeyed the orders of the Court and carried them out by authorising his attorney Joy Krishna Bose to execute the document on his behalf. In the circumstances of this case, in my judgment, it is both legitimate and reasonable to presume not only that the deed was executed by the attorney of Brojo Nath Sircar by whom it purports to have been executed but also that Joy Krishna Bose was the duly authorised agent of Brojo Nath Sircar to execute the deed on his behalf. There is

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a further reason for making the above-mentioned presumption. On the facts of this case there can be no doubt that by a power-of-attorney, dated the 2nd of May 1891, Brojo Nath Sircar authorised his attorney Bepin Behary Banerjee to appear before the Registrar and admit the execution of the deed by Brojo Nath Sircar and that the attorney did appear before the Registrar on the 6th of May 1891 and duly admitted the execution by Brojo Nath Sircar. The next point has reference to the provisions of the Indian Registration Act, 1908.

The presentation for registration was made by Radha Nath Sircar; and no point arises in connection with the presentation for registration.

The point arises with regard to what happened as to the admission of execution.

The deed bore the following endorsement: "Execution was also admitted this the sixth day of May 1891 at the Calcutta Registry Office by Bepinbihari Banerji, son of Umesh Chunder Banerji of Calcutta, Solicitor, personally known to me as attorney for Braja Nath Sircar under power authenticated by me on the 2nd day of May 1891 and recorded as No. 373 for 1891.

(Sd.) Bepinbihari Banerji.

P. Ghosha,
Registrar,
6-5-91.

Registered
in Book I,
Vol. 40,
Pages 179 to 194,
being No. 1812
for 1891."

(Then there was the seal of the Registrar of Calcutta.)

"P. Ghoshā,
Registrar,
Calcutta,
9-5-91."

The argument presented in this Court on behalf of the Defendant was in effect this, that inasmuch as the deed was signed by Joy Krishna Bose on behalf of Brojo Nath Sircar, Joy Krishna Bose was the person who should have appeared before the Registrar to admit execution: and as I understand, the learned Counsel's argument went to this extent that the only person who could admit execution was Joy Krishna Bose or some person duly authorised by him, or if he were dead his representative. The argument went to this length of saying that even if Brojo Nath Sircar himself had appeared before the Registrar and had admitted the execution of the deed by him through the pen of his duly constituted attorney Joy Krishna Bose, it would not have been a sufficient compliance with the provisions of the Registration Act.

I am not prepared to accept that argument.

In the first place, I am not prepared to hold that Brojo Nath Sircar was not a person executing the document within the meaning of sec. 35 of the Registration Act, as was contended by the learned Counsel for the Defendant.

In the second place, I am prepared to hold and do hold that if Brojo Nath Sircar had appeared personally before the Registrar and had admitted the execution of the deed by his duly constituted attorney Joy Krishna Bose, that would have been a sufficient compliance with the provisions of the Act.

If that be so, and if the appearance of Brojo Nath Sircar to admit the execution would have been sufficient it was in my judgment competent to Brojo Nath Sircar to authorise some person to appear on his behalf before the Registrar and to admit the execution, as he undoubtedly did.

It appears from the deed itself and from the Registrar's certificate that a

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power, dated the 2nd of May 1891, duly executed by Brojo Nath Sircar in favour of Bepin Behary Banerjee was produced by Bepin Behary at the Calcutta Registry Office and was authenticated by the Registrar; and that Bepin Behary admitted execution of the deed by Brojo Nath Sircar. It was part of the duty and within the powers of the Registrar to satisfy himself as to the authenticity of the power-of-attorney which was produced to him.

The appearance was 3 or 4 days after the execution of the power, viz., on the 6th of May 1891 and having regard to the facts of this case in my judgment the admission of execution by Bepin Behary Banerjee was as valid and effective as if Brojo Nath Sircar himself had appeared before the Registrar on the 6th of May and had admitted the execution of the deed. The result is therefore that in my judgment the provisions of sec. 35 of the Registration Act of 1908 were complied with.

I have now dealt with all the points which were raised by the learned Counsel on behalf of the Defendant with regard to the title; and I am of opinion that the title is a good title and should have been accepted by the Defendant. But the learned Counsel argued that the Official Referee had reported against the title and that the learned Judge had accepted that report and that consequently we ought not to force upon the Defendant a title which might be said to be a doubtful one.

This Court, in my judgment, has a duty cast upon it to express its opinion whether the title is a good one or not.

I have already intimated that in my judgment there is no doubt that the title which the Plaintiffs produced should be accepted as a good title; and with respect to the last point which the learned Counsel raised there is no ground for the suggestion that the Court is forcing upon the

Defendant a doubtful title. I do not refer to the numerous cases which the learned Counsel for the Defendant cited to us, because although many of them are instructive for the purpose of elucidating the meaning of the various sections of the Registration Act when applied to different facts, I do not find that the point which arose for decision in this case has been raised or discussed in any of the cases cited.

For these reasons the appeal is allowed. The exceptions will be upheld and a declaration will be made that the title is a good one.

The Defendant must pay the Plaintiffs costs of the proceedings before the learned Judge and the Official Referee and of this appeal.

RANKIN, J.—I agree.

The agreement for sale of the premises in the town of Calcutta known as 13. Marsden Street, out of which the present suit arises was dated the 20th of February 1920. By the terms of that agreement the purchase was subject to the approval of the vendor's title by the purchaser's attorney. After certain correspondence had taken place, a suit was instituted on the 30th of June 1920 and certain objections to the title were put forward in the written statement as justifying the Defendant's refusal to complete. At the trial, however, before Mr. Justice Page, these objections, which have no connection with any of the objections that are now taken, were thought to be of so little importance that the suit was decreed by consent in terms which have already been referred to. A decree was made for specific performance subject to an investigation of the Plaintiff's title in chambers; and, there can be no doubt that the Plaintiff has to show a good title which involves at

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least a marketable title and not merely a good holding title.

Before the learned Official Referee who conducted the enquiry certain objections were taken on behalf of the Defendant and of these we are now concerned only with three.

The first objection was sustained by the Official Referee but has been dismissed as unfounded by the learned Judge. That is the objection which arose out of the allegation that the interest conveyed to a mortgagee by one Radha Nath Sircar by the deed of the 27th of March 1886 is still outstanding and forms a cloud upon the Plaintiff's title. With reference to that, the facts appear from the documents before us which unfortunately do not include the plaint in suit No. 342 of 1879 and they are as follows: It appears that by Indenture of Trust, dated the 29th of April 1853, one Hari Mohan Sircar transferred to certain trustees diverse messuages and premises including the property now in suit, and that the trusts were as follows: "It being the intent of these presents and of the parties thereto that all and singular the said messuages thereby granted and conveyed should remain continue and be deemed and considered a permanent endowment settlement and provision made and appointed to and for the maintenance and performance of the *sebah* or worship of the said Idol Sreedhorjee and for the performance of the said several religious ceremonies therein and hereinbefore mentioned proviso that if any of the rents issues and profits aforesaid should remain after paying and defraying all and every the charges and expenses aforesaid then in such case the said trustees or the survivors of them or other the trustee or trustees for the time being should apply and dispose of such surplus in and towards the maintenance and support of such of the

sons of the said Hari Mohan Sircar and of their families respectively as should be living and on further trust when and if it should seem fit to the said trustee or trustees so to do suffer and permit such son or sons of the said Hari Mohan Sircar to reside with their families respectively in such of the said houses messuages and premises thereby conveyed as to the said trustee or trustees should seem fit." This property and other properties came to the hands of the trustees of Hari Mohan Sircar. Unfortunately after a certain number of years, by which time there had been changes of trustees, a suit was brought on the 19th of May 1879, being suit No. 342 of 1879, for certain purposes. The plaint is not in the documents but the decree of Mr. Justice Cunningham and the decree of the Court of Appeal show sufficiently what was the scope of that suit. It was a suit brought first of all to declare that certain of the religious trusts were invalid and upon that basis to obtain partition of a certain portion of the trust property amongst the heirs or representatives of the founder. It asked amongst other things for an account against one of the intermediate trustees Gopal Chunder Sircar, deceased, and it asked for administration of his estate. It asked also for a declaration as to the rights of the parties in the surplus income of the trust and also for partition of the family dwelling-house. Amongst other things which it asked for was the formulation of a scheme for carrying out the religious trusts. The only observation that it is necessary to make here is that whether or not that was a suit for administration of the remaining estate of Hari Mohan Sircar (I think myself that it was not) it was a suit for the administration of the whole of that trust fund being held at that time under the trust which Hari Mohan Sircar had made.

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That being so, the Court held, first, that the religious trusts were perfectly good and went on afterwards to say not only that certain provision should be made for the residence of the idol in the family dwelling-house but that provision should be made for partition thereof amongst the members of the family and to give directions as to the division into one-sixth shares of the surplus income of that trust.

Before Radha Nath Sircar in 1886 executed his mortgage the decree of the Court of Appeal had directed various costs to be borne out of the trust fund and it had remitted for further direction the question as to how these costs should be provided for in certain particulars. Radha Nath Sircar, so far as the trust property was concerned, never had more than a claim to a share in the surplus income and he had that claim entirely because Hari Mohan Sircar had to that extent made him a beneficiary. When, therefore, he granted the mortgage of the 27th of March 1886 he was purporting to mortgage something that came to him as a beneficiary of that trust and he had no other right in this property save as such beneficiary. Thereupon it appeared very shortly afterwards that the litigation to establish the trust had been so costly that it could not be paid for, the cost of all parties being billeted upon the fund, without selling some of the items of the trust property. That was done under an order of the Court. A conveyance was directed to be settled by the Registrar and the property was sold free from the trust which Hari Mohan Sircar had impressed upon it by his deed in his life-time. In these circumstances it seems to me plain to demonstration that this mortgage of Radha Nath Sircar is no encumbrance whatsoever upon the property which the present Plaintiffs are now purporting to sell.

It is true that in another case between the Plaintiffs and somebody else this matter came before Mr. Justice Chaudhuri. It appears that there, as here, the contract which the Plaintiffs had made was to show a title to the approval of the purchaser's solicitor. The purchaser's solicitor made a requisition as to this mortgage and he got a rather feeble or evasive answer. In fact, the Plaintiffs' solicitor knew nothing about the mortgage and could not give any information. Thereupon the purchaser's solicitor refused to approve the title, and upon the matter coming before Mr. Justice Chaudhuri, Mr. Justice Chaudhuri said: "There is the mortgage, there is the requisition; the solicitor has said he does not approve the title because of this, he is quite within his rights." That has no bearing whatsoever upon the position now before this Court.

The question of the purchaser's attorney's approval has gone out of this case by the order of Mr. Justice Page. We have the facts before us and on those facts it is, I think, plain that the matter of this mortgage has nothing whatsoever to do with the title.

The next question which has been raised by way of objection to the title is also a matter that was in no way referred to in the written statement or in previous negotiations, and that is, that the conveyance by the trustees and other parties to the suit of 1879 to the Plaintiff's father Shoshee Bhushan Mukerjee in 1890 is bad for want of registration. It has been registered in fact, but it is said that the registration is a nullity and the document cannot be admitted in evidence. The basis of that contention is that if one looks to the Registration Act one finds the word "executant." The contention is that in the case of a *bakalam* signature, as

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it is called, such as we have here, executant means the agent whose actual pen signs the name of the party and does not mean the party for and on behalf of whom the name is put. 'It is said that although, as has happened in the present case, an admission was made by an agent of the party himself the whole process was *ultra vires* because the executant is the only person who can admit or deny, i.e., the person whose pen actually wrote.

This contention has to my mind nothing to support it in the Act and it encounters serious objections upon the face of the Act itself. I doubt whether it would have been seriously entertained, had it not been that in the course of diverse cases in connection with the Registration Act, observations have been made which may be considered as intending what the Defendant's Counsel urges upon this appeal.

I take the Act first : In my opinion, the Act deals with parties and executants of documents on an ordinary common sense footing without contemplating or making particular provision for the case of a man whose name by his authority is written by some one else. The ordinary meaning of the word "executant" is fairly clear. It was said by the learned Official Referee that it meant signing. In my opinion the present question cannot be solved by stressing any such attempted definition. The ordinary meaning of executing a document is signing a document as a consenting party thereto.

A man may sign a document as a witness, no one would call him a person executing a document. To treat the fact of signature as a physical fact, apart from the circumstance that the signature is intended as an expression of assent to the document, is, in my judgment, to go out of one's way to be wrong, when dealing

with an Act that makes no particular provision for the exact case we are now dealing with. If one looks at the provisions of the Registration Act, important for the purpose, one finds this : 'As regards presentation, any one interested can have a document presented. When you come to the state after presentation you find that there is to be an enquiry before the Registering Officer. No document shall be registered before a Sub-Registrar unless the persons executing such document or their representatives, assigns or agents appear before the Registering Officer within a certain time. The Registering Officer shall thereupon enquire whether or not such document was executed by the persons by whom it purports to have been executed, satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and so on. If all the persons executing the document appear before the Registering Officer or if he be satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, then the document is to be registered. On the other hand, if any person by whom a document purports to be executed denies its execution or if any such person appears to be a minor, an idiot or a lunatic, the Registering Officer shall refuse to register the document as to the person so denying, appearing or dead. In my judgment, applying the language of the Statute to the particular type of case before us, the correct view is that the man whose name has been put to the document as evidencing his assent thereto, is the executant for the purpose of the section I have quoted from. That seems to me to follow very plainly from sec. 35. As I have pointed out in the course of the argument, it is quite possible for a minor to be an agent, but it is not possible under

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the Indian law for a minor to make a valid contract; and, it seems to me that a person by whom a document purports to be executed cannot mean an agent, who may or may not be a minor. Moreover, "to refuse to register a document," "as to the person so denying, appearing or dead," to my mind, points in the same direction. To register a document as to a mere agent is an idle conception: it must be with reference to a person who has intended to be a party to the document and not merely to an agent. Whether or not there is in this Act scope for saying that either the agent or the principal will satisfy sec. 35, of one thing I am clear and that is that in case of a *bakalam* signature such as we have here, a person whose name is put with his authority in evidence of his assent to a document is "executant" within the meaning of sec. 35.

I consider that this matter becomes even plainer if you look to the later stages of the Act and if you consider what will happen supposing that a Sub-Registrar refuses to register and that an enquiry has to be made by the Registrar himself, or the matter comes exactly on the same footing in a suit before the Court. If one carefully considers the rulings under the later sections of the Act one will find, it is true, that there are difficulties as to where the line is to be drawn as to the scope of the Registration Act enquiry. But it seems to me impossible to suppose that admission or denial in the Act means anything except admission or denial on behalf of the party who is the principal to the document.

With reference to the case of *Muhammed Ewaz v. Brijlal* (2) certain words were very much pressed before us and I

notice that they appear in the judgment of the learned Judge. The words are: "There the persons described are the persons executing the document, not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it." The learned Judge has applied these words in the way in which we have been invited to apply them, namely, to the case of a signature *per procuracionem*; and as meaning that not the man whose name is put on the deed as a consenting party—but the man who holds the pen, is the person upon whose appearance, whose admission, whose denial the Registration Act lays so much stress. The learned Counsel for the Appellants has pointed out to us, and I entirely agree with him, that those words in the judgment quoted, taken in their context turn out to have a different meaning altogether. A, B and C in that case were parties to the document on the face of the deed. The deed purported to contain the signature of all of them. For the purposes of the case it was proved that two had executed it. There was no proof that the third had executed it and there was no contention that it could be made available against her. The question was whether the document was void against every body or whether it could be regarded as duly registered as against A and B; and the distinctions their Lordships were making in the passage cited had nothing to do with the particular circumstance that C in that case had had her name put to the document by the hand of either A or B. The point was, can you or can you not read certain words in sec. 35, so that the section can be treated distributively? For that reason their Lordships were making the observation.

Again a case has been referred to [*Bissen-*

(2) L. R. 4 I. A. 166; s. c. I. L. R. 1 All. 465 (1877).

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loyal v. *F. Schlaepfer* (3)], but the whole basis of the decision of Sir Richard Couch would seem to be utterly inapplicable to such a case as the present. A certain person was in partnership with another. He signed the name of the firm; and Sir Richard Couch proceeded upon this to say that the signature of this partner's name was not to be taken as *bakalam* signature of his partner, that the partner executing it was the only party to the agreement, that he disclosed on the face of the agreement that he was the agent of the partnership which consisted of himself and the other. That being so, there can be no doubt that the only executant was the person who had signed.

Certain other cases have given rise to a certain amount of contention on the same lines. Those cases are somewhat special, because they are cases where a guardian has purported to bind his ward or his ward's property. The case of *Kesho Deo v. Hari Das* (4) is a perfectly simple case where on no construction of the signature was the ward a party to the instrument. It was an instrument executed by a guardian, stating in the document that he intended not merely to affect his own property but also to affect the property of which he was a trustee. There an observation was made, simply to this effect, that when an admission of execution is made by a man who executes a document as a trustee it is not necessary that his *cestui que* trust should also execute the document.

An exactly similar case is the older case of *In the matter of Ram Chunder Biswas* (5). The basis of the decision was that the document there did not purport to be executed by the minor, that no person was re-

quired to appear before the Registrar as his representative, that the deed purported to have been executed by three persons all of whom appeared before the Registrar. "A man may execute a deed and state in it that he is selling his portion of the property as well as the portion of another individual to whom he stands in a fiduciary relation, but only sign his name." The Registrar has no business to enquire what actually passes by that document or whether the interest of a third person is or is not affected by it.

A very similar case is found in *Raj Lakhi Ghose v. Debendra Chander Majumdar* (6), where a guardian purported on behalf of the ward's estate to sell certain property contrary to the terms of the order which the District Judge had made. An attempt was made to set up this defect as a reason why the instrument should not be registered and the Court held that this had nothing to do with the question. The guardian as guardian was the only executant whether it affected a third party or not.

There is an interesting case [*Kanhaya Lal v. Sardar Singh* (7)] which arose where certain people had had their names put to a document by a mooktear. The *mooktearnama* was produced and proved. But the principals objected to the act of the mooktear and said that the *mooktearnama* had never been explained to them; the Court held that if there was a *mooktearnama* and if the mooktear had purported to execute the deed in terms thereof that was all that was necessary to justify registration.

None of these cases about guardian and ward has any bearing upon the question of *bakalam* signature.

The whole point about infancy is that an infant has no capacity to contract. He

(3) 22 W. R. 68 (1874)

(4) I. L. R. 21 All. 281 (F. B.) (1899).

(5) 16 W. R. 180 (1871).

(6) I. L. R. 24 Cal. 668 (1897).

(7) I. L. R. 29 All. 284 (1907).

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may or may not be well able to sign his name. A guardian desiring to make a contract, which will bind the ward or ward's estate, will indeed go out of his way to be wrong in form if he signs the ward's name and treats himself as a mere pen. For these reasons, it appears to me that the contention which has been so ably and carefully advanced before us by Sir Benode Mitter is not sustainable. In my judgment the attack upon the title, which has been made in the present case, if allowed for a moment, would upset registered titles throughout the whole of India. It seems to me that the endeavour to read the *dicta* which have been cited to us into the Registration Act for the purpose of showing that an admission or denial is a matter which has nothing to do with the party really affected, cannot be sustained.

The only other question in the present case is whether this title is defective by reason of the fact that the authority of Joy Krishna Bose to sign the document on behalf of Brojo Nath has been insufficiently proved. In my judgment it is amply proved. The attorney of Brojo Nath who appeared before the Registrar to admit the execution of Brojo Nath Sircar to the document was authorised by a power, dated the 2nd May 1891. He appeared before the Registrar to carry out his duty on the 6th May 1891. The actual execution by Joy Krishna Bose was on the 8th September 1890 and the power under which he acted was of the 20th June 1890. The position is as follows : We know from the document that Brojo Nath was one of two persons ordered as trustees to convey certain trust property by a conveyance to be settled by the Registrar. We know that he had no option in the matter and that the beneficiaries were ordered to join in the conveyance. We find after the

deed had been executed he gave on the 2nd of May to Bepin Behary Banerjee a power, which he exercised on the 6th of May to admit this very execution. That power is available, the Plaintiff Promotha Nath offered to get a certified copy if it was wanted. No objection has been taken to it. The Plaintiffs are the sons of the man who took under that conveyance. That they are in possession now nobody disputes. They have shown their possession, it is true, only for the last 3 or 4 years, but there is no suggestion anywhere that Brojo Nath claimed on his own behalf or on behalf of the trust some interest as left to him in spite of the conveyance of September 1890. The purchase money was paid into Court. In this country the legal estate follows the beneficial interest and it is not necessary that an authority to sign should be in writing. Such cases as *Re Airey* (*Airey v. Stapleton*) (8) are not in point. That any one claiming as a beneficiary of Hari Mohan Sircar's trust could now put forward any claim upon this property is a baseless apprehension.

I think that a good title has been shown and that this appeal succeeds.

Mr. J. N. Mukerjee, Solicitor for the Appellants.

Mr. N. C. Bose, Solicitor for the Respondent.

P. D.

(8) [1897] 1 Ch. 164.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 28 of 1923.

PEARSON, J.	}	DEVENDRA NATH BASU
GRAHAM, J.		and ors., Appellants,
1924,		v.
Heard,		KAILASH CHANDRA
14, May.		KALU and ors.,
Judgment,		Respondents.
16, May.		

Civil Procedure Code (Act V of 1908), Or. 21, r. 66—Sec 47—Objection by judgment-debtor as to incorrect statement of boundaries in sale proclamation—Order on decree-holder to furnish correct boundaries failing which execution case to be dismissed—Order, if appealable under sec. 47.

In execution of a decree for rent the decree-holder applied, for the sale of the land. On notice under Or. 21, r. 66, C. P. C., the judgment-debtor put in an objection on the ground that the boundaries of the land were not correctly stated in the sale proclamation. The Munsif decided in favour of the judgment-debtor and ordered the decree-holder to furnish a true description of the land within a specified time failing which the execution case was to be dismissed:

Held—That the Munsif's order amounted to a judicial determination of the rights of the parties and was a final order under sec. 47, C. P. C., and was appealable.

This was an appeal preferred on the 5th December 1923 against an order of the District Judge of Zillah Nadia (Mr. W. A. Seaton), dated the 4th September 1923, affirming the order of the Munsif of Ranaghat (Babu B. K. Dutta), dated the 22nd May 1922.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and Babu Bireshwar Bagchi for the Appellants.

Babu Santosh Kumar Bose for the Respondents.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS:—

PEARSON, J.—This is an appeal from an order of the District Judge of Nadia confirming an order of the Munsif of Ranaghat.

The Appellants obtained a decree for rent and applied in execution for sale of the lands. A notice was served on the judgment-debtors under Or. 21, r. 66, upon which the latter appeared and objected that the lands were not properly described in the sale proclamation. The objection related to the western boundary which was stated to be certain accreted lands, whereas the judgment-debtors contended that the accretions should be included in the sale, the boundary on that side being in that case the river. Upon a hearing of the application the Munsif decided in favour of the judgment-debtors and ordered the decree-holders to furnish a true description of the rent lands within a week, failing which the execution case would be dismissed.

From that order an appeal was preferred, and the learned Judge upheld the order of the Munsif, holding upon a preliminary objection that no appeal lay, inasmuch as the order was one under Or. 21, r. 66, which did not judicially determine any matters between the parties. I am not prepared to say that the determination of a question arising upon an application under Or. 21, r. 66 may not also be an order passed under sec. 47, C. P. C. The test in each case would be whether there had been a judicial adjudication binding on the parties in a subsequent proceeding, finally determining the rights of the parties: *Deoki Nandan Singh v. Bansi Singh* (1) and *Baisnab Charan Saha v. Bank of Bengal* (2). An estimate of value is on a different footing from a fixing of definitive boundaries. These were

(1) 16 C. W. N. 124 (1911).

(2) 19 C. L. J. 681 (1914).

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arrived at by the Munsif after full consideration of the evidence adduced and it is difficult to see how the question so determined could be re-opened and re-agitated upon that particular ground in subsequent proceedings under Or. 21, r. 90. In my opinion the Munsif's order amounted to a judicial determination of the rights of the parties and was a final order under sec. 47 and so appealable. Some support also is lent to this conclusion by the case of *Ramabhadra v. Kadiriyasami* (3). The appeal is therefore allowed, the order of the District Judge set aside, and the case must go back to be disposed of on the merits. The Appellants will get their costs in this Court. Hearing fee, two gold mohurs.

GRAHAM, J.—This appeal is directed against the judgment and decree of the District Judge of Nadia confirming the decision of the Munsif of Ranaghat and arises out of an execution of a rent decree. The decree-holders, now Appellants, wanted to put the holding in question up for sale in accordance with the boundaries given in the plaint wherein one of the boundaries was described as an accretion and not as the river itself. Notice was served on the judgment-debtors under Or. 21, r. 66 and they then objected that the boundaries had not been properly described, their contention briefly being that the river was the boundary and not the accretion.

Two points arose before the Court of first instance. *Firstly*, whether the application was maintainable under sec. 47 of the Code of Civil Procedure, and whether the matter could be gone into in the execution stage, and *secondly*, on the merits whether, if it could be gone into, the disputed portion was an accretion.

The Munsif decided both points in

favour of the tenants and the decree-holders were directed to give correct boundaries within a week failing which the execution case would be dismissed.

The decree-holders then appealed to the District Judge who dismissed the appeal on a preliminary objection holding that the order of the Munsif had been made under Or. 21, r. 66 and that therefore no appeal lay.

Against that order the decree-holders have now preferred this second appeal and the substantial contention urged on their behalf is that the learned District Judge erred in law in holding that no appeal lay, and that inasmuch as the order of the Munsif conclusively determined the rights of the parties in regard to the accreted portion it was a decree within the meaning of sec. 2 (2), C. P. C., and therefore an appeal was competent.

In my opinion this contention is well founded and must prevail. There can be no question that if the order falls within sec. 47, C. P. C., and is a final order it is a decree within the meaning of the Code, and can be challenged by way of appeal. In order to determine whether the order falls within the terms of sec. 47, sub-sec. (1), it is necessary to see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. There is no room for controversy that the order relates to the execution of the decree, and that the question does arise between the parties to the suit. The only essential which remains therefore to be fulfilled is that the order decided something. As to that it seems to me to be plain that the order finally determined the liability of the judgment-debtors to have execution issued against them on the basis of the decree. Such an order seems to me to be

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plainly a final order made under sec. 47, C. P. C.

In my judgment the learned District Judge erred in giving effect to the preliminary objection and the case must go back to the Court below for an investigation on the merits.

I agree that the appeal must be allowed with costs.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

LORD DUNEDIN.

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

1924,

Heard, 12 and

13, May.

Judgment,

13, May.

GANGA RAM and
ors., Appellants,
v.

NATHA SINGH and
ors., Respondents.

Mortgage—Stipulation to pay interest—Interest, if a charge on the property.

The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate.

ALIA KHAN v. KANSHI RAM (1) referred to.

This was an appeal from a decree, dated the 10th December 1920, of the High Court at Lahore, which modified a decree, dated the 31st March 1916, of the Court of the senior Subordinate Judge of Ferozepore.

At various dates from 1888 to 1891 Diwan Singh, a Punjabi zamindar, executed five mortgages of his property.

In 1914 the Respondents as representatives of Diwan Singh brought the suit against the mortgagees for redemption of the mortgaged lands. They contended

(1) [1913] P. R. 176.

that they were entitled to redemption on payment of the principal sum due, viz., Rs. 8,937, and urged that the conditions in the deeds relating to interest were void as being introduced by undue influence and without the proper knowledge or understanding of the mortgagor. The Subordinate Judge decided that the mortgages were executed with full knowledge as to the conditions of interest and compound interest and held that the interest was a charge on the land which had to be paid prior to redemption.

On appeal the High Court (Chevis and Raoof, JJ.) allowed the appeal and held that the interest and compound interest were not chargeable on the lands mortgaged.

Mr. Wallach for the Appellants.—The High Court have based their decision largely on *Alia Khan v. Kanshi Ram* (1), but that decision was based on the document then before the Court.

The general rule is that interest is a charge on the land and there is nothing in the present documents to take them out of the general rule.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In this case the Plaintiffs sue for redemption of five mortgages. Two of those mortgages, the earlier two in date, were usufructory mortgages; the other mortgages were not usufructory, but with regard to the next two—for as to the fifth one there is no question at all—there is a recital that interest is to be paid upon the sum borrowed.

Now, the whole point of the case is whether that interest in this third and fourth mortgage does or does not form a charge upon the property. The learned

(1) [1913] P. R. 176.

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trial Judge held that it did form a charge on the property, and therefore granted redemption only upon terms of paying the principal sums and the interest. That decree was reversed upon appeal, and the High Court allowed redemption upon payment of the principal loan only. Their Lordships find that in the judgment of the learned Judges in the High Court they state with perfect correctness what their Lordships apprehend is undoubted law. They say: "The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate."

Their Lordships have been entirely unable to find anything in the deeds which would serve to displace that general rule. The learned Judges seem to have gone particularly upon the case of *Alia Khan v. Kanshi Ram* (1). It is, perhaps, a little difficult to follow that case, as the material parts of the deed in question are only printed in the vernacular; but it is perfectly clear from the Report even as it stands that there were various mentions of the sum to be redeemed in different parts of the deed, and that consequently the deed itself formed, so to speak, a glossary for the particular meaning of the word that was used when you came to the repayment clause. Nothing of this sort is here. The mortgages are expressed with great brevity, and, indeed, if there is anything at all, it rather seems, such as it is, to point the other way, because especially in the fourth mortgage there, is this expression: "I shall without objection pay the additional mortgage money with interest in the following instalments." That certainly points much more in favour of the general rule than against it, but it is quite

(1) [1912] F. R. 270.

enough to say that there is nothing to be found here which disturbs the general rule, which, it is most important, should not be shaken in any particular.

It is impossible to restore in terms the decree of the trial Judge, because it was discovered in the course of the hearing before the High Court that the Plaintiffs were not in right in the whole of the mortgages, and accordingly the judgment of the High Court ran: "We give the Plaintiffs a decree for redemption of whatever share in the mortgaged land is still owed by them on payment of a proportionate share of the principal debt."

There ought, therefore, to be a declaration that it is not only a share of the principal debt, but also interest that must be paid before redemption, and the case will have to go back in order that the decree may be worked out on those terms.

Their Lordships therefore think that the appeal must be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. Ed. Delgado* for the Appellants.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER,
UPPER BURMA.]

LORD SHAW.

LORD CARSON.

SIR JOHN EDGE.

MR. AMBER ALI.

SIR LAWRENCE JENKINS.

1923,

Heard, 19 and

20, November.

Judgment,

18, December.

MA THAUNG and
anr., Appellants,v.
MA THAN and ors.,
Respondents.

Burmese Buddhist law—Inheritance—Partition with sons and daughters by father after wife's death—Deed apparently of partnership, really of division

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—Ambiguity—Subsequent conduct, admissibility of—Marriage after partition—Claim to father's inheritance against step-mother, if lies—Wife's position, that of partner.

In the Burmese social and legal system, the wife is, to all intents and purposes, a partner.

U N., a Burman trader, on the death of his wife M. G. with whom he carried on a profitable business in rice, and in contemplation of a second marriage, executed with his children by M. G. a document which purported to be a deed of partnership. But it contained a number of provisions appropriate only to a division of family property on the demise of one of the parents, the subsequent conduct of the parties pointing the same way :

Held—That the deed was more a division of rights and interests than a deed of partnership.

The conduct of the parties to a contract reduced into writing may not vary or alter it but their conduct may help to explain or elucidate a contract open to different meanings.

The Judicial Committee agreed with the Judicial Commissioner in accepting the authenticity and binding character of a Dhammathat which lays down that the children have after partition with their surviving parent no right in the property retained by the latter as against their step-mother or step-father.

This was an appeal (No. 10 of 1923) from a decree, dated the 25th October 1921, of the Court of the Judicial Commissioner, Upper Burma, reversing a decree, dated the 31st March 1920, of the Court of the District Judge of Mandalay.

The subject-matter of the present dispute is the estate of U Nyein, a deceased Burmese Buddhist. U Nyein first married Ma Gale and by her had seven

children, two of whom are the present Appellants. On Ma Gale's death in 1904 he married Ma Than, the present Respondent, and himself died in 1914 without further issue. Prior to his second marriage in 1905 U Nyein and his children executed a document (Ex. I.) which is set out in full in the judgment of the Judicial Committee.

By this document U Nyein gave to his children shares in his property. The dispute between the parties depends on the construction and meaning of this document.

The suit was brought by the Appellants against their step-mother, the 1st Respondent, for shares in the property of U Nyein.

They alleged that Ma Than is according to Buddhist law entitled to get only $\frac{1}{4}$ th share in U Nyein's "payin" property and her share in the property acquired subsequent to her marriage ("lettelpwa" property) is only two-thirds and they claim for themselves and the others of Ma Gale's children the rest of the property left by their father.

The Respondent contended that the deed of arrangement (Ex. I.) between U Nyein and his children was a division by inheritance in view of his approaching marriage with the 1st Respondent and that U Nyein's children were debarred from any share in his property at his death.

The District Judge held that Ex. I. was a deed of partnership and not of inheritance and that it did not preclude U Nyein's children from sharing in his property at his death.

On appeal the Court of the Judicial Commissioner reversed the decision of the District Judge and found as follows :—

"The conclusion that I have come to therefore is that on the occasion of U

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Nyein's marriage he did partition his property amongst his children by his former wife and that at that partition the children obtained a larger share than they could have claimed under any of the rules laid down in the Dhammathats.

That being the case, the plain provisions of the extracts from the Dhammathats quoted in secs. 213 and 214 cannot be overlooked and the children cannot claim any further share."

Sir Geo. Lowndes, K. C., Messrs. Parikh and Maung Sin Wa for the Appellants.—The agreement of 11th May 1905 (Ex. L) is on the face of it a partnership deed and from its terms cannot be construed as a division of inheritance. Under a strict division the eldest son would be entitled to one-fourth share; see sec. 212, U Gaung's Digest of Burmese Buddhist Law, and he did not receive such share under this document.

Maung Tun Tha v. Ma Thit (2).

The Appellate Court has based its decision on a ruling of the Kyaw that where a father divides his property in his life in anticipation of a second marriage the children of the first marriage cannot share in the father's estate on his death.

See U Gaung's Digest, Vol. I, sec. 213, p. 276.

That ruling applies to a period when an attempt was being made to adapt the law of Manu to the conditions in Burma when the Burmans were still an inferior race and is not the law of Burma at the present time. It has never been confirmed by judicial decision.

Admittedly, Manu Kyaw is entitled to great weight, *Ma Nhin Bwin v. U Shwe Gone* (1), but Dhammathat Kyaw does not

profess to make any exception to the general rule that there should be a division between step-children and their step-mother.

See Digest, sec. 274.

The general rights which are enumerated in secs. 211 and 212 of the digest are not cut down by the provisions of sec. 213.

Messrs. Dunne, K. C. and Kenworthy Brown for the 1st Respondent.—The deed of 1905 (Ex. L) has been rightly construed by the Judicial Commissioner as a division of his inheritance by U Nyein in contemplation of his second marriage.

The rule contended for by the Respondent is consistent with the whole system for dealing with parental property as appearing in the Dhammathats.

Under Burmese Buddhist law there is no joint property or right in the children at birth.

See Chan Toon's Principles of Buddhist Law, p. 104.

A man and his wife are co-owners of his property and of all profits made during marriage.

Chan Toon, p. 107.

On the mother's death the eldest son or daughter is entitled to one-fourth share in the property if he or she claim it, otherwise the children have no right to share. Chan Toon, pp. 100, 110.

Mi Chit v. Maung To Aung (3).

In the present instance U Nyein gave 7/8ths of his property to be divided among his children which included the 1/4th for his eldest child so that no further right to division existed.

The rule applied by the Appellate Court is consistent with Dhammathat Kyaw and as it is not inconsistent with any other Dhammathat it must prevail.

(3) 1872-92 Sel. Judgments, p. 197.

(1) L. R. 41 I. A. 121; s. c. I. L. R. 41 Cal. 887; 18 C. W. N. 1121 (1914).

(2) L. R. 44 I. A. 42; s. c. I. L. R. 44 Cal. 879; 21 C. W. N. 527 (1916).

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Ma Nhin Bwin v. U Shwe Gone (1).
: Sir G. Loundes, K. C., in reply—
The rule contended for by the Respondent is laid down by only one Dhammathat, the others exclude this principle by propounding other principles which are inconsistent with it.

Sec. 214, Digest.

Moreover although the rule has been applied on the death of a mother it has not been so applied on the death of a father.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This appeal arises out of a suit brought by the Plaintiffs in the Court of the District Judge of Mandalay, Upper Burma, for a share in the inheritance of one U Nyein, a Burmese, subject to the Burmese Buddhistic law. It was treated in the first Court as a suit for administration, and a decree was made therein by the District Judge on the 1st June 1920. This decree was reversed on the 25th October 1921 by the Judicial Commissioner of Upper Burma, and the Plaintiffs' claim was dismissed; hence this appeal to His Majesty in Council.

The facts of the litigation are set out with clearness and precision in the able judgment of Mr. Mosley, the District Judge.

U Nyein was a trader by profession and appears to have carried on in conjunction with his wife, Ma Gale, a profitable business in rice.

They had a rice-mill which, it is stated, was opened in 1894 and appears to have been at the time of Ma Gale's death in December 1904, a valuable property. It is to be noted that in the Burmese social

and legal system the wife is, to all intents and purposes, a partner.

U Nyein had by Ma Gale five sons and two daughters, who were all *sui juris* when she died. Although under the Burmese law, the eldest daughter became entitled on Ma Gale's death to a definite share in her property, no division took place, and the father and the children continued, as in her life-time, working in common.

Some months after Ma Gale's death, U Nyein appears to have contemplated marrying again. Before, however, the marriage was actually contracted, on the 11th May 1905, he executed the document Ex. L, on the construction and meaning of which the determination of this appeal turns. About a fortnight later U Nyein married Ma Than, the contesting Respondent in this appeal.

Ex. L is in form a partnership deed, but the Respondent contends that in fact it is a partition deed by which U Nyein divided his property amongst his children. It is urged on her behalf that, under the law of the Dhammathats, the children have after the partition, no right in the property retained by the father. The Plaintiffs deny the correctness of the legal proposition on which the Respondent bases her contention, and they urge that whatever the meaning of Ex. L, they are entitled to a share in their father's inheritance.

A number of issues were framed in the Court of the District Judge; the two following embody the substance of the matter now in dispute.

(i) Was the deed of arrangement, dated the 11th May 1905 (Ex. L) between U Nyein and his children a division of inheritance in view of his approaching marriage with Ma Than, or was it a mere agreement of partnership?

(1) L. R. 41 I. A. 121, 131; s. c. I. L. R. 41 Cal 887; 18 C. W. N. 1121 (1914).

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(ii) Are his children who signed that agreement entitled as heirs to share in the property retained by U Nyein under that agreement?

The District Judge on the form of the document coupled with the evidence to which he refers in his judgment, came to the conclusion that Ex. L was not a deed of partition but merely a partnership agreement, and he accordingly, as stated already, made an administration decree with respect to the inheritance of U Nyein.

On appeal the Judicial Commissioner has taken a different view. From the circumstances proved in the case he infers that contemporaneously with Ex. L there must have been between U Nyein and his children some agreement, necessarily parole, which led him to put the division in the shape it has taken. In one place he says as follows :—

"It is open to the parties to prove that it was a condition precedent to the attaching of any obligation under the contract, that the disposition should be regarded as a partition of property in view of the marriage, and that the claims of the children of U Nyein as his heirs on his death should be modified accordingly. Further Ma Than was not a party to the document, nor can she I think for this purpose be regarded as the representative in interest of such a party. She is therefore entitled under the provisions of sec. 99 of the Evidence Act to show a contemporaneous agreement. It does not seem to me however that Ma Than is trying to show such a contemporaneous agreement. She does not deny that the terms of agreement between the parties were those of a partnership. Her contention is that that agreement formed a part of a larger transaction and that it was made for the purpose of effecting a division of property. I am of opinion that it is open to her to prove her contention by oral evidence. At the time that the deed was drawn up Ma Than was a stranger to the family. It is not surprising therefore that she is unable to bring any direct evidence

as to the intention of the parties when the deed was drawn up, and as to the effect of the deed."

He is, however, definite in his conclusion that the deed in question was drawn up in view of the approaching marriage, and that by this instrument U Nyein did effect a partition of his property with his children by Ma Gale.

Owing to this divergence of opinion between the two Courts in Burma, their Lordships have carefully examined the terms of the document (Ex. L). In their opinion, it speaks for itself. It begins with the usual formula :—

On the 11th May 1905, corresponding to the 9th *Wasing* of the month of *Kason* 1267 (Burmese Era), at Mandalay, U Nyein and his sons and daughters, in order to carry on business, execute this agreement as follows :—

U Nyein will transfer all the properties, which have been in his name up to this date, to the name of the partnership.

All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership.

The sums of money, which Maung On Shwe, Maung San Hnyin and Maung Aung Min have taken before this date, will be considered as the money belonging to the partnership.

The mill and all machines connected with it, which have been already taken possession of, belong to the partnership.

Without the consent of the majority (but not one) of the partners, the husband, wife, or co-heir of a partner cannot make use of the properties belonging to the partnership.

The shares, to which the partners have the right to ownership in all the partnership properties are shown below.

Either partner Ma E Yin or partner Ma Thaung will take charge of all the private properties belonging to partnership, such as jewellery, etc.

The partnership is responsible for all the

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debts which have been owed to, or owed by, other people up to this date.

The partnership will carry on business in accordance with the wish of the majority of the partners.

It then gives the shares as follows :—

1. U Nyein has the right of ownership to one-eighth share.

2. Maung On Shwe

3. Ma E Yin

4. Maung San Huiyin

5. Maung Aung Min

6. Ma Thaung

} These 5 persons have the right of ownership to six-eighths share.

7. Maung Po 'Thaung }
8. Maung Po Ka } These 2 persons have the right of ownership to one-eighth share.

The deed was duly signed by all the executants.

The strange similarity of language between the terms of the provision contained in the second paragraph of Ex. L and the rules laid down in the Dhammathats for division of family property on the demise of one of the parents is striking. The paragraph in question provides that "all the house sites, buildings, rice, paddy, ponies, gharries, gold and money which have been in existence up to this date will belong to the partnership." In any ordinary partnership the inclusion of these articles would be regarded as unusual; but bearing in mind the rules of the Dhammathats it would be natural and in the ordinary course in a deed of partition. Again, the paragraph relating to jewellery appears to be unusual in a deed of partnership designed for carrying on business.

The provision is as follows :—

"Either partner Ma E Yin or partner Ma Thaung" (two of the daughters) "will take charge of all the private properties belonging to the partnership, such as jewellery, etc."

These particular provisions appear, in their Lordship's opinion, to furnish the key to the solution of the question whether

Ex. L is a deed of partnership or a deed of partition. U Nyein was about to contract a second marriage. Under the Burmese law whatever he possessed at the time of contracting the relationship which he contemplated, would become on the marriage the common property of his wife and himself. Nothing was more natural than that, influenced by the effect of such an eventuality on the position of his children by Ma Gale, he should, in order to provide for them during his life-time, whilst he was absolute owner of the properties he possessed, decide upon a partition which would secure a definite share in his or her own right to each child. He accordingly, with the agreement and consent of his sons and daughters, entered into the arrangement embodied in Ex. L. None of them was entitled to any share in his life-time. By this deed he allotted to five of his children a six-eighths share of his property and to the two younger ones one-eighth between them, retaining for himself an eighth share. The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. The mode, therefore, in which the sons and daughters of U Nyein dealt with their shares is material; it helps to strengthen the conclusion that Ex. L was more a record of a division of rights and interest rather than a deed of partnership.

There were not only independent dealings between one or other of the children, but also between them on one side and Ma Than and U Nyein on the other. In 1907 in a suit brought by the ~~minor son~~ of U Nyein's third son against U Nyein and his other children the rights of the parties came into debate. In his written statement U Nyein distinctly states that the

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business of rice-miller was started by him on his own account with his own capital and that "by way of providing for his children he gave them the shares in the business mentioned in the partnership deed." U Nyein's statement was confirmed by the other Defendants in a joint defence filed by them. The attempt to make out they had made that admission under the instigation of U Nyein signally failed in the first Court.

After her marriage with U Nyein, Ma Than appears from the evidence to have assisted him in his business and although there was no definite separation between U Nyein and his children by Ma Gale, the new *ménage* was carried on quite independently and separately from them.

On the whole, their Lordships have come to the conclusion that Ex. L evidences a partition of the rice-mill business and other property U Nyein possessed at the time. That being so, the question arises whether the provision of law the Respondent invokes in her favour excludes Ma Gale's children from sharing in the inheritance of U Nyein. It has to be noticed that U Nyein died nine years after his marriage with Ma Than and within this period U Nyein and Ma Than appear to have accumulated considerable property. The present claim therefore cannot be regarded as unreasonable or unnatural.

The passage on which the Respondent relies is contained in sec. 213 of Mr. U Gaung's Digest of the Burmese Buddhist law, Volume I, page 276. The heading of the section runs thus:—

"AFTER PARTITION BETWEEN CHILDREN AND SURVIVING PARENT, THE LATTER MARRIES AGAIN AND DIES; THE CHILDREN ARE NOT ENTITLED TO CLAIM INHERITANCE FROM THE STEP-FATHER OR STEP-MOTHER."

The rule which follows is in these terms:—

"After the death of the husband, the wife partitions the property with her children and marries again taking her share with her. On her death the children of her former marriage cannot claim from their step-father any property which she took to the second marriage, because they have already obtained their shares."

"The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares."

This rule appears in the Digest as being an extract from Dhammathat Kyaw.

It is contended on behalf of Ma Than that under the latter clause, the Plaintiffs, having received from U Nyein their respective shares, cannot claim any further share in his inheritance. On the side of the Plaintiffs it is urged that this latter rule does not occur in any of the other Dhammathats and ought not therefore to have effect given to it.

Admittedly this is the only passage which expressly declares that the children will not be entitled to share in the inheritance of their father after a partition in his life-time allotting them specific shares in the property he possessed.

The Burmese Dhammathats are numerous and the criterion for arriving at a definite conclusion with regard to a particular rule is indicated in the judgment of the Board in the case of *Ma Nhin Bwin v. U Shwe Gonc* (1).

Their Lordships, however, do not think it necessary in the present case to go through all the Dhammathats for the purpose of discovering what the other Dhammathats declare. Nothing has been shown to militate against the authenticity or the binding character of the rule on

(1) L. R. 41 I. A. 121; s. c. I. L. R. 41 Cal. 887; 18 O. W. N. 1121 (1914).

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which the Respondent relies; and in the present state of the authorities, their Lordships are not prepared to dissent from the view expressed by the Judicial Commissioner. They are, accordingly, of opinion that this appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty to this effect. There will be no order as to costs.

Solicitor: *Mr. F. Delgado* for the Appellants.

Solicitors: *Messrs. Lowe & Co.* for the 1st Respondent.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 222 OF 1923.

PAGE, J.	}	ASKARAN CHOUTMAL
1925,		v.
2, January.		THE E. I. RY. CO.

Counsel, authority of, to compromise a suit—Compromise, how far and when binding on his client—Civil Procedure Code (Act V of 1908), Or. 23, r. 3—Order, if must be final, to be followed by decree.

The relation of a client to his counsel is of a nature different from that of a principal to an agent. His authority is not in any sense incidental to a contract into which he has entered with his client. The conduct and control of the cause are necessarily left to the counsel and his authority to compromise a case is derived from the very nature of the work he undertakes to do and is commensurate with his responsibility.

Where therefore a counsel while acting in the cause in Court enters into a compromise, it is binding upon the party for whom he acts.

But his unfettered authority to bind the client extends only while he is appearing in Court and consequently a compromise effected by counsel out of Court

and not assented to by client is only binding upon him if it is expressly authorised or subsequently ratified by the client or by his agent authorised in that behalf.

The rights, privileges and obligations of an advocate of the Calcutta High Court are the same as those of counsel entitled to practise in the High Court of Justice in England, and they remain the same whether he is appearing in the High Court or in Courts subordinate thereto.

In considering whether a settlement arrived at would justify the Court in passing a decree under Or. 23, r. 3, the question as to which the Court has to be satisfied is not whether the order was a final order or a perfected order but whether it was an agreed order.

STRAUSS v. FRANCIS (1), MATHEWS v. MUNSTER (2), NEALE v. GORDON LENNOX (3), COLLEDGE v. HORN (4), SWINFEN v. LORD CHELMSFORD (5), HUTCHINSON v. STEPHENS (6), SHEPHERD v. ROBINSON (10), GREEN v. CROCKETT (11), RICHARDSON v. EYTOR (12), TURVIRALL v. BOGLE (13), SWINFEN v. SWINFEN (14), THOMAS v. HEWES (15), HOLT v. JESSE (16), HARVEY v. CROYDON UNION SANITARY AUTHORITY (17), LEWIS v. LEWIS (18), JUNG BAHADUR SINGH v. SANKAR RAO

(1) L. R. 1 Q. B. 379 (1866).

(2) 20 Q. B. D. 141 (1887).

(3) [1902] A. C. 465 at p. 469.

(4) 3 Bing. 119 at p. 121 (1825).

(5) 5 Hurlstone and Norman's Rep. at p. 920 (1860).

(6) 1 Keen. 659 (1837).

(10) [1919] 1 K. B. 474.

(11) 34 L. J. (N. S.) Eq. 606 (1865).

(12) 2 DeG. Mac. & G. 79 (1852).

(13) 4 Russell 142 (1827).

(14) 20 Bev. 549 (1855).

(15) 2 C. & M. 519 (1834).

(16) 3 Ch. D. 177 (1876).

(17) 26 Ch. D. 249 (1882).

(18) 45 Ch. D. 281 (1900).

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(19), HICKMAN v. BERENS (20), WILDING v. SANDERSON (21), NANDO LAL BOSE'S CASE (22) and RICHARDSON v. PATO (23) referred to.

The facts of the case will appear from the judgment.

Mr. A. N. Chaudhuri for the Plaintiff.

Mr. Langford James for the Ry. Co.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—This motion raises a question of general interest and importance relating to the authority of counsel to compromise a suit. The material facts are simple and can readily be ascertained. The suit out of which this motion arises was brought to recover a sum of Rs. 3,117-13 as damages for the non-delivery of a consignment of *ghee* which the Defendant Company had accepted for transportation. On the 11th November 1924 the suit was in the list for hearing, but was adjourned by consent. On the 20th or 21st November Mr. A. K. Roy, counsel for the Plaintiff and Mr. S. K. Gupta, counsel for the Defendant, in the presence of Mr. Sushil Sen, solicitor for the Plaintiff, held a meeting in the Bar Library for the purpose of negotiating a settlement of the suit. Mr. Gupta suggested that the claim should be settled for Rs. 1,500. Mr. Roy asked for Rs. 2,000, and eventually it was agreed that a decree should be passed for Rs. 1,750 in full settlement of the Plaintiff's claim and costs. On the 24th November Mr. Sen requested Mr. Gupta to move the Court that the terms of settlement be recorded

and a decree passed in accordance therewith. Mr. Gupta expressed his willingness to do so. Late in the afternoon on the 24th November, however, Messrs. Morgan & Co., solicitors for the Defendant Company, received a letter from the Defendant refusing to agree to a settlement, and expressing a desire that the suit should be fought out. On the 25th November Mr. Gupta informed Mr. Sen in Court that the Defendant was not willing to accept the proposed terms of settlement. On the 3rd December the Plaintiff launched this motion that the settlement be recorded, and a decree passed in accordance therewith. I am satisfied on the affidavits, indeed it is not disputed, that Mr. Gupta agreed to the above terms of settlement with Mr. Roy. Mr. Satish Chandra Bose, an assistant in Messrs. Morgan & Co.'s office, however, stated in an affidavit (para. 5) that " Mr. Gupta suggested Rs. 1,500, Mr. Roy suggested Rs. 2,000 : then Mr. Sushil Sen suggested Rs. 1,750, upon which Mr. Gupta kept quiet. Mr. Gupta did not exclude the possibility of the matter being re-opened should clients think otherwise, but he did not make it clear, but as is usual in such matters there was always a mental reservation of reference to clients." On the 27th November 1924 Messrs. Morgan & Co. writing to Messrs. Dutt & Sen, solicitors for the Plaintiff, stated that " it was no doubt tacitly agreed between Counsel that the suit should be settled on the terms mentioned, but there was always a reservation of reference to clients." Admittedly, Mr. Gupta did not communicate either to Mr. Roy or to Mr. Sen the " mental reservation " which Mr. S. C. Bose stated was in Mr. Gupta's mind. On the contrary Mr. Gupta appeared to be giving his consent unreservedly to the proposed settlement, and, in my opinion,

(19) 1 L. B. 13 All. 272 (1890).

(20) [1896] 2 Ch. 398.

(21) [1897] 3 Ch. 597.

(22) [1910] 2 K. B. 638.

(23) 1 M. & G. 896 (1840).

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the sanctity of contracts would be greatly imperiled if the Court was to permit a person, acting under no mistake of fact and not misapprehension as to his capacity to contract and who to all intents and appearances had entered into a contract, subsequently to resile therefrom by unfolding a mental reservation, of the existence of which no mention had been made at the time when the contract was entered into. To hold such a person to the agreement which he had made is merely to apply the common law principle that a person's intention is to be ascertained from his acts, and the Court is not concerned to enquire what the uncommunicated mental processes may have been which at the material time were exercising his mind. I hold, therefore, that on the 21st November counsel, purporting to act on behalf of the parties, agreed to settle the suit. And upon the evidence I am further of opinion that the parties did not thereafter agree to treat the compromise so entered into as cancelled or at an end. The question which I have to determine is whether the above agreement to settle the suit is binding upon the parties. Now I am satisfied—indeed the Plaintiff does not contend to the contrary—that the Defendant Company neither expressly authorised nor subsequently ratified the said agreement. If it had done so the question of the extent of counsel's authority would not have arisen, for the authority of Mr. Gupta and Mr. Roy to enter into the agreement would in that event have been derived from the mandate which they had received from the parties, and the fact that they happened to be counsel would have been immaterial. I have, therefore, to consider whether in the above circumstances Mr. Roy and Mr. Gupta as counsel were clothed with authority to bind their clients by the compromise which

they effected. In this judgment when using the term "counsel" I intend to refer in India to advocates entitled to practise on the Original Side of the High Court, and I must not be taken to refer to vakils or attorneys, for with respect to their authority and position different considerations arise. Now, the position of counsel who are retained to act in a cause on behalf of clients is not always understood. It is of the utmost importance, however, to the community at large as well as to the legal profession that the relation of counsel to their clients should be fully appreciated; the more so inasmuch as "the old order changeth giving place to new," and the roll of advocates entitled to practise on the Original Side of the High Court, which hitherto has been confined to persons entitled to practise as barristers in England and Ireland or as members of the Faculty of Advocates in Scotland has been enlarged so as to include under certain conditions vakils and attorneys who have not necessarily received any legal training in Great Britain or Ireland. It is essential, therefore, that the vakils and attorneys so admitted who are bound in all respects to conform to the practice obtaining and are subject to the same obligations and rules of professional etiquette as advocates, practising on the Original Side of the Court, should be under no misapprehension as to the rights and obligations which attach to them as advocates of the High Court. Moreover, since the hearing of this motion my learned brother Bepin Behary Ghose, sitting with Walmsley, on the Appellate Side of the Court, in Final Appeal No. 94 of 1924 and Miscellaneous Appeal No. 136 of 1924, passed the following observations: "Before dealing with the matters in controversy before us I should

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refer to the observations of the Subordinate Judge as to the application of the rule in England regarding the authority of counsel to compromise a case without reference to his client. He appears to have held that the common law rule in England is applicable to this case and he refers to the cases of *Strauss v. Francis* (1) and *Mathews v. Munster* (2). This is contested by the Appellant. Even if this case exactly came under the rule in those cases I should be extremely reluctant to hold, unless compelled to do so by any binding authority, that a rule of practice in England which has its roots in different traditions and environments should be applied in this country, particularly in the mofussil where people never heard of any such practice." After citing a passage from the judgment of Lord Halsbury, L. C., in *Neal v. Gordon Lennox* (3) to which I shall hereafter have occasion to refer, His Lordship added "I need hardly say anything further on the point as learned Counsel for the Respondent in his careful argument did not rely upon the general authority of counsel to compromise the case." Now, the above observations are *obiter dicta*, for in that case their Lordships held that in fact no concluded or valid agreement had been effected, but so apposite is the view which B. B. Ghose, J., expressed to the question which I have to determine on this motion that I feel constrained to express my opinion as to whether it is correct. With great respect I am unable to subscribe to the doctrine that the status of an advocate of the Calcutta High Court differs from that of a barrister in England. I apprehend that the rights, privileges and obligations of

an advocate of the Calcutta High Court are, and since its foundation have been, the same as those of counsel entitled to practise in what is now the High Court of Justice in England. The traditions and environment in which counsel in England carry on their practice to the honour of their profession long ago were implanted in India, and have ever been the pride and mainstay of the advocates of the Calcutta High Court. I should decline to entertain any suggestion that the future advocates will not foster and maintain the traditions which hitherto have obtained in the Calcutta High Court, and I should disassociate myself from any attempt which might be made to detract from the privileges of counsel, or to limit the authority which attaches to advocates of the High Court. In my opinion, the authority of advocates remains the same whether they appear as counsel in the High Court or in Courts' subordinate thereto. The rights and obligations of counsel, in my judgment, do not vary according to the Court in which they happen to be appearing, for the authority of counsel is derived not from the fact that they are appearing in any particular Court, but from the status which they acquire on being admitted to the roll of advocates. I am of opinion that where counsel appear in Courts other than the High Court they carry with them the traditions and privileges of their profession and the sanctions of their high calling. Now it is not unfrequently asserted that the relation of a client to his counsel is that of a principal to an agent. In truth, the relationship is of a very different nature. The authority of counsel is not in any sense incidental to a contract into which he has entered with his client. "Barristers," wrote Sir William Blackstone, "may take upon them the pro-

(1) L. R. 1 Q. B. 379 (1866).

(2) 20 Q. B. D. 141 (1887).

(3) [1902] A. C. 465 at p. 469.

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tection and defence of any suitors whether Plaintiff or Defendant, who are therefore called their clients like dependants upon the ancient Roman orators. Those indeed practised gratis, for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us that a counsel can maintain no action for his fees, which are given not as *locatio vel conductio* but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity which a counsellor cannot demand without doing wrong to his reputation." In *Colledge v. Horn* (4) Chief Justice Best said, "I cannot allow that the counsel is the agent of the party." In *Swinfen v. Lord Chelmsford* (5) Chief Baron Pollock observed that "we are of opinion that an advocate of the English Bar accepting a brief in the usual way undertakes a duty, but he does not enter into any contract or promise, express or implied. Cases indeed occur where on an express promise (if he made one) he would be liable in assumpsit; but we think that a barrister is to be considered not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client but the Court in which the duty is to be performed and the public at large have an interest." And later—"The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit should be conducted he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness or putting or omitting to put a particular question or for honestly taking a view of the case

which may turn out to be quite erroneous. If he were so liable counsel would perform their duty under the peril of an action by every disappointed and angry client."

Again—"I think it right to express my own opinion that provided that an advocate acts honestly with a view to the interest of his client he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law or any mistake in fact or for being less eloquent or less astute than he was expected to be. According to my view of the law a barrister acting with perfect good faith, and with a single view to the interest of his client is not responsible for any mistake or indiscretion or error of judgment of any sort." In *Strauss v. Francis* (1) Justice Blackburn, as he then was, stated the rule in memorable words: "Mr. Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause; and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every princi-

(4) 3 Bing. 119 at p. 121 (1828).

(5) 5 Hurlstone and Norman's Rep. at p. 980 (1880).

(1) L. R. I Q. B. 575 (1866).

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ple this agreement should be held binding." "No counsel," added Mellor, J., "certainly no counsel, who values his character, would condescend to accept a brief in a cause on the terms which the Plaintiff's counsel seems to suggest, viz., without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief." In *Hutchinson v. Stephens* (6) Lord Langdale, M. R., remarked: "With respect to the task which I may be considered to have imposed upon counsel I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honourable and important services which they constantly perform as minister of justice, acting in aid of the Judge before whom they practise. No counsel supposes himself to be the mere advocate or agent of his client to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel knowing what is due to himself and his honourable profession are qualified not only by considerations affecting his own character as a man of honour, experience and learning, but also by considerations affecting the general interest of justice. It is to these considerations that I apply myself; and I am far from thinking that any counsel who attends here will knowingly violate or silently permit to be violated any established rule of the Court, to promote the purpose of any client or refuse to afford me the assistance which I ask in these cases." In *Mathews v. Munster* (2) Lord Esher laid down the rule as follows:—"This state of things raises the question of the relationship between Counsel and his

client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of Court and to act for him in Court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client." And Bowen, L. J., stated that "counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the Opposite Party." It is, in my opinion, settled law that an advocate of the High Court in the course of conducting a cause is clothed with authority to compromise a suit in which he has been retained as counsel. In *Nundo Lal Bose v. Nistarini Dassi* (7), Maclean, C. J., observed that "there cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority, an apparent author-

(2) 20 Q. B. D. 141 (1887).

(7) 12 Cal. 426 (1887).

(7) 1 L. R. 27 Cal. 426 (1887).

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ity, which must be taken to continue until notice be given to the other side by the client that it has determined to settle and compromise the suit in which he is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained." [See also *B. M. Sen & Bros. v. Chunilal Dutt & Co.* (8).] In my opinion, such a compromise would be valid and binding upon the parties even although it had been effected contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side. [*Strauss v. Francis* (1), *Mathews v. Munster* (2), *Walsh v. Roe* (9) and *Shepherd v. Robinson* (10).] In some cases in which the compromise of a suit has been effected by counsel in Court it has been held that the Court will not order a decree to be drawn up in accordance with the settlement, but will leave the party to enforce the agreement by filing a suit. [See *Green v. Crockett* (11) and *Richardson v. Eytor* (12).] In my opinion, however, in India the Court in such cases ought not to put the parties to the expense of further litigation by bringing a separate suit upon the agreement, but in a proper case should exercise the powers which it possesses under Or. 23, r. 3. [See the observations of Mathew, L. J., in *Neale v. Gordon Lennox* (3).] Again, there is authority to be found in support of the following propositions that until a

consent order has been drawn up the party may under certain circumstances re-sile from an agreement to settle a suit to which he has assented, and that in respect of a compromise there is a difference between a consent order which is interlocutory and one which is final. With all due deference I am unable to give my assent to either of these propositions. In my opinion, in considering whether such a settlement has been arrived at as would justify the Court in passing a decree under Or. 23, r. 3 the question as to which the Court has to be satisfied is not whether the order was a final order, or a perfected order, but whether it was an agreed order. But a litigant is not entitled *ex debito justitiæ* to an order under Or. 23, r. 3, to a decree in a suit brought to enforce a compromise effected by counsel merely because the Court is satisfied that counsel in bringing about the settlement possessed authority as counsel in that behalf. The duty of the Court in such circumstances is clearly, and to my mind conclusively, laid down by the House of Lords in *Neale v. Gordon Lennox* (3). With all due respect to Macardie, J., I do not agree in thinking that this case "is not a precedent of general application" [*Walsh v. Roe* (9)]. In my opinion, all cases relating to the authority of counsel must now be read in the light of the judgment in that case. Lord Halsbury in stating what in his opinion is the duty of the Court in such circumstances took the broad and common sense view which, if I may venture to say so, is invariably to be found in the judicial utterances of that great Judge. His Lordship observed: "My Lords, as I said, I will not go through the cases, because to my mind there is a higher and much more

(1) L. R. 1 Q. B. 379 (1866).

(2) 20 Q. B. D. 141 (1887).

(3) [1902] A. C. 465 at p. 469.

(8) L. R. 51 Cal. 885 (1924).

(9) 87 L. J. K. B. 520 (1918).

(10) [1919] 1 K. B. 474.

(11) 84 L. J. (N.S.) Eq. 606 (1905).

(12) 2 DeG. Mac. & G. 79 (1852).

(3) [1902] A. C. 465 at p. 469.

(9) 87 L. J. K. B. 520 at p. 522 (1918).

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important principle involved. The Court is asked for its assistance, and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done; the Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of Justice is so far bound by the unauthorised act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone; the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of Justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer, to take it from the jurisdiction of the ordinary tribunal, shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to. But when I come to this case and consider the question of what should be the position of the other party who has acted upon the apparent authority of counsel, there are cases in which

the Court undoubtedly, in the exercise of its discretion (and that is the observation which I intended to make), might well say, 'If it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs.' That is one example. Or the position of the other party might have been totally altered; for instance, I could imagine a case to be so delayed that it made the statute of limitation to run so that there was no possibility of trying the action again; and other cases might be put which would raise the question of the other party being put into such a position by the unauthorised act of counsel that one might well say, 'This is a case in which one of the two innocent parties must suffer; then the person by the act of whose counsel (the counsel whom he is responsible for employing) the difficulty has been created must suffer; the position of the parties has been totally altered by what has taken place and therefore we cannot interfere.' [Neale v. Gordon Lennox (3)]. Whether or not the Court is satisfied that the suit has been adjusted by a valid agreement or compromise which the Court is bound to enforce must depend upon the circumstances of each case. See *Turvirall v. Bogle* (13), *Swinfen v. Swinfen* (14), *Thomas v. Hewes* (15), *Holt v. Jesse* (16), *Harvey v. Croydon Union Sanitary Authority* (17), *Lewis v. Lewis* (18), *Jung Bahadur Singh v. Sankar Rao* (19), *Hickman v. Berens* (20), *Wilding v. Sanderson*

(3) [1902] A. C. 465 at p. 469.

(13) 4 Russell 142 (1827).

(14) 20 Bev. 540 (1855).

(15) 2 C. & M. 519 (1824).

(16) 3 Ch. D. 177 (1876).

(17) 26 Ch. D. 240 (1893).

(18) 45 Ch. D. 281 (1900).

(19) I. L. R. 13 All. 272 (1890).

(20) [1895] 2 Ch. 686.

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(21), *Nando Lal Bose's* case (22) and *Shepherd v. Robinson* (10). In this case I am satisfied that Mr. Gupta when he effected the settlement of the suit with Mr. Roy was not labouring under any mistake of fact or any misapprehension as to the extent of his authority as counsel to compromise the suit on behalf of the Defendant Company, and if this settlement had been arrived at or had been assented to in Court I am of opinion that the Court ought to give the seal of its authority to the arrangement and to pass an order and decree as prayed. But it is urged on behalf of the Defendant Company that the apparent authority of counsel who is retained to conduct a suit to bind his client by his admissions and acts is restricted to acts and admissions in Court or *coram judice*, and that such acts and admissions out of Court do not bind the client unless in fact they are authorised by the client or by his agent duly authorised in that behalf. I have been unable to discover any direct authority on this important question, but upon principle I am of opinion that this contention which has been raised on behalf of the Defendant is sound. The duty of Counsel, as Lord Esher stated in *Mathews v. Munster* (2), is "to advise his client out of Court and to act for him in Court." The nature of the duty which an advocate accepts by undertaking to appear for a client would seem to indicate that he is clothed with authority to bind his client only when he is in fact engaged in the actual management of the suit. (See Pollock and Maitland's *History of English Law*, Vol. I, p. 211 *et seq.*). It is only because he is entrusted with the ac-

tual conduct of the suit that his discretion in the management thereof is to remain unfettered. In *contestatione litis* he is no more the agent of his client or bound by his instructions than the master of a vessel is the agent of the passengers whom he has undertaken to carry in his ship. Alike in the conduct of the suit and in the navigation of the vessel the person who has undertaken the duty must carry it out in reliance upon his own skill and judgment. In short, counsel's authority is commensurate with his responsibility. But when he is not appearing in Court the reason for the unfettered discretion which counsel possesses in Court no longer exists. He then "advises," he does not "act" for his client, and, in my opinion, a compromise effected by counsel out of Court and not assented to by the client is only binding upon the client if it is expressly authorised or subsequently ratified by the client or by his agent authorised in that behalf. Three cases may be referred to in this connection. In *Richardson v. Pato* (23), the Defendant's counsel having obtained a rule *nisi* calling upon the Plaintiff to show cause why a judgment should not be entered as in case of a non-suit, the attorney for the Plaintiff met the Defendant's counsel in the street, informed him that the Plaintiff was unwell and unable to give the necessary instructions for showing cause against the rule, and requested the Defendant's counsel to postpone bringing on the motion to make the rule absolute, which the latter consented to do upon being informed that counsel would be instructed to oppose the rule. Tindall, C. J., in giving judgment remarked: "I think that this rule ought to be discharged. The grounds upon which this application is made are such as would place

(2) 20 Q. B. D. 141 at p. 143 (1887).

(10) [1919] 1 K. B. 474.

(21) [1897] 2 Ch. 537.

(22) [1910] 2 K. B. 638.

(23) 1 M. & G. 896 (1840).

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counsel in a false position, and would be very injurious to the practice of the Bar. The attorney admitted to prosecute or defend represents his client throughout the case, but a counsel represents his client only when speaking for him in Court. It would confuse the relative position of the two branches of the profession if we were to hold that a communication made by the counsel was to have the same effect as a communication made to a proceeding from the attorney." In *Green v. Crockett* (11) cogent evidence was adduced to prove that the agreement which had been effected by counsel out of Court was in fact authorised by the client. The Lord Chancellor (Lord Cranworth), however, while expressing no opinion as to whether an agreement could be enforced by a bill for specific performance, stated that "the arrangement so made could not be treated as an agreement made in the cause or in Court." The decision in this case as reported does not appear to be satisfactory or conclusive, for, having regard to the practice in Chancery *non constat* that the Court would have granted the prayer in the petition even if the arrangement had been arrived at in Court. The judgment of Walmsley, J., in the case reported in 48 Irish Law Reports 53 does not carry the matter any further, for the Court held that the counsel who settled the case did not purport to do so on their own authority and that no agreement to settle the suit had in fact been concluded between the parties. Applying the rule which I have stated to the facts of this case it is common ground that the counsel who effected the settlement in the Bar Library did not assent to the arrangement *coram iudice*, and as the Defendant Company, which neither expressly authorised nor

ratified the arrangement, refuses to give its consent to the terms thereof, I hold that the compromise is not binding upon the parties, and I dismiss this application, but without costs.

Messrs. Dutt & Sen, Solicitors for the Plaintiff.

Messrs. Morgan & Co., Solicitors for the Defendants.

S. N. B.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1082 OF 1924.

GREAVES, J.	}	GIRINDRA NATH RAY, Petitioner, v. KEDAR NATH BIDYANTA and ors., Opposite Party.
CHAKRAVARTI, J.		
1924,		
Heard,		
24, November.		
Judgment,		
19, December.		

Civil Procedure Code (Act V of 1908), secs. 73, 63, Or. 21, rr. 81, 85—Rateable distribution, application for, made before balance of sale proceeds deposited, if made before "assets received" by Court—Sales in lots—Balance deposited for some before and others after application—Applicants for execution in inferior Courts, if entitled to participate in assets without application for execution in superior Court.

Until the sale becomes a concluded transaction by deposit of the balance of the purchase money under Or. 21, r. 85 of the Civil Procedure Code, there are no assets in the hands of the Court within the meaning of sec. 73 of the Code, and a decree-holder who has applied to the Court for execution before the balance is paid up is entitled to participate in the sale proceeds under that section.

Where, therefore, properties, being sold in lots, the balance of the purchase money was paid in Court as regards some of the lots before but as regards the others after such application, the applicant would be entitled to participate in

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the sale proceeds of the latter but not of the former lots.

RAMJAS AGARWALA v. GURU CHARAN SEN (1) and MAHARAJAH OF BURDWAN v. APURBA KRISHNA ROY (2) referred to.

Holders of decrees of inferior Courts, whereof execution has been stopped by the superior Court under sec. 63 of the Code, are entitled to apply to the latter Court for rateable distribution under sec. 63 read with sec. 73 of the Code without any further application.

CLARK v. ALEXANDER (3), BEJOY SINGH DUDHURIA v. HUKUM CHAND (5), HAR BHAGAT v. ANANTA RAM (6), RAMJAS AGARWALA v. GURU CHARAN SEN (1), KRISHNA KUMAR GHOSH v. PASUPATI BANERJEE (7) and MONDAL & Co. v. FAZUL EALLAHIE (4) referred to.

This was a Rule granted on the 26th August 1924 against an order of the Subordinate Judge of Nadia (Osman Ali, Esq.), dated the 23rd August 1924.

The facts of the case were as follows :—

Certain properties belonging to the judgment-debtor Binodbehari Bagchi (Opposite Party No. 9) were attached at the instance of Opposite Party No. 1 Kedar Nath Bidyanta in Money Execution Case No. 17 of 1924 in the Court of the Subordinate Judge of Nadia. The properties were sold on 17th July 1924 in three lots. The first lot was sold for Rs. 283, the second for Rs. 125 and the third for Rs. 7,800. The whole of the purchase money of the first lot was deposited on the same day, but Rs. 40 only in respect of the second and Rs. 2,000 in respect of the third lot. The purchaser of the third lot

deposited the balance of Rs. 5,800 on the 29th July, but the balance of the purchase money of the second lot (Rs. 85) was not deposited till the 1st August 1924.

Opposite Party No. 2, Rajlakshmi Debi, had long before the 17th July, the date of the sale, applied for execution against the same judgment-debtor in Money Execution Case No. 754 of 1924 in the Munsif's Court at Nadia, and Opposite Party No. 4, Katayani Debi, in Money Execution Case No. 1016 of 1924 in the Munsif's Court at Ranaghat. Opposite Parties Nos. 2 and 4 applied in Money Execution Case No. 17 of 1924 on the 7th July 1924 for rateable distribution of the assets to be realised in the last mentioned execution case.

Opposite Party No. 3, Surajmohini Debi, had pending Execution Case No. 1248 of 1924 in the Munsif's Court at Nadia from before the date of the sale. On the 7th July 1924, Opposite Party No. 3 applied to the Munsif for rateable distribution of the assets realised in Money Execution Case No. 17 of 1924. She made no application of any kind before the Subordinate Judge.

By an order passed on the 17th July 1924 in Money Execution Case No. 17 of 1924, the Subordinate Judge called for the records of Money Execution Cases Nos. 754 of 1924 and 1016 of 1924 in the Munsif's Court at Nadia and Money Execution Case No. 1248 of 1924 in the Court of the Munsif at Ranaghat for purposes of rateable distribution.

The Petitioner Girindra Nath Ray and Opposite Party No. 8, Durgamoney Debi, obtained decrees against the same judgment-debtor on the 30th July 1924 and on the 31st July 1924 applied to the Subordinate Judge for execution and rateable distribution in Money Execution Cases

(1) 14 C. W. N. 396 (1909).

(2) 15 C. W. N. 872 (1911).

(3) I. L. R. 21 Cal. 200 (1893).

(4) I. L. R. 41 Cal. 825 (1914).

(5) I. L. R. 29 Cal. 773 (1902).

(6) 2 C. W. N. 126 (1897).

(7) 25 C. W. N. 740 (1921).

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Nos. 99 of 1924 and 98 of 1924 respectively.

Opposite Parties Nos. 5, 6 and 7 had applications for execution pending in the Subordinate Judge's Court against the same judgment-debtor from before the sale of 17th July 1924.

The Opposite Party No. 1 at whose instance the sales took place objected to Opposite Parties Nos. 2, 3 and 4 participating in the sale proceeds on the ground that they had not applied for execution in the Subordinate Judge's Court—Opposite Party No. 3 in particular not having even applied for rateable distribution in that Court. He also opposed the Petitioner's and Opposite Party No. 8's application for rateable distribution on the ground that the sales had been completed and assets received before these persons had obtained their decrees and applied for execution. No question was raised as to the right of Opposite Parties Nos. 5, 6 and 7 to rateable distribution.

The Subordinate Judge held that the Opposite Parties Nos. 2, 3 and 4 were entitled to participate in the sale proceeds under sec. 73, but the Petitioner and Opposite Party No. 8 were entitled to rateable distribution in respect only of the sum of Rs. 85, the balance of the deposit in respect of the second lot of property sold on the 17th July—which alone was received in Court subsequent to their applications for execution, the other amounts having been deposited in Court prior even to the date on which these persons had obtained their decrees.

Petitioner Girindra Nath Ray moved the High Court against this order and obtained this Rule.

Opposite Party No. 8's application in similar terms which was moved later was directed to be heard along with the Rule.

Babu Mritunjoy Chatterjee (with *Babu*

Pashupati Ghose) appeared for the Petitioner.

Babu Amarendra Nath Bose appeared for the Opposite Party No. 8 and generally adopted the arguments addressed on behalf of the Petitioner.

Babu Nagendra Nath Ghose appeared for the Opposite Party No. 1.

Babu Rupendra Kumar Mitter appeared for the Opposite Parties Nos. 2 and 4.

Babu Radhabenode Pal appeared for the Opposite Party No. 3.

Babus Charu Chandra Bhattacharya, Jatindra Mohan Chaudhury, Bhupendra Kishore Ray and Dharma Das Set for the other Parties.

THE JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J. — The Rule No. 1082 of 1924 and the analogous application pending in this Court, raise the question as to the distribution of the assets realised in execution of a decree for money, by the Subordinate Judge of Nadia in Execution Case No. 17 of 1924. The properties of the judgment-debtor, who is Opposite Party No. 9 in this Rule, were sold in three lots. Lot No. 3 was sold for Rs. 283 on the 17th July 1924 and the whole of the purchase money was deposited on that very day. On the same day lot No. 4 was sold for Rs. 125 out of which Rs. 40 only was deposited and lot No. 5 was sold for Rs. 7,800 out of which only Rs. 2,000 was paid on the date of sale. On the 29th July 1924 Rs. 5,800, the balance of the price of lot No. 5, was deposited and on the 1st of August 1924, Rs. 85, the balance of the price of lot No. 4, was deposited. Now the Petitioner in the Rule obtained his decree in the Court of the Subordinate Judge on the 30th July and made his application for rateable distribution on the 31st July 1924. The applicant, in the ana-

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logous petition, obtained his decree and made his application on the same day as the Petitioner in the Rule. Besides these two Petitioners, it appears that a decree was obtained by Opposite Party No. 2 and was executed in Execution Case No. 751 of 1924 in the Munsif's 1st Court at Nadia, that Opposite Party No. 3 also obtained a decree in the same Court and executed it (Execution Case No. 1284) and that Opposite Party No. 4 obtained a decree in the Munsif's Court at Ranaghat which was executed in Execution Case No. 1016 of 1924. It appears that the records for execution of all these three decrees passed by the Munsifs were transferred to the Court of the Subordinate Judge, by an order of the Court on the 17th July 1924, after the decree-holders in Execution Cases Nos. 754 and 1016 had applied for rateable distribution on the 7th and 4th of July 1924 respectively. Execution Case No. 1218 was transferred along with the other two executions on the same day; but, it appears, no specific application for rateable distribution was made before such transfer. I ought to have stated that all the three decree-holders holding decrees of the Munsifs' Courts had attached the same properties of the Opposite Party No. 9 in execution of their respective decrees, long before their executions were transferred to the Subordinate Judge's Court. The Subordinate Judge, before whom all these applications were made for participation in the assets which were realised in the manner stated before, held that the Petitioners were entitled to obtain rateable distribution only of the sum of Rs. 85 which was deposited after they had obtained their decrees and made their application for rateable distribution. As to the holders of the three decrees of the Munsif's Court by Opposite Parties Nos. 2, 3 and 4, the learned Sub-

ordinate Judge held that they were entitled to rateable distribution out of the entire sum realised after their decrees had been transferred to the Court. Against this order the Rule now before us was obtained and the analogous petition filed and the learned Vakil for the Petitioners contended that their clients were entitled to rateable distribution of the whole of the sale proceeds on the ground that the sale proceeds were not realised until the last deposit was made. Their next contention was that at any rate their clients were entitled to rateable distribution out of Rs. 125, the price realised for property No. 1, on the ground that until the sum of Rs. 85 was deposited, the mere deposit of the earnest money could not be held to be the assets of lot No. 4. Lastly, it was contended that Opposite Parties Nos. 2, 3 and 1 were not entitled to rateable distribution as there were no application for execution made before the learned Subordinate Judge; and as regards one of the decree-holders, namely, the Opposite Party in No. 1248, there was no application for rateable distribution. As to the first point it appears to us that there is no ground for this extreme contention; the properties were sold separately, their sale proceeds were realised separately and the sale of each lot was at any rate completed when the whole of the balance of the purchase money was deposited in Court. As to the second contention, it appears to us that it is sound. The point is covered by express authorities. The earliest of these is the case of *Ramjas Agarwala v. Guru Charan Sen* (1), and the case of *Maharajah of Burdwan v. Apurba Krishna Roy* (2) also supports this view. The mere deposit of the earnest money cannot be said to be the assets realised by the sale

(1) 14 C. W. N. 396 (1909).

(2) 15 C. W. N. 872 (1911).

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until the balance of the purchase money is deposited and the sale becomes a concluded transaction. In this view we think that the Petitioner and the applicant in the analogous case are entitled to the rateable distribution out of Rs. 125 realised for lot No. 4. The third point, namely, whether the holders of decrees of any inferior Court, the executions of whose decrees had been stayed by the superior Court under the provisions of sec. 63, are entitled to rateable distribution of the assets realised by the superior Court under the provisions of sec. 63 read with sec. 73, C. P. C. As a matter of bare justice to the decree-holders of the inferior Courts, whose execution cases were stayed under the provisions of sec. 63, because the superior Court is the only Court which could realise assets, they are entitled to participate in the assets as they were precluded on that ground from pursuing their own execution cases and bringing the properties which they had attached to sale. But the language of sec. 63 which is substantially the same as of sec. 285 of the old Code and the provisions of sec. 73 which are substantially the same as the provisions of sec. 295 of the old Code have been construed differently and in consequence there is a divergence of judicial decisions on the point. The view, which has favoured the claim of the holders of the decrees of the inferior Courts, has in effect held that although the right to distribution arises out of the provisions of sec. 63, the distribution in effect is made under the provisions of sec. 73 or at any rate on the principles laid down in it. The divergence of views relates to three points: Firstly, whether sec. 63 does at all give any right to the holders of decrees of the inferior Courts to claim satisfaction of their decrees out of the proceeds realised by the superior Court and whether the determination of such claim is contemplated

by sec. 63; secondly, whether the holders of such decrees must apply for execution of their decrees before the superior Court and also apply for rateable distribution to that Court before the assets are realised as provided by sec. 73. The second point may be very shortly dealt with. If the holders of such decrees have no right or claim under sec. 63 and their only remedy is to apply under sec. 73, then it is quite clear that they must comply with the provisions of sec. 73 before they can claim benefits under that section. As to the first question, the real point is this:—Do the provisions of sec. 63 which prevent the inferior Courts from executing their decrees and direct that the sale should be held by the superior Court, leave the holders of such decrees to the remedy of sec. 73 which is open to any decree-holder of any Court; or does sec. 63 which provides for the methods for realisation of the assets by the superior Court give power to that Court to distribute the assets realised by the sale of the attached properties? It would seem unreasonable to suppose that sec. 63 which imposes a bar against the holders of the decrees of the inferior Courts does not contemplate a method by which such decree-holders can ask the superior Court to give them their share of the assets realised by the sale of the properties which they had attached. This question arose in the case of *Clark v. Alexander* (3). It is a judgment of Mr. Justice Sale sitting on the Original Side and the learned Judge had long experience of the practice on the Original Side of the Court; therefore his view on a matter of practice is of considerable weight, the present question being really and ultimately a question of practice. The learned Judge at p. 203 laid down the rule in these terms:—“To give sec. 295 the signification contended for by the

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Plaintiff would in my opinion have the effect of altogether nullifying sec. 285. The duty of the superior Court under sec. 285 is to consider and determine the rights of the attaching creditors in all the cases to which that section applies whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim determined he must obtain a transfer of the decree to the superior Court and apply to that Court for execution. If that were required it would operate with great hardship in case of creditors for small amounts who had attached through the Small Cause Court, especially where the attached property was of small value. The extra expense that would be incurred by reason of the transfer to the superior Court and the re-attachment through that Court would in some cases deprive the Small Cause Court creditors of all benefits arising under their attachments and the result in those cases would be at the least the practical postponement of the rights of such creditors to those of creditors for larger amounts who had attached through the superior Court. It certainly would be a remarkable result if where property is attached under sec. 285 the superior Court while required by that section to consider the rights of all attaching creditors irrespective of the Courts by which the attachments were made, should at the same time be restricted so as to have no alternative but to apply the rule of exclusion contained in sec. 295 to all creditors except those who have applied to the superior Court prior to realisation and so come strictly within the terms of that section. Such a result cannot have been intended and may be avoided if secs. 285 and 295 be read together and due effect be given to each." The learned Judge then considered all the authorities

then available and referred to three cases of this Court. Apart from the previous authority it appears to us that the reasons upon which the rule is based are convincing unless there is anything in sec. 63 which clearly debars the superior Court from doing what is manifest justice to the holder of decrees of inferior Courts. There is no reason why this rule based upon long practice should not be followed. Turning to sec. 63 of the Code the words "Court which shall receive or realise such property and shall determine any claim thereto and objection to the attachment thereof" shall be the Court of the highest grade. It would be putting a very narrow construction upon the words "shall determine any claim thereto," that is, to the property, to hold that they exclude the determination of the claim of the holders of the decrees of the inferior Court while providing that all the assets should go into the hands of the superior Court. It may be conceded that all claims coming under Or. 21, r. 60 whether made before the superior Court or the inferior Court should be determined by the former. The determination of the rights of the decree-holders *inter se* is not in any way excluded, and for the reasons given by the learned Judge, whose words I have quoted above, I think that this practice is based upon consideration of justice and simplicity. This question is really more a matter of procedure and practice than of substantive right. The right of all the decree-holders to a rateable distribution is undoubted, the only question is as to the procedure to be adopted. In these matters uniformity is of great practical importance and when a practice has been established it should not be departed from even if there may be some doubt as to its strict soundness. Sir Lawrence

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Jenkins in the case of *Mondal & Co. v. Fazul Eallahie* (4) says :—"Uniformity on questions of procedure under the Code is of such importance that I think I ought to follow the decision." This view of Mr. Justice Sale was adopted in the case of *Bejoy Singh Dudhuria v. Hukum Chand* (5) by Mr. Justice Ghose sitting with Mr. Justice Brett, both of whom had considerable experience in these matters. In that case the learned Subordinate Judge sent for the execution case from the Court of the Munsif and without further application made a rateable distribution amongst all the decree-holders including the decree-holder of his own Court. This was done under secs. 285 and 295 read together. A similar view was taken in the case of *Har Bhagat v. Ananta Ram* (6) by Mr. Justice O'Kinealy sitting with Mr. Justice Rampini, both of whom had long experience of the practice of the District Courts, and those learned Judges, even without referring to the earlier cases, took the same view. The only case in which a contrary view was taken is the case of *Ramjas Agarwala v. Guru Charan Sen* (1). In that case Mr. Justice Mookerjee and Mr. Justice Vincent held that the holders of decrees of inferior Courts were not entitled to participate in the sale proceeds unless they strictly complied with the provisions of sec. 295 and the learned Judges further held that sec. 285 had no application to the question of determination of the rights of the decree-holders but that the word "claim" in sec. 285 was limited to the claim under sec. 278 of the old Code. The learned Judges there decided the case in the light of the authority of the case of *Bejoy*

Singh Dudhuria v. Hukum Chand (5), but did not follow the rule laid down by Mr. Justice Ghose that the Subordinate Judge was right in making the distribution even in the absence of any application either for execution or for rateable distribution filed before the superior Court. Again the learned Judges were not prepared to differ from the rule laid down by Mr. Justice Sale, but observed : "That the whole question shall have to be reconsidered in a case in which the question arises in future." The learned Judges observed as follows : "But we need not express any opinion upon the question whether the decision in *Clark v. Alexander* (3) may or may not be justified on the grounds suggested, nor need we discuss whether that decision may not require reconsideration when another case precisely similar to it in fact arises." The view of Mr. Justice Sale was, it appears, also followed in effect in the case of *Krishna Kumar Ghosh v. Pasupati Banerjee* (7) by Mr. Justice N. R. Chatterjea, sitting with Mr. Justice Newbould. Although in that case their Lordships did not wish to differ from the case of *Ramjas Agarwala v. Guru Charan Sen* (1) they held that the decree-holder of the inferior Court in which the attachment was prior to the attachment made by the superior Court was entitled to rateable distribution although no application either for execution or for rateable distribution appears to have been made before the superior Court but not in respect of the decree in which the attachment was subsequent. It is not necessary to discuss that distinction for the purpose of the present case. It is enough

(1) 14 C. W. N. 396 (1909).

(4) I. L. R. 41 Cal. 825 (1914).

(5) I. L. R. 29 Cal. 773 (1902).

(6) 2 C. W. N. 126 (1897).

(1) 14 C. W. N. 396 (1909).

(3) I. L. R. 21 Cal. 200 (1893).

(5) I. L. R. 29 Cal. 773 (1902).

(7) 25 C. W. N. 740 (1921).

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to point out that rateable distribution was allowed to holders of decrees of the inferior Courts without any application specifically made under sec. 295. The decision of Mr. Justice Sale is still good law and although attempts have been made to distinguish it, it has never been dissented from, much less overruled. On the whole, therefore, on a review of the decisions cited above we do not see any difficulty in following the rule laid down by Mr. Justice Sale, and followed in the subsequent cases that the holders of the decrees of inferior Courts, whose execution had been stopped by the superior Court under sec. 63, are entitled to rateable distribution under that section read with sec. 73 without any further applications. The decrees of the inferior Courts were transferred to the superior Court to which applications for rateable distribution were made in writing in the Cases Nos. 754 and 1016. The rule laid down by Mr. Justice Sale was followed by Mr. Justice Ghose and Mr. Justice O'Kinealy, and it seems that no further application before the superior Court was thought necessary.

In the result therefore we vary the order of the learned Subordinate Judge with respect to the sum of Rs. 85 and the Petitioner is entitled to share in the rateable distribution not only of Rs. 40 but also of Rs. 125, the entire proceeds of the property No. 4. Under the circumstances we make no order as to costs. This judgment governs the application also.

GREAVES, J.—I agree.

N. G.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD DUNEDIN.

LORD CARSON.

SIR JOHN EDGE.

1924.

Heard, 29, July.

Judgment, 29, July.

CHANDIKA BAKUSH

SINGH and anr.,

Appellants,

v.

MADHO SINGH,

Respondent.

Will, genuineness of—No probate taken out but produced to obtain mutation of names—Will substantially representing testator's wishes.

The genuineness of a Will, the terms of which appeared to be natural in the circumstances, having come into question twenty-five years after its execution, it was shown to have been produced for obtaining mutation of names shortly after the testator's death and for a similar purpose on a later date. But it was never produced for probate. The two attesting witnesses still living were both clear that the Will was really executed; that it represented what the testator wished and although he might not have understood some of the flowery expressions, he was yet perfectly competent to comprehend its simple provisions:

Held—That the Will was properly upheld, and the mere fact that it was not produced for probate did not make any difference, as this is not often done.

This was an appeal from a decree, dated the 13th December 1921, of the Court of the Judicial Commissioner of Oudh which reversed a decree, dated the 18th May 1920, of the Subordinate Judge of Mohanlalganj, Lucknow.

The suit was brought on the 20th November 1917 by the present Appellants for possession with mesne profits of the lands mentioned in the plaint.

The lands were the property of Kirti Singh who died on the 22nd August 1895

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leaving a widow and daughter, a son-in-law, the present Respondent Madho Singh.

By a Will, the validity of which was challenged in the suit, the property of the deceased was divided among the above three persons in equal shares, and they applied for and obtained mutation of names on the 21st October 1895.

The daughter of Kirti Singh died in 1903 and his widow on the 10th January 1910 executed a deed of gift of her $\frac{1}{3}$ rd share in her husband's estate in favour of the Respondent. The widow died on the 24th November 1915 and at the time of suit the Respondent was in sole possession of the property. The second Appellant who claimed to be the nearest reversioner of Kirti Singh, together with the 1st Appellant to whom he had assigned a part of his interest in the property, filed the suit and disputed the validity of the Will. The Subordinate Judge decreed the suit in favour of the Plaintiffs and held that the Will was not proved.

That decision was reversed by the Appellate Court and the present appeal was lodged by the Plaintiffs.

Mr. Kenworthy Brown for the Appellants.

Messrs. Dunne, K. C. and Dubé for the Respondent.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The only question in this case is whether a certain Will was really executed or not. This point is mooted for the first time twenty-five years after the Will was executed, and that fact necessarily explains to a certain extent the paucity of evidence which is available as to the actual facts of execution. The Will was witnessed by several persons; death has taken away all of

them except two, but, as regards those two, they are both quite clear that the Will really was executed; that it represented what the testator wished, and that he, although he might not have understood some of the flowery expressions, was yet perfectly competent to comprehend what, after all, were very simple provisions.

The Will was produced at once; it was not kept quiet; it was produced within a very short time for the practical purpose of having mutation made of names in the register. The same thing happened when there was another change, owing to a death, and, again, the Will was produced for the purpose of mutation of names.

In those circumstances, what really is said against the Will? It is said, first of all, that it is of an unnatural character, because the eventual taker under the Will is only a son-in-law. Their Lordships, however, are inclined to agree with the view taken by the Appeal Court that, considering that the reversioner was a person far off, a person as to whose own particular identity there must have been some considerable amount of doubt, because the pedigree, at that time, had not been, so to say, cleared up, it was not unnatural that this man should wish that his son-in-law should succeed, and it was certainly most natural that he should make a Will, because, according to the custom of the village, if he allowed himself to die intestate, his daughter, who was naturally the person whom he would have cared for most, would have been cut out altogether. It is also quite clear that not only his daughter, but also his widow, who under an intestacy would have been entitled to a life interest of the whole, both acquiesced in this Will and in proceedings being taken for mutation under its provisions.

Then it is said that it is curious that

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this man did not have any of the villagers at the place that he lived in for witnesses. Their Lordships do not consider that that fact by itself is at all of sufficient weight to get over the circumstances which they have already mentioned. It really becomes rather a matter of speculation to settle who are most likely to be taken as witnesses. The fact of the Will does not seem necessarily to depend on the exactitude of the story that is told by the Defendant. The truth is that, if there were only the evidence of the Defendant, it might be said that it was obviously interested. Their Lordships are therefore inclined to discard the evidence of the Defendant as liable to be attacked upon the ground of interest, and because weight must be given to the fact that he certainly did, in the matter of the pedigree, seem to have shown himself a most unreliable person. But that does not affect the actual facts, which have been already stated.

The only other ground is that the Will was not produced for probate, but those who are conversant with these matters say that that often is not done.

On the whole their Lordships do not see any reason why they should interfere with the judgment—which seems a very careful judgment—of the Court of Appeal, and they will humbly advise His Majesty to dismiss this appeal with costs.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitors: Messrs. Barrow, Rogers & Nevill for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SHAW.

LORD BLANESBURGH.

MR. AMEER ALI.

LORD SALVENSEN.

1924,

Heard, 14 and

15, February.

Judgment,

13, March.

MAHOMED RABIM-
TULLA HAJI JOOSAB,
Appellant,

v.

ESMAIL ALLARAKHIA,
Respondent.

Compromise decree—Condition that Plaintiff should pay a certain amount within given time to recover possession—Payment made in Court, if sufficient—Right of mortgagee or vendee of Plaintiff to pay—Payment by mortgagee, withdrawn to defeat right of vendee from mortgagor—Condition, if fails and how it may be made good.

By a compromise decree Plaintiffs were to have six months to pay a certain amount to Defendant and if payment was made within that time Plaintiffs were to recover possession, otherwise the suit was to stand dismissed:

Held—That though payment might have been made to the Defendant in person, the condition was equally satisfied by payment in Court, which in the circumstances was the appropriate mode of satisfying the condition.

That a mortgagee from the Plaintiffs had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless.

The deposit in this case made by the mortgagee within the allotted time was withdrawn by him with the object of defeating the claims of one E under a contract of sale (which was specifically enforced) made by the mortgagor in his favour.

Held—That the benefit of the deposit necessarily inured to all parties having an

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interest in the condition being performed. But the deposit having been withdrawn by the mortgagee, the only way to do justice between the parties was to allow E to make the deposit, such deposit to be regarded as made within time.

ESMAIL ALLARAKHIA v. DATTATRIYA RAM CHANDRA (1) *affirmed.*

Appeal from a judgment and decree of the High Court of Judicature at Bombay, dated the 22nd September 1920, which set aside an order of the Subordinate Judge of Thana, dated the 5th October 1918.

That order was made on an application by Dattatraya Gandhi for the return of money paid into Court by him to the credit of the Plaintiffs in suit No. 57 of 1914 and a counter application by the Respondent who opposed the withdrawal on the ground that it could not be made in defeasance of his superior rights. The Subordinate Judge sanctioned the withdrawal of the money but his order was set aside by the High Court.

The property in suit originally belonged to a Mahommedan named Balabhai who died leaving as his heirs his widow Banubai, three sons and three daughters, all infants. Banubai sold the property to a Marwari named Punamchand in 1907 and he in turn sold it to the present Appellant in 1911.

In 1914 Banemiya and his sister Putlibai, the surviving children of Balabhai, brought a suit to recover possession of their share, i.e., 10/16th of the property on the ground that the sale by their mother to Punamchand was without legal necessity. That contention was upheld by the trial Court and by the High Court on appeal, and a decree was passed on the 26th February 1918, that the Plaintiffs should recover possession of the land in suit on payment to the present Appellant, within

(1) I. L. R. 45 Bom. 987 (1920).

6 months, of certain sums representing the amount by which the estate had benefited from the sale during their minority.

Pending the decision of the High Court Banemiya, on the 21st July 1915, mortgaged his own share to Dattatraya Ramchandra Gandhi for Rs. 2,000 and he entered into the following transactions in regard to his own and his sister Putlibai's shares, viz. :—

On 15th September 1916 he sold a five annas share in the property (i.e., one-half of their interest) to Narayan Gandhi, a brother of Dattatraya : and

On the 10th June 1918 Putlibai having died in the meantime, he contracted to sell to the present Respondent his remaining interest in the property and to obtain for him an assignment of Putlibai's interest from her heirs.

A decree for specific performance of this contract was obtained by the Respondent on the 10th October 1918.

On the 3rd July 1918 Narayan Gandhi transferred the five annas share which he held to Motilal Ratansi, and on the 3rd August 1918 Motilal and Dattatraya agreed to transfer all their rights in the property to the Respondent.

On the 22nd August 1918 Banemiya had not made the payment stipulated for in the High Court decree of 26th February 1918 and to prevent the decree from becoming inoperative a sum of Rs. 4,000 was paid into Court by Dattatraya.

On the 3rd October 1918 Dattatraya's mortgage was redeemed and on the following day he applied to withdraw the money in Court.

This application was opposed by the Respondent who filed a counter application (the subject-matter of the appeal) praying that he might be brought on to the record as a party to the execution proceedings, and that Dattatraya should not

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be allowed to withdraw the money in Court.

He contended that the payment into Court had fulfilled the condition of the decree of 26th February 1918 which had been confirmed, and urged that the withdrawal of the money would nullify the decree and extinguish Banemiya's rights which he had acquired.

At the same time he offered either to pay the decretal amount to the Defendant Rahimtulla (the present Appellant) or to repay Dattatraya the amount of his deposit.

The Subordinate Judge by whom the applications were heard decided that Dattatraya was entitled to withdraw his deposit and made an order accordingly.

From that order the Respondent appealed to the High Court at Bombay and his appeal was heard by a Division Bench, consisting of Macleod, C. J., and Fawcett, J., who set aside the order of the Subordinate Judge and gave the Respondent liberty to deposit Rs. 4,000 in Court, such payment to be treated as made within the six months allowed by the decree of the 26th February 1918.

The report of the case in the High Court will be found in *Esmail Allarakhia v. Dattatriya Ram Chandra* (1).

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant.—The decree of 26th February 1918 really created an option under a decree analogous to a decree in a pre-emption suit. It declared that upon certain payment the Plaintiff should have certain rights.

No payment was made by the Plaintiff under that decree. A payment was made into Court by a third party.

No payment was made to the Appellant nor was any payment ever accepted by him.

(1) I. L. R. 45 Bom. 967 (1920).

Moreover, the Rs. 4,000 paid into Court was paid by Dattatraya not by the Respondent. The latter is not entitled to derive any benefit from the payment which may prejudice the Appellant; nor can the Appellant be prejudiced by any *interim* alienation on the part of Banemiya.

Sec. 52, Transfer of Property Act, 1882.

The High Court were in error in basing their decision on a comparison of equitable rights. No question of equity is involved.

Messrs. A. M. Dunne, K. C. and Douglas McNair for the Respondent.—Dattatraya was entitled to pay the money into Court under sec. 47 of the Civil Procedure Code.

[LORD BLANESBURGH.—The High Court decree suggests that the money should be paid to the Defendant, not into Court.]

The method of payment was immaterial.

Or. 21, r. 1 of the Civil Procedure Code, Act V of 1908, enables money payable under a decree to be paid into Court, and that method was adopted here with notice to the Plaintiff and Defendant.

By sec. 47 of the Civil Procedure Code of 1908 a representative of one of the parties to a suit may come in execution, and "representative" includes a mortgagee or assignee.

Civil Procedure Code, Or. 22, r. 10.

Sheo Narain v. Chunni Lal (2), *Madho Das v. Ramji Patak* (3), *Badri Narain v. Jai Kishen Das* (4) and *Paramananda Das v. Mahabir Dossji* (5).

Once the money was paid in by Dattatraya, the Plaintiff had a vested interest which he transferred to the Respondent.

Sir G. Lowndes, K. C., in reply.—Sec. 47 of the Civil Procedure Code only refers to a final decree. This was not a

(2) I. L. R. 23 All. 243 (1900).

(3) I. L. R. 16 All. 286, 291 (1894).

(4) I. L. R. 16 All. 483 (1894).

(5) I. L. R. 20 Mad. 378 (1896).

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final but a preliminary decree. *Md. Masihullah Khan v. Jarao Bai* (6).

The Respondent had only a contract for sale of a portion of the property. That did not give him a tangible interest in it so as to enable him to come in as a representative.

See sec. 54, Transfer of Property Act, 1882.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SALVESEN.—This is an appeal from a decree of the High Court of Bombay of the 22nd September 1920, which set aside an order of the Subordinate Judge of Thana, dated the 5th October 1918.

The Appellant derives such title as he has to the property in dispute from the widow of Balabhai, a Mohammedan resident in Bombay. When she sold the property, the widow professed to act for herself and as guardian of her minor children. The transaction was, however, challenged by Banemiya, the only son of Balabhai then surviving, and by others representing the rest of the family, by a suit raised in 1914 in the Thana Court, in which they claimed that the sale by the widow should be set aside in so far as the shares of the son and daughters were concerned. In that suit, which ultimately came to depend before the High Court of Bombay, Banemiya and his co-Plaintiffs, on the 26th February 1918, obtained a decree against the Appellant which is thus expressed:—

"The Plaintiffs will have six months within which to pay their share, i.e., 10/16th of the Rs. 1,250 and the Rs. 1,200, with added interest as directed in the lower Court's judgment."

"If within six months the Plaintiffs pay the sums due from them they are to recover possession of the land in suit. But if within that time the Plaintiffs do not pay

(8) I. L. R. 37 All. 226 (1915).

the sums due from them then the suit to stand dismissed with costs."

Prior to the date of this decree Banemiya had, on the 21st July 1915, mortgaged his share of the property to one, Dattatraya R. Gandhi, for Rs. 2,000. On the 15th September 1916, he had sold a 5 annas share to Narayan, a brother of Gandhi, who in turn transferred it to one Motilal Ratansi. Subsequent to the decree Banemiya contracted, on the 10th June 1918, to sell to the Respondent all his remaining interest in the property and undertook to obtain an assignment in his favour of the right, title and interest of the heirs of his sister who had died. By these transactions Banemiya, for himself and the other Plaintiffs (assuming he was authorised to act for them), deprived himself of all interest in the conditional decree of the 26th February 1918. In these circumstances the mortgagee, Dattatraya R. Gandhi, realising that the security which he held over the property would become valueless if the condition specified in the decree was not purified, on the 22nd August 1918, or four days before the money fell to be paid, presented an application in which on the narrative that Banemiya had failed to pay the sum required and that he estimated the sum at less than Rs. 4,000, prayed that the said amount might be ordered to be received for payment to the Appellant according to the High Court decree and paid to him. The money was duly deposited in Court and a notice to this effect was signed by Mr. R. B. Gogte, Sub-Judge.

No question has been raised, as to the sufficiency of the amount to satisfy the Appellant's claim nor is it open to doubt that the Appellant would have been entitled to uplift the whole sum of Rs. 4,000 or as much of it as represented the

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Rs. 1,250 and Rs. 1,200 with added interest which formed a first charge on the shares of Banemiya and his sister.

The Appellant, however, made no application for payment to him of the sum deposited. Instead of doing so he entered into an agreement, dated the 3rd October 1918, with the two brothers Gandhi, the substance of which was that in consideration of Rs. 5,000 paid by the Appellant to them, they agreed to withdraw the application under which the Rs. 4,000 had been deposited and to claim the return of the said sum to the depositor. In terms of this agreement, an application in the name of Gandhi was duly lodged on 4th October 1918 in the Court of the First Class Sub-Judge at Thana. The applicant prayed for the return of the deposit made by him on the ostensible ground that as the amount of his mortgage had been repaid there was now no possibility of his being involved in loss. The application was opposed by the Respondent. He maintained that the payment made by Gandhi had fulfilled the condition in the decree, and offered to pay the amount of Rs. 4,000 to the Appellant on the footing that such payment should be treated as equivalent to the payment made by Gandhi. The Sub-Judge overruled the Respondent's contentions and allowed Gandhi to take back the money and it was, in fact, uplifted by him. The Respondent thereupon appealed to the High Court, which set aside the order granting leave to Gandhi to take back his money and allowed Respondent an opportunity of paying the money within a specified short period, such payment to be treated as within the period of six months allowed by the decree of the 26th February 1918.

Various contentions were put forward by the Appellant in support of his appeal from this order : (1) He contended that on

a sound construction of the decree the sum that was provided to be paid by the Plaintiffs in that suit fell to be paid to the Appellant and that a deposit in Court did not satisfy the condition in the decree. Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the Appellant in person, which he accepted, it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition. (2) It was contended that a deposit made by another than a party to the suit did not satisfy the condition, and that the mortgagee, who was not a party, had no right in a question with the Appellant to make the deposit. Their Lordships agree with the learned Judges of the High Court in rejecting this argument for the reasons they state. They are further of opinion that the mortgagee had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the Plaintiffs in his favour he had acquired their rights, and the mortgage deed expressly authorises him to charge on the mortgaged property any expenses which the mortgagee might be required to make for his protection.

(3) Lastly, it was contended that the mortgagee had an absolute right to withdraw the deposit. If no other interests were in question but those of the mortgagee and the Appellant this would no doubt have been the case. But it cannot be overlooked that the real object of the application for the withdrawal was to defeat the claims of the Respondent who was the only other person that had an interest in the condition expressed in the decree being satisfied. Their Lordships

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think that the benefit of the deposit having been made before the expiry of the time limit necessarily inured to all parties having an interest in the condition being purified. The legitimate interest of the Appellant was to obtain payment of the sums to which he was preferably entitled and this was secured to him by the deposit. Just as the Plaintiffs' suit would have stood dismissed if the deposit had not been made, so equally the decree provided that if the sums in question were paid the Plaintiffs were to recover possession of the land in suit. The Respondent in virtue of the agreement of the 10th June 1918, of which he subsequently obtained a decree of specific implement, is now in right of this decree and entitled to enforce it against the Appellant. As, however, the money deposited by Dattatraya had been actually uplifted by him before the order of the High Court was made, the condition which the Court imposed on the Respondent appeared to be the only method by which the position which had been inverted by the Appellant's action could be restored so as to do justice between the parties. Their Lordships are accordingly of opinion that the decision of the High Court was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors : *Messrs. Ashurst Morris Crisp & Co.* for the Respondent.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 826 OF 1925.

C. C. GROSE, J.	}	ROBINDRA NATH DUTT,
1925,		Plaintiff,
Heard,		v.
25, March.		ABDUL AHAD & Co.,
Judgment,	}	Defendant.
26, March.		

Limitation—Summary suits under Or. 37 of Civil Procedure Code (Act V of 1908)—Limitation Act (IX of 1908), Art. 5—Such suits, if may be admitted after 6 months from the cause of action—Civil Procedure Code, sec. 128 (2) (f).

In an application for the admission under Or. 37 of the Civil Procedure Code of a plaint in a suit on a promissory note, the Master refused to admit the plaint as the suit was not brought within 6 months from the date when the debt became payable:

Ordered—That the plaint be admitted, as suits under Or. 37 are not governed by Art. 5 of the Limitation Act.

The facts of the case will appear from the judgment.

Mr. P. C. Basu, Counsel, for the Plaintiff.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS :—

C. C. GHOSE, J.—In this matter a point of some novelty has arisen. *Mr. P. C. Basu*, counsel on behalf of *Robindra Nath Dutt*, applies for admission of the plaint under Or. 37 of the Civil Procedure Code, the suit being one purporting to be laid under Or. 37 of the Code of Civil Procedure.

The cause of action has arisen on non-payment of principal and interest due on a promissory note executed by the Defendant so far back as the 29th July 1922. The executant of the promissory note undertook to repay the principal with interest at the rate of 12 per cent. per

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annum on demand. The Master, before whom the plaint was presented in the first instance, refused to admit it as a plaint under Or. 37 on the ground that the suit has not been brought within 6 months from the date when the debt became due and payable and he accordingly held that the plaint would not be admitted. As I understand the matter, the Master raised no objection to the admission of the plaint as a suit brought in the ordinary manner on the negotiable instrument, the period of limitation in respect of which is three years.

Mr. Basu urges that the suit should be treated as one under Or. 37 of the Code of Civil Procedure and he argues in the following manner. He says that under Art. 5 of the Limitation Act of 1877 the period of limitation in respect of suits under Chap. XXXIX of the Code of Civil Procedure, 1882 (which corresponds to Or. 37 of the present Code of Civil Procedure) was six months from the date on which the debt became due and payable but that there has been a material alteration in the language of Art. 5 of the present Limitation Act and that the effect of the alteration is that the period of six months prescribed therein is applicable now only to suits instituted under the summary procedure referred to in sec. 128 (2) (f) of the present Code of Civil Procedure and cannot be made applicable to suits under Or. 37. In other words, Mr. Basu's contention is that the period of limitation under the old Limitation Act in respect of suits coming within the category of suits referred to under Or. 37 of the Code has now been done away with and at present there being no other article in the Limitation Act specially applicable to suits under Or. 37, suits under Or. 37 must now be taken to be covered by the ordinary period of limitation, viz., a period of three years.

As I have said the point is of considerable novelty and although the Limitation Act was passed at the same time as the present Code of Civil Procedure and although as far as I am aware it has never been suggested up to the present moment that the limitation in respect of suits under Or. 37 of the Code of Civil Procedure is other than six months it is clearly incumbent upon me to examine Mr. Basu's contention having regard to the changes made in the Limitation Act.

Sec. 128 of the Code of Civil Procedure which relates to rules which may be made by the High Courts in respect of matters therein set forth occurs in Part X of the Code and the first section in that part, viz., sec. 121, enacts that the rules in the first schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this part. It would therefore seem to follow *prima facie* that the rules made under sec. 128 of the Code of Civil Procedure could only refer to amendments of the First Schedule to the Code and in particular to rules in respect of certain matters therein set forth. It would seem to follow further that rules made under sec. 128 (2) (f) of the Code of Civil Procedure cannot have reference to suits referred to in r. 2 of Or. 37 in respect of which rules for summary procedure have been made by the legislature itself and in respect of which no rules have been made by the High Courts under the rule-making power vested in them. That being so, in my opinion, subject to what may be urged by the Defendant when he appears in this suit, Art. 5 of the present Limitation Act cannot refer to suits under Or. 37 of the Code of Civil Procedure. It seems to me, however, that it was the intention of the legislature when they amended Art. 5 of the Limitation Act to prescribe a period

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of limitation of six months to all summary suits but that the intention of the legislature has not been expressed in clear and apt words in Art. 5 of the present Limitation Act, with the result that strictly speaking and subject to what I hear further in the course of this suit, suits under Or. 37 are not now governed by Art. 5 of the present Limitation Act. I am, therefore, compelled to say that I have no other alternative but to admit this plaint under Or. 37 of the Code of Civil Procedure. The plaint will, therefore, be admitted. I think the matter requires serious consideration by the legislature and I have been just now informed that the matter is awaiting consideration by the legislature.

The Plaintiff must pay his own costs of this application.

Babu Ratindra Nath Dutt, Solicitor for the Plaintiff

P. D.

[CIVIL REVISIONAL JURISDICTION.]

REF. No. 10 OF 1924.

<p>GREAVES, J. MUKERJI, J. 1925, 26, January.</p>	}	<p>NIRMAL KUMAR SINGH NOWLAKSHA, Applicant, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.</p>
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Income Tax Act (XI of 1922), secs 22, 23 (2)—Income Tax Officer not satisfied with return and documents produced by assessee, if bound to give notice to him to adduce further evidence—Provision, if mandatory or directory—Notice, if should specify points.

If the Income Tax Officer is not satisfied with the return submitted under sec. 22, he is bound under sec. 23 (2) of the Income Tax Act to serve upon the person who made the return a notice requiring him, on a day to be specified to produce evidence to support the return.

Per GREAVES, J.—Such notice may be waived.

Per MUKERJI, J.—The provisions of sub-sec. (2) to sec. 23 of the Act are mandatory.

Secs. 22 and 23 of the Act read together appear to be intended to give to the assessee two opportunities of supporting the return he has submitted.

Per GREAVES, J.—Sec. 23 (2) does not impose upon the Income Tax Officer any obligation to directly specify the points upon which evidence is to be given. It is a sufficient compliance with the provisions of the section if he gives notice to attend or notice to produce evidence in general terms.

Per MUKERJI, J.—The notice under sec. 23 (2) should, if possible, specify the points upon which the assessee has to produce evidence.

This was a Reference made by the Commissioner of Income Tax, Bengal, under sec. 66 (3) of the Indian Income Tax Act (XI of 1922) stating certain questions of law to the High Court for opinion.

The Respondent, Nirmal Kumar Singh Nowlaksha, who resided at Azimgunge, Murshidabad, carried on business in various commodities in six different places in Bengal and Behar. In pursuance of a notice issued by the Income Tax Officer of Murshidabad, he filed his return of income for 1922-1923, produced his accounts in support thereof, and furnished an abstract statement of profit and loss for reference, if necessary. For the purpose of computing the profits of the business, the Income Tax Officer accepted the total amounts of receipts under different heads shown in the statement, but in dealing with the expenditure incurred for earning the profits, he, in disregard of the original accounts, as also of the statement compiled therefrom,

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is alleged to have adopted an arbitrary method and allowed deduction by mere guess, thereby totally rejecting the debit side of the accounts. As a result of such calculations, the Income Tax Officer assessed the Respondent with an income of Rs. 1,02,236 and fixed the amount of income-tax and super-tax payable by the Respondent at Rs. 12,919.

Against this assessment the Respondent preferred an appeal to the Assistant Commissioner who, however, dismissed the appeal. Thereupon, the Respondent asked the Commissioner of Income Tax, Bengal, to submit certain questions arising out of the case for the opinion of the High Court under sec. 66 (2) of the Act, but the Commissioner refused to submit such a case for reference, holding that no question of law arose.

Thereafter, the Respondent obtained a rule from the High Court which was made absolute, and their Lordships (Mr. Justice Suhrawardy and Mr. Justice Chakravarti) held that the questions of law raised by the Respondent challenged "the very foundation of the assessment" and they "arose upon the proceedings adopted in the case," and directed the Commissioner to refer the two following questions for the opinion of the High Court: (1) Is it legal to make an arbitrary assessment in cases when a return was duly submitted, without giving a notice in terms of sec. 23 (2) of the Act for producing evidence; and (2) had the Income Tax Officer jurisdiction to make an assessment in the way it was done, without serving a notice under sec. 23 (2) after a return had been made? [Vide *Nirmal Kumar Singh Nowlaksha v. The Commissioner of Income Tax, Bengal* (1).]

The Commissioner of Income Tax, in
(1) 29 C. W. N. 28 (1924).

making the reference, stated that the answers were in the negative, and that it was true that no such notice as required under sec. 23 (2) was served. But as the assessee produced his accounts along with his return of income, which were examined for two days by the Income Tax Officer, in his opinion there had been a "technical non-compliance" with the provision of the law and this should not be held to invalidate the assessment.

Babu Surendra Nath Guha and *M. Nuruddin Ahmed* for the Government contended that the assessee had waived notice by his conduct and there had been a substantial compliance with the law.

Babus Tarak Chandra Chakravarty and *Prafulla Chandra Chakravarty* for the Applicant submitted that the provisions of sec. 23 (2) were mandatory, and the Income Tax Officer was bound to serve a notice requiring the assessee to produce evidence on "special points" to be stated by the officer if the latter had reason to believe that a return was either incorrect or incomplete. The Income Tax Officer had jurisdiction to make an arbitrary assessment under cl. (4) of sec. 23 if the assessee either failed to make a return or failed to comply with the terms of any notice either for production of evidence generally or on "special points." As there was no such notice given and, consequently, no default on the part of the assessee, the assessment was illegal.

The JUDGMENT OF THE COURT was as follows:—

GREAVES, J.—This is a Reference made to us by the Commissioner of Income Tax in accordance with a previous direction of this Court. The Respondent was called upon by the Income Tax Officer of Mur-

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shidabad to forward a return under the provisions of sec. 22 of Act XI of 1922. Considerable delay occurred in furnishing the return and extensions of time were granted on several occasions. Ultimately, on the 11th October the return was filed and so far as I have been able to ascertain this return which was filed by the *gomosthas* or servants of the Respondent was examined on the 12th and the 13th of October in the presence of the *gomosthas*. On the 13th of October an assessment was made upon the Respondent. It appears that the Respondent's return of the profits of his six businesses was accepted, but that the Income Tax Officer refused to accept the deductions which the Respondent sought to make in respect of the expenses of his business and made a percentage deduction from the profits to represent the legitimate deductions for expenditure incurred and we are told that this percentage was calculated without any relation to the actual facts of the expenditure incurred. An appeal was presented against the assessment to the Assistant Commissioner of Income Tax of the Burdwan Range and he upheld the assessment and the Commissioner refused to make a reference. An application was accordingly made to this Court and the Commissioner was directed to make the reference which is now before us. It is now necessary to turn to the provisions of the Act. Sec. 23 of the Income Tax Act provides that if the Income Tax Officer has reason to believe that the return made under sec. 22 is incorrect or incomplete he shall serve on the person who made the return a notice requiring him on a day specified therein either to attend at the office of the Income Tax Officer or produce or cause to be produced at the office any evidence on which the assessee relies in support of the return. Sub-sec. (3) provides that on the date

specified in the notice the Income Tax Officer after hearing such evidence as the assessee may produce and any other evidence which he may require on specified points shall by an order in writing assess and determine the sum payable on the basis of such assessment. Sub-sec. (4) provides for cases in which there is a failure to make a return under sec. 22 or failure to comply with the notice issued under sub-sec. (4) of sec. 22. The sub-section further deals with a failure to comply with all the terms of a notice issued under sub-sec. (2) of sec. 23. There is no doubt that if the Income Tax Officer is not satisfied with the return he is bound to serve the notice specified in sub-sec. (2). In the present case no such notice was served, but I think that the notice was waived. The return was made in person, as I have already stated, on the 11th of October and it was examined on the 12th and the 13th of October in the presence of the servants of the assessee. I cannot conceive that there was not considerable discussion at any rate with regard to the items which were disallowed and it must be that arguments were urged and reasons adduced by the servants of the assessee as to what items of expenditure should have been allowed. Apparently, no application was made by the servants of the assessee to adduce any further evidence, oral or documentary, with regard to the items disallowed and the only conclusion which I can draw is that no other evidence was available and that after the interview on the 12th and the 13th when the accounts were examined all matters were urged by the servants of the assessee which could have been urged against the disallowance. It has been urged before us that there is some obligation on the Income Tax Officer to serve a notice indicating the points on which evidence should be produced. I do

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not find any such indication in sec. 23. It is true that under sub-sec. (3) it is open to the Income Tax Officer, if he so desires, to require evidence to be produced on specified points but he is not bound to specify any point on which evidence is required, and in my opinion it is a sufficient compliance with the provisions of the section on his part either to give notice to attend or notice to produce evidence in general terms and in my view the reference to "all the terms of notice" in sub-sec. (4) means all the terms of the notice directed to specified points if the Income Tax Officer thinks fit to specify any special points on which he requires evidence. But as I have already stated, I do not think that the section imposes upon him any obligation to directly specify the points upon which evidence should be given. In my view, in the present case although no notice was served under sub-sec. (2) of sec. 23 as required by the Act this was waived and I think that the servants of the assessee were fully aware of all the matters in the return which were questioned by the Income Tax Officer and that they should not now be given any further opportunity of adducing evidence which they did not ask or desire to adduce either on the 12th or the 13th of October. But my learned brother takes a different view and as I do not think that this is a question upon which there should be a reference to a third Judge and, as I understand, he thinks that the assessee should have a further opportunity of adducing evidence with regard to the items which were disallowed, I do not think that I should stand in the way.

The result will be that this judgment and that of my brother Mukerji will be forwarded to the Commissioner in accordance with the provisions of sec. 66, sub-sec. (5)

in order that he may dispose of the case in conformity with the judgment.

MUKERJI, J.—This is a Reference made by the Commissioner of Income Tax under the provisions of sec. 66, sub-sec. (3) of the Income Tax Act, XI of 1922. The Reference has been made in pursuance of an order passed by this Court, on the 28th August 1924, in Civil Rule No. 478 of 1924. The circumstances under which the order was passed by this Court and the facts out of which the Reference arises have been set out in detail in the judgment just delivered by my learned brother and it will not be necessary for me to recapitulate them.

The Commissioner of Income Tax states in his reference that in the present case no notice under sec. 23, sub-sec. (2) was issued on the assessee because the assessee at the time of submitting his return produced along with it his evidence in support thereof, namely, his accounts. He states that the accounts were produced and examined for two days before the assessment was made; he further states that the assessee did not give the Income Tax Officer to understand that he had any further evidence in support of his return. He accordingly is of opinion that although there may have been a technical non-compliance with the provisions of sec. 23, sub-sec. (2), the issue of a notice was superfluous and that the procedure followed by the Income Tax Officer, though not in strict accordance with the provisions of the section, was not, under the circumstances of the case, either unreasonable or inequitable; and in that view of the matter he recommends that the assessment should not be held to have been invalidated.

It is conceded that so far as the provisions of sec. 22 of the Income Tax Act are concerned they have been duly complied with. It is stated, as I have already

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said, in the letter of Reference that the return was duly submitted and that accounts were also submitted in support of the return and also that the accounts were examined prior to the assessment for two days. The question under these circumstances is whether, after all this, it was necessary to give the assessee a further opportunity under the provisions of sec. 23, sub-sec. (2) to adduce any evidence in support of the return. The Commissioner seems to suggest the object of issuing a notice under sub-sec. (4) of sec. 22 is practically the same as that of issuing a notice under sub-sec. (2) of sec. 23. In this, however, I am unable to agree. Reading secs. 22 and 23 of the Act, it seems to me clear that the law intends that there should be two opportunities given to the assessee for the purpose of supporting the return which he has submitted. Under sec. 22 of the Act, he is given an opportunity to submit such accounts or documents as the Income Tax Officer may require. When a return is submitted under that section the Income Tax Officer may proceed to deal with the matter on the basis of the return and may not require the assessee to produce any further material or he may, as required by sub-sec. (4) of that section, call upon him to produce or cause to be produced such accounts or documents as the Income Tax Officer may require. Under sec. 23, sub-sec. (2), the law gives the assessee a further opportunity of producing any evidence on which the assessee may rely in support of the return. It is true that for two days in the presence of the assessee's officer the accounts were examined by the Income Tax Officer. At the end of those two days the proceedings, in my opinion, came to a stage at which sec. 23, sub-sec. (1) could be availed of if the Income Tax Officer was satis-

fied that the return made under sec. 22 was correct and complete, but not beyond that stage at all. After the examination of the accounts for two days during which presumably the assessee's officer had an opportunity of explaining the accounts to the Income Tax Officer, and I may take it also of producing such evidence as he could produce in order to show that the return was correct and complete, the Income Tax Officer had to determine whether he should proceed under the first paragraph of sec. 23. If he was of opinion that the return was correct and complete he could assess the income of the assessee on the basis of such return. Evidently, the Income Tax Officer was not of opinion that the return was correct or complete and therefore he did not think fit to proceed under sub-sec. (1) of sec. 23. When he came to be of that opinion, he should have proceeded under sub-sec. (2) of that section. The law provides that under those circumstances, before proceeding to make an assessment in accordance with his own judgment under the provisions of sub-sec. (4) of sec. 23, he should give the assessee an opportunity of producing further evidence. Under sec. 23, sub-sec. (2) when the Income Tax Officer has reason to believe that the return made under sec. 22 is incorrect or incomplete he is bound to serve upon the person who made the return a notice requiring him on a day therein specified either to attend at the Income Tax Officer's office or produce or cause to be produced any evidence on which such person may rely in support of his return. Under sub-sec. (3) of that section, if such evidence is produced, the Income Tax Officer after hearing such evidence as may be produced, and such other evidence as he may require, on specified points, shall assess the income of the assessee. Under

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sub-sec. (4) of sec. 23 if there is a failure to comply with all the terms of notice issued under sub-sec. (2) of sec. 23 the Income Tax Officer shall make the assessment to the best of his judgment. The intention of the law clearly is that if the Income Tax Officer makes up his mind not to assess the income on the basis of the return upon the ground that the return is not correct or complete the assessee is entitled to know the position and to have an opportunity of producing evidence in order to support the return.

A further question arises as to what should be the terms of a notice issued under sub-sec. (2) of sec. 23. The wording of the sub-section is to the effect that the notice issued under that sub-section should require the assessee either to attend at the Income Tax Officer's office or to produce or cause to be produced any evidence on which such person may rely in support to the return. That sub-section standing by itself would seem to indicate that a general notice calling upon the assessee to appear or to produce evidence or cause it to be produced is sufficient. On a perusal of sub-secs. (3) and (4) of sec. 23, however, it seems to me that ordinarily the notice that is to be issued under sub-sec. (2) should contain the points upon which the assessee has to produce evidence, if he thinks fit, for under sub-sec. (3) the expression "on specified points" appears to be governed not only by the word "required" but also by the word "produced" appearing in that sub-section; and in sub-sec. (4) dealing with the question of failure to comply with the terms of notice issued under sec. 23, sub-sec. (2), the legislature speaks of failure to comply with "all the terms" of the notice under that sub-section. Moreover, it seems to me, to be only fair that if an opportunity is to be given to an

assessee to produce evidence in order to show that the return submitted by him is correct and complete he should be told, if possible, specifically, what the points are upon which such evidence is to be produced. In the present case it is conceded that no notice at all was served upon the assessee under the provisions of sub-sec. (2) of sec. 23. I am not prepared to hold that because the assessee's officer was present at the office of the Income Tax Officer for two days at an earlier stage, there was a proper or substantial compliance with the provisions of the law; and with the utmost deference to the opinion of my learned brother, I am unable to hold that the failure of the assessee to produce any further evidence at that stage, can be construed as a waiver on his part to have a notice issued on him under sub-sec. (2) of sec. 23. The further opportunity, which the law allows the assessee by reason of the provisions of sub-sec. (2) of sec. 23, he has not had in the present case; and I am, therefore, of opinion that the non-compliance with the terms of that sub-section, which is admitted on all hands, has prejudiced the assessee.

Apart from all this the provisions of sub-sec. (2) of sec. 23, to my mind, are mandatory, and no appeal in respect of an assessment made under sub-sec. (4) of that section lies to the Assistant Commissioner. Under such circumstances there is no reason why the mandatory provisions of an enactment in a taxing statute like the Income Tax Act should not be strictly observed in the matter of making an assessment under its provisions.

I, therefore, think that our answer to the Reference that has been submitted to us should be that the provisions of sec. 23, sub-sec. (2) not having been complied with the assessment made has been invalidated

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and should be set aside and made over again in due compliance with the law.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 94 OF 1924

AND

APPEAL FROM ORDER

No. 136 OF 1924.

WALMSLEY, J.	}	SRIMATI TARUBILA
B. B. GHOSE, J.		DASI, Defendant,
1924,		Appellant,
Heard, 17 and 18,		v.
November and		SOURENDRA NATH
8 and 9, Dec-		MITTAR and ors.,
ember.		Plaintiffs, Respondents.
Judgment,		
18, December.		

Counsel's authority to compromise—English rule of practice, if applicable in this country, particularly in Mofussil—Civil Procedure Code (Act V of 1908), Or. 23, r. 3—Application to record adjustment—Lawful agreement—Compromise decrees—Appeal—Civil Procedure Code, Or. 32, r. 7—"Voidable" against all parties other than the minor, meaning of—Purdanashin lady—Agent's authority—Ratification.

An agent authorised to do a certain act cannot be held to be authorised to do another act in connection with the same business.

Any person seeking to bind a purdanashin woman by the act of her agent must give strict proof of such agency.

AZEEZONISSA v. BAQUR KHAN (5) and SABAT KUMARI v. AMULYADHAN (6) referred to.

Principles by which the Courts are to be guided in dealing with transactions by purdanashin ladies as applicable to the case of a compromise by a lady adverted to.

(5) 10 B. L. R. 205; 17 W. R. 393 (P. C.) (1872).

(6) 27 C. W. N. 629; s. c. 37 C. L. J. 501 (P. C.) (1922).

TACORDEEN TEWARY v. SYED ALI HOSSEIN (8), SUDISHT LAL v. SHEOBARAT KOER (10), ANNODA MOHINI v. BHUBAN MOHINI (11) and SHAMBATI v. JAGO BIBI (9) referred to.

A breach of the provision of sub-r. (1) of Or. 32, r. 7 of the C. P. C. does not render the compromise unlawful but only voidable at the option of the minor as provided in sub-r. (2) of the above rule.

Sub-r. (2) of Or. 32, r. 7 of the C. P. C. contemplates the case of a minor on one side ranged against adults on the other as regards the matter of compromise, and it can have no reference to the effect of any compromise between adults although a minor may be a party to the suit. The question as between adults must be governed by the general law and not by this sub-rule.

Semble:—The rule of practice in England regarding general authority of counsel to compromise a suit without reference to his client, which has its roots in different traditions and environments, should not be applied in this country, particularly in the Mofussil where people never hear of such practice.

Dictum of LORD HALSBURY in NEALE v. GORDON LENNOX (4) approved.

SHEPHERD v. ROBINSON (3), STRAUSS v. FRANCIS (1) and MATHEWS v. MUNSTER (2) referred to.

(1) L. R. 1 Q. B. 379 (1866).

(2) 20 Q. B. D. 141 (1888).

(3) [1919] 1 K. B. 474.

(4) [1902] A. C. 465, 469.

(5) L. R. 1 I. A. 192; 13 B. L. R. 427; 21 W. R. 340 (1874).

(6) L. R. 29 I. A. 131; s. c. 6 C. W. N. 682 (1902).

(10) L. R. 8 I. A. 39; s. c. I. L. R. 7 Cal. 245 (1881).

(11) L. R. 28 I. A. 71; s. c. I. L. R. 28 Cal. 546 (1901).

SRIMATI TARUBALA DASÍ v. SOURENDRA NATH MITTER.

This was an appeal preferred on the 15th April 1924 against the decree as also an order of the Subordinate Judge, Zillah Hooghly (Babu Hem Chunder Mitter), dated 31st March 1924.

Plaintiffs brought a suit (T. S. No. 21 of 1923) in the Court of the Subordinate Judge at Hooghly against the Defendant on the 12th April 1923 for partition of certain moveable and immoveable properties and for accounts. Plaintiffs' case was that they were entitled to a two-thirds share of all the joint properties and the Defendant was entitled to one-third; that the suit was instituted to have the said properties partitioned by metes and bounds and to get an account of the alleged liabilities of the Defendant's husband to the joint estate for his conducting the management thereof. The defence, *inter alia*, was that some moveable and immoveable properties were omitted from the plaint and that the properties in Sch. (ga) were not the separate properties of her husband. She denied her husband's exclusive management of the joint estate and asserted her right to the properties standing in the name of Parul Sundari, widow of Lal Behari Mitra, and also claimed an account of the liabilities of the Plaintiffs Nos. 1 and 3 for their management of the joint estate. The principal controversy between the parties was what properties the joint estate consisted of, and what was the extent of the liability to the joint estate on an adjustment of account.

On the 4th June 1923 an application was filed on behalf of the Defendant for appointment of a Receiver to the estate and Mr. N. N. Sircar, counsel, was engaged on behalf of the Defendant to argue the Receiver matter only. During the pendency of this application a petition was filed on the 15th September 1923 on behalf of the Plaintiffs with a memorandum

containing certain alleged terms of compromise of the whole suit signed by the Plaintiffs and by counsel for the Defendant and the Plaintiffs thereafter by a petition, dated the 21st November 1923, prayed to have the said compromise recorded under Or. 23, r. 3 of the Civil Procedure Code, and to pass a decree in accordance therewith. On the 24th November 1923 the Defendant filed a petition denying the allegations of the Plaintiffs, and stating, *inter alia*, that she was not aware of the circumstances in which her counsel came to sign the alleged terms of compromise or why, where and how he did it, that counsel had no express or implied authority to compromise the suit and that he was engaged only in the Receiver matter and not to conduct the suit, that she was not bound by what her counsel purported to do on her behalf which he did without her knowledge and instructions, that she never authorised her counsel or any other person including Babu Jitendra Nath Roy or Babu Anath Nath Roy to compromise the suit on the terms alleged or any other terms. It was further stated that the dispute as to what the joint estate consisted of was never settled and the subject-matter of partition was never ascertained, and that the alleged terms of settlement were vague, and unenforceable, and in so far as they dealt with the Defendant's rights they were highly prejudicial to her interest and she would never have agreed to the said terms. The Defendant therefore prayed that the alleged terms of compromise be not recorded or any decree passed in accordance therewith, and further prayed that the application for the appointment of a Receiver be disposed of at an early date. The Subordinate Judge heard evidence, both oral and documentary, and came to the conclusion that the compromise had

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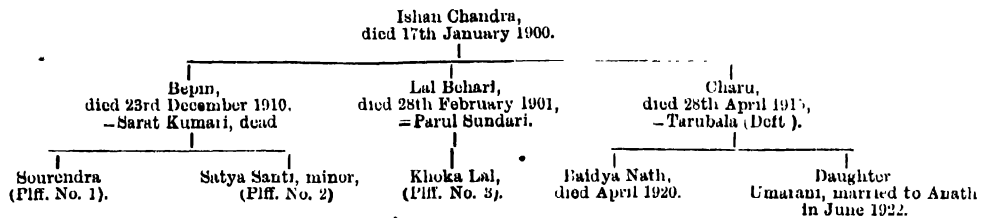
been arrived at and was binding upon the parties, and by his judgment, dated the 31st March 1924, ordered the compromise to be recorded and made a preliminary decree in accordance therewith so far as it related to the suit. The Defendant then preferred the present appeals to the High Court against the order recording the compromise and against the preliminary decree (M. A. No. 136 of 1924 and F. A. No. 94 of 1924 respectively).

Mr. B. L. Mitter, Sir P. C. Mitter, Babus Hemendra Chandra Sen and Surendra Nath Bose (I) for the Appellant.

Messrs. Langford James, S. C. Bose, Babus Ajit Ghose and Nandolal Bannerjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—These two appeals by the Defendant arise out of a suit for partition and accounts. One is from an order under r. 3 of Or. 23 of the Civil Procedure Code that a compromise be recorded, and the other appeal is from the decree passed in accordance with the compromise. The properties to be partitioned were valued at over 16 lacs of rupees and the claim for accounts was valued at Rs. 10,000. The parties formed a joint Hindu family governed by the Bengal School of Hindu law. The following genealogical table will show the position of the parties :—



Sourendra is guardian for his minor brother Satya Santi. Khoka Lal was a minor till February 1922 and his mother Parul Sundari was appointed guardian of his person and property during his minority under the Guardians and Wards Act. Tarubala took out Letters of Administration of the estate of her husband with the copy of his Will annexed after his death, and it is stated that she is entitled to the properties left by Charu as heir of her son Baidya Nath who had succeeded to the estate of his father. She has, however, been described as administratrix of the estate of her deceased husband in the plaint. All the persons lived in the family dwelling house at Hughli till March 1923. It is alleged that since the death of Baidya Nath disagreements began to arise between Tarubala and the other members of the family which eventually

became so acute that Tarubala found it impossible to dwell in the house at Hughli and felt compelled to leave it on 21st March 1923 and take shelter in the house of the father of her son-in-law. After leaving the family house the Defendant demanded partition of the family properties and accounts from the Plaintiffs through her attorney. Some correspondence passed between the attorneys of the Plaintiffs and the Defendant to which it is unnecessary to refer here. The Plaintiffs anticipating the Defendant filed the present suit in the Court of the Subordinate Judge at Hughli on the 12th April 1923. It appears that Jiten Roy, father of the son-in-law of the Defendant, who is said to be a wealthy man, has been financing the Defendant and acting in all matters in connection with the case on her behalf. There was no dispute

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between the parties as to the share. But the dispute was whether certain properties belonged to the joint family and whether the joint family was liable for certain debts alleged to have been incurred by Charu. There was also serious controversy about the liability to render accounts by the different parties. One of the matters in dispute was whether certain properties described in Schedule "ga" attached to the plaint, belonged exclusively to Charu or not. I need only refer to item No. 1 here, which is a colliery called Ranidih Colliery. Plaintiffs allege that this along with other properties in Schedule "ga" was Charu's exclusive property. It appears that it was heavily mortgaged when it was acquired and the equity of redemption at the time of the suit seems to be of very small value. Defendant alleges that it is joint family property. This involves the question as to how the purchase money for the property should be debited in accounting as it was paid by Charu out of the common till, and who would be liable to discharge the incumbrance on that property.

The Defendant made an application for the appointment of a Receiver on various allegations on the 4th of June 1923. This was strenuously opposed by the Plaintiffs. In the proceedings relating to the appointment of a Receiver four matters of dispute emerged as of primary importance. (1) The question of Ranidih Colliery already referred to; (2) a decree of Janakinath Roy against Charu and Sourendra for about a lac and fifty thousand rupees; (3) a claim by Hari Mohan Ghose for about fifty thousand rupees for which a suit is now pending on the Original Side of this Court; and (4) a sum of Rs. 50,000 obtained on an insurance policy on Charu's life, which sum was deposited in the common fund of the joint family. The dispute with regard to

items (2) and (3) was whether those debts are payable by the joint family or by the Defendant alone as representing the estate of Charu, and with regard to the 4th item, whether the Defendant was entitled to get the money. Mr. N. N. Sircar, a Barrister and an Advocate of this Court of considerable experience, was instructed on behalf of the lady to conduct her case with regard to the appointment of a Receiver. Jiten Roy and his son Anath, the son-in-law of the lady, were instructing Mr. Sircar on her behalf. Attempts were made by the relations of the parties to bring about a settlement. One such attempt made in July 1923 by Rai Mahendra Chandra Mitra Bahadur, the brother of Ishan Chandra, failed. Another gentleman Mr. S. M. Bose, Barrister-at-Law, a relation of the parties, approached Mr. Sircar with a view to settlement. It appears that by their efforts certain terms were arranged under which the Plaintiffs agreed to pay Rs. 5,72,500 to the lady in certain instalments on certain conditions, and the lady was to give up all claims to the properties. Apparently the lady did not agree to the instalments and the rate of interest proposed. In one of his letters to Anath Mr. Sircar wrote to him about the authority of counsel to compromise a case and said: "My client in the case is a *purdanashin* lady incapable of judging for herself. . . . So far as I am concerned, I have no desire to force a settlement which is unacceptable to client but I certainly reserve to myself the right to retire from the case." This was on the 28th August 1923. The case however was not settled and it appears from Mr. Sircar's letter to Jiten Roy of the 29th August that he was preparing himself for arguing the case in Court. The hearing of the matter of the appointment of a Receiver had commenced on the 18th August and partly heard on

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the 25th August. The arguments were resumed on the 1st September and continued till the 3rd. The order in the order-sheet of that date concludes thus :

He (counsel for Plaintiff No. 3) has not quite finished when there has been a talk of compromise and the case is adjourned to 5th September 1923 for further hearing." What happened on the 3rd September may be taken from the judgment of the Subordinate Judge as there is no dispute about those facts before us. He says : " On this date the Plaintiffs' counsel Mr. S. R. Das finished his arguments and then he sent a slip of paper containing certain terms of compromise from the Court verandah to Mr. Sircar who was inside the Court room. As will be seen later on, those terms were discussed and accepted on both sides with some modifications and then embodied in the memorandum, Ex. 1, which was signed by the defence counsel, Mr. Sircar, and also by the Plaintiff No. 1 for himself and the minor Plaintiff except the Plaintiff No. 3, Khoka Lal, as he was absent from Court that day. The terms were signed by Khoka Lal on the 4th September 1923 in the afternoon." Later on in his judgment he refers to the evidence of Mr. Sircar and proceeds thus : " From Mr. Sircar's evidence it is clear that the modifications suggested by Mr. Roy were then discussed with him by Messrs. Sircar and Das and ultimately the terms were settled and embodied in the memorandum and signed without any objection on any side." On the 5th September the order of the Court on a petition filed by the Defendant was thus :—" Defendant has filed a petition consented to by the Plaintiffs praying for time for amicable settlement of the suit. *Ordered*—That the suit be adjourned to the 15th September 1923 for further hearing. Parties do file the peti-

tion of compromise on that date." It is apparent that it was not the case of either party on that date that the suit had already been compromised. The order of the 7th September also shows that neither party asserted that the suit had already been compromised. Issues in the suit had not yet been settled. The order of the Court of the 10th September is also relevant, which runs thus : " Plaintiffs pray for a week's time for settlement of issues on the score that there has been a talk of compromise between the parties. *Ordered*—That the suit be adjourned to 15th September 1923 for settlement of issues. Parties do settle the issues on that date if the proposal for amicable settlement falls through." On the 15th September Defendant filed a petition praying for a date being fixed for the hearing of her application for the appointment of a Receiver alleging that the proposal for compromise had not been finally settled. On that date Plaintiffs filed a petition alleging that the terms had been settled and signed by the Plaintiffs and counsel for Defendant as mentioned above. They filed a copy of the memorandum of the terms signed by Mr. Sircar and the Plaintiffs and prayed that the compromise be recorded under Or. 23, r. 3 of the Civil Procedure Code. The Defendant raised various objections which were overruled by the Subordinate Judge and he ordered the compromise to be recorded and passed a preliminary decree in accordance with the compromise so far as it related to the suit. The Defendant appeals both against that order and the decree. Before dealing with the matters in controversy before us, I should refer to the observation of the Subordinate Judge as to the application of the rule in England regarding the authority of counsel to compromise a case without reference to his client. He appears to have held that the

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common law rule in England is applicable to this case, and he refers to the cases of *Strauss v. Francis* (1) and *Mathews v. Munster* (2). This is contested by the Appellant. Even if this case exactly came under the rule in those cases, I should be extremely reluctant to hold unless compelled to do so by any binding authority, that a rule of practice in England which has its roots in different traditions and environments should be applied in this country, particularly in the Mofussil where people never heard of any such practice. Moreover, there are two lines of cases in England as has been pointed out by Bankes, L. J., in *Shepherd v. Robinson* (3). I should rather follow, wherever possible, the *dictum* of Lord Halsbury, L. C., in *Neale v. Gordon Lennox* (4) where his Lordship said: "The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of justice is so far bound by the unauthorised act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard." I need hardly say anything further on the point as learned counsel for the Respondents in his careful argument did not rely upon the general authority of counsel to compromise a case.

I shall now deal with the other grounds urged on behalf of the Appellants and it would be convenient to take them in the inverse order of the argument of the learned counsel. The *first* is that the agreement or compromise is not "lawful" as mentioned in Or. 23, r. 3 of the Civil

Procedure Code, as no leave of the Court to enter into the compromise was obtained under Or. 32, r. 7 of the Code by the next friend of the minor Plaintiff. The argument is two-fold, (1) that on the terms of sub-r. (2) of r. 7, Or. 32, the agreement is voidable by the Defendant as against the adult Plaintiffs, as it provides that such agreement shall be voidable against all parties other than the minor. I cannot accept this argument as it seems to me clear that that sub-rule contemplates the case of a minor on one side ranged against adults on the other, as regards the matter of compromise, and that it can have no reference to the effect of any compromise between adults, although a minor may be a party to the suit. The question as between adults must be governed by the general law and not by this sub-rule. *Secondly*, it is said that the compromise was entered into by the next friend of the minor against the imperative provision of sub-r. (1) of r. 7 and therefore it was not "lawful." But sub-r. (2) lays down what should be the effect of a breach of the provision of sub-r. (1) and I do not think that the agreement can on that ground be set aside as not being lawful. I should state here that application was made by the next friend of the minor Plaintiff for leave of the Court to compromise on the terms set out, on the 12th January 1924 during the course of the argument in the Court below, and that Court sanctioned the compromise on behalf of the minor by the order under appeal. In my opinion this ground urged by the Appellant fails.

The *second* point taken is that the compromise is too vague and uncertain to be carried into effect and should not therefore be recorded. If the terms of an agreement are intelligible, and the agreement is binding between the parties, it cannot

(1) L. R. 1 Q. B. 379 (1866).

(2) 20 Q. B. D. 141 (1888).

(3) [1919] 1 K. B. 474.

(4) [1902] A. C. 465, 469.

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be avoided by one of the parties, on the ground that he does not understand whether a particular matter is included in those terms or not. It is urged that the four matters in dispute already stated have not been provided for, as to who should pay the encumbrance on the colliery and who should be liable to pay the debts due to Janakinath Roy and Hari Mohan Ghose and what would become of the money received on Charu's life insurance policy. In answer it is urged on behalf of the Respondents that the clauses of the agreement are quite clear, because those who take shares in an encumbered property must pay the encumbrance according to their shares and the liability to pay debts is provided for by cl. 2 of the agreement. If the debts referred to are shown in the books of the estate the Plaintiffs must pay them. Charu's insurance money is similarly provided for by cl. 3 as coming within the term "deposits." The Appellant argues that she never understood the matter to be so. This however is relevant with reference to the question of ratification which I shall deal with later on. But it cannot be said that the terms are unintelligible on that ground. In my opinion the contention of the Respondents should be accepted as sound that the terms of the agreement are not vague or indefinite.

I now come to the next two important questions: whether Jiten Roy had authority to agree to the compromise on behalf of the Defendant, and if not, did the Defendant ratify the agreement and is therefore bound by it. It seems to me that it cannot be doubted on the evidence that Jiten Roy did agree to the compromise and there was discussion between him and Mr. Sircar as to the terms before Mr. Sircar accepted them. It is immaterial to consider what led Jiten Roy to agree to those

terms. We have to decide whether the lady is bound by his acts. The Subordinate Judge says: "Mr. Jiten Roy was all in all in respect to the litigation throughout and he is so even at the present moment. So Mr. Jiten Roy had full authority to compromise and the counsel engaged by him was equipped with authority to enter into a compromise." It seems to me there is a confusion of ideas here. It is true that Jiten Roy was doing everything in the matter of conducting the litigation for the lady. A *pardanashin* lady in the situation of the Defendant must find some body to advance her money for her litigation and to act for her generally but it would be disastrous to the interests of *pardanashin* ladies if we were to hold that a *tadbirkar* or a financier is authorised on behalf of a *pardanashin* to compromise a suit on any terms he thinks fit and thereby bind the lady. There is in this case no direct evidence of Jiten Roy's authority and there was no communication from the lady to her counsel. The Defendant as well as Jiten Roy swear as to the absence of any such authority. The Subordinate Judge disbelieves them, but that cannot establish the positive fact of the existence of authority, which must be proved. The learned counsel for the Respondents supports the conclusion of the lower Court somewhat in this way: "Jiten had been doing everything for the lady; there was a talk of compromise on what has been called the 'cash basis,' Jiten had been doing everything in that connection and the lady was prepared to compromise on the 'cash basis' if the terms had been accepted by the Plaintiffs. Therefore Jiten had authority to compromise on certain terms, and it may be inferred from his conduct and other circumstances that Jiten had authority to compromise on other terms." I am

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unable to hold that such an inference can be legitimately drawn. An agent authorised to do a certain act cannot be held to be authorised to do another act in connection with the same business. It is quite true that Jiten was in a position to induce the lady to accept any terms he considered proper, but the decision must ultimately be hers. This was also realised by Mr. Sircar when he wrote to Anath Roy that his client being a *purdanashin* lady was not in a position to judge for herself. I am of opinion that Jiten Roy had no authority to consent to the compromise on behalf of the lady and that his acts cannot bind her. Any person seeking to bind a *purdanashin* by the act of her agent must give strict proof of such agency, and there is no such proof in this case. *Azeezoonissa v. Baqur Khan* (5). Appellant's counsel also relies upon the case of *Sarat Kumari v. Amulyadhan* (6) while the Respondents rely on *Bhutnath v. Ram Lal* (7). No case can be an authority as to the facts of another case which must be decided on the evidence in each case; but it is instructive that in *Sarat Kumari's* case (6) their Lordships of the Privy Council referred to the cases of *Tacoordeen Tewary v. Syed Ali Hossein* (8) and *Shambati v. Jago Bibi* (9) laying down the principles by which the Courts are to be guided in dealing with transactions by *purdanashin* ladies, as applicable to the case of a compromise by a lady. The last case as well as the case of *Sudisht Lal v. Sheobarat Koer* (10) which

(5) 10 B. L. R. 205; 17 W. R. 393 (P. C.) (1872).

(6) 27 C. W. N. 629; s. c. 37 C. L. J. 501 (P. C.) (1922).

(7) 6 C. W. N. 82 (1900)

(8) L. R. 1 I. A. 192; 18 B. L. R. 427; 21 W. R. 340 (1874).

(9) L. R. 29 I. A. 131; s. c. 6 C. W. N. 982 (1902).

(10) L. R. 8 I. A. 39; s. c. 1 L. R. 7 Cal. 245 (1881).

it followed, deal with transactions by agents of *purdanashins*. The cases on the subject are numerous and the principles are clearly laid down, but they are sometimes lost sight of. Even where a deed is executed by a *purdanashin* lady herself there must be evidence of clear understanding by her of what liabilities she is taking and what is being given to her [*Annoda Mohini v. Bhuban Mohini* (11)]. This should be borne in mind in connection with the question of ratification by the lady which I am next proceeding to deal with. The Appellant argues that the question of ratification could not be raised by the Respondents as this was never alleged in their petitions in the lower Court but was only started during the course of their argument in that Court. I will assume that the question might be raised. There is no direct evidence of any ratification by the lady. During the course of her examination she was not asked a single question on the point. But it is urged that the statements of Jiten Roy and Anath to Mr. Sircar prove beyond doubt that the lady had ratified the transaction; and that is also supported by the conduct of the lady. The facts are these: Jiten Roy enquired of Mr. Sircar more than once on the 4th September through the telephone, whether Khoka Lal, Plaintiff No. 3, agreed to the terms and said that the terms were very satisfactory and Khoka Lal would "cry off." Jiten also told him that the lady wanted Rs. 1,500 a month instead of Rs. 750 during the pendency of the partition proceedings as provided in cl. 7 of the memorandum of agreement. Mr. Sircar succeeded in inducing Khoka Lal and the other Plaintiffs to consent to pay Rs. 1,400 a month and certain other terms of that

(11) L. R. 28 I. A. 71; s. c. 1 L. R. 28 Cal. 545 (1901).

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clause were modified and put down in writing. Mr. Sircar then read out to Jiten the whole of the contents of the paper by telephone. Anath also saw Mr. Sircar on the 4th and Mr. Sircar asked him whether his mother-in-law was satisfied with the terms, particularly about cl. 5 relating to the Hooghly house. Mr. Sircar says : " I understood from him that there was no question of his mother-in-law or her party being dissatisfied but he told (me) that he was sure Khoka Lal would not sign it." Whether the wish of the Roys was the reason for the thought is not certain, but they deny having made all these statements. They have been disbelieved by the Subordinate Judge and there can be no doubt that they made those statements to Mr. Sircar. But to hold on the statements of such unreliable persons that the lady ratified the transaction would in my opinion be erroneous. They did not apparently give any straightforward answer to Mr. Sircar that the lady had consented to the compromise and the conduct of the Roys in this matter was tortuous. There is evidence that on the 4th Anath saw, under instructions from his father, a vakil of this Court and also a Barrister-at-Law with the object of getting out of the compromise, as they were under the belief that counsel had authority to compromise a suit on any terms he thought fit. On the 6th it was clear that Mr. Sircar understood that there was a desire to get out of the agreement on the part of the Defendant. Another fact should be mentioned. The lady was given a Bengali translation of the memorandum by Anath on the evening of the 3rd September. It is clear that she read it then. It is urged that it must be taken that she ratified the transaction, since she did not raise any objection to the terms except with regard to the monthly

payment of Rs. 750. Assuming that it was she who wanted more money, the question is whether she understood all the terms and whether they were explained to her clearly. Did she understand whether she would have to pay the debts of Janakinath Roy and Hari Mohan Ghose from her own share? Was she told whether those debts were shown in the books of the estate or not? We are informed that these are still matters in controversy. There is no evidence that she consented to the compromise with full knowledge of all these facts and full knowledge is essential on the question of ratification. Similarly it is difficult to say whether she understood that the life insurance money of Charu was given up, because in cl. 2 the word " deposits " has been mixed up with several other matters placed before and after it. I cannot therefore hold that there was any ratification by the Defendant of the proposed agreement. Further, there was no communication of any ratification by the lady to the Plaintiffs before she repudiated the transaction. It is clear that the Plaintiffs themselves represented to the Court on the 10th September 1923 that there had been a talk of compromise and never said before the 15th September that there had been a completed agreement to settle. Nothing had happened between the 10th and the 15th which altered the situation. There is therefore neither any direct evidence of ratification nor can any inference be drawn from the evidence that the lady did ratify the transaction with full knowledge of the facts and the effect of it. There cannot be any doubt that Mr. Sircar acted as he did under the belief, on the materials placed before him, that he was acting in the best interest of his client. But much as we may desire that this litigation should be compromised and feel that it would be ad-

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vantageous to the lady to settle it, I do not think we can force her to accept the terms which she does not like. It is regrettable that the advisers of the parties did not take the ordinary precautions which must be taken while dealing with *purdanashins*.

On these grounds I am of opinion that the order of the lower Court and the decree based on the compromise must be set aside and the case remitted to that Court to be heard from the stage it had reached on the 3rd September 1923.

As all this was brought about by the acts of her counsel and her advisers I think the Defendant should pay the costs of the proceedings in the Court below as ordered by that Court but the Defendant will recover her costs in this Court from the Respondents. The hearing-fee will be 10 gold mohurs in both the appeals. The costs of the supplementary paper-book incurred by the Defendant are not recoverable by her.

Let the records be sent down to the Court below at once.

WALMSLEY, J.—I agree.

H. C. S. *Appeal allowed;*
Case remanded.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.	}	KESHO PRASAD
LORD BLANESBURGH.		SINGH, Appellant,
MR. AMEER ALI.		v.
1924,		SHEO PARGASH
Heard, 12, May.		OJHA and ors.,
Judgment, 29, July.		Respondents.

Hindu law—Alienation by widow—Suit by presumptive reversioner for declaration that alienation invalid—Decree, if binds actual reversioner—Suit in a representative capacity—Civil Procedure Code (Act V of 1908), sec 11, Expl. VI.

A Hindu reversioner expectant on the death of a widow suing in the latter's life-

time for a declaration that an alienation by the widow did not bind the reversion does so in a representative capacity. A decree passed in his favour enures for the benefit of the person who actually succeeds as reversionary heir on the widow's death. A judgment adverse to the Plaintiff is equally binding on the actual successor provided the decree has not been obtained by fraud or collusion.

This was an appeal (No. 43 of 1923) from a decree of the High Court at Allahabad, dated the 9th July 1921, which affirmed a decree, dated the 3rd September 1918, of the Subordinate Judge of Ghazipur.

The suit was brought by the Respondents as reversionary heirs of Manohar Ojha, a Hindu governed by the Mitakshara, for possession of an estate named Pachrokhia, and other properties. The Appellant, the Maharaja of Dumraon who was the owner of an eight annas share in Pachrokhia, purported to have purchased Manohar's 2-2/3rd annas share. Manohar died without issue in 1856, and Oudha Koer who died in 1914 was his last surviving widow. In 1899 she mortgaged the property to Kishan Prasad and in 1903 Kishan Prasad obtained a decree for the sum then due on the mortgage and in execution purchased the share of Manohar in the property.

In 1904 Dhanai Ojha as next reversioner of Manohar brought a suit against the widow and Kishan Prasad for a declaration that the mortgage of 1899 and decree of 1903 were invalid and he obtained a decree and the declarations which he sought.

During Kishan Prasad's tenure of the estate he defaulted in payment of the Government revenue and his holding was purchased by the Dumraon Estate, who obtained possession in 1912.

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The widow Oudha Koer died in 1914 and the present suit was brought in 1917 to recover from the Dumraon Raja Manohar's share which he had purchased.

The Plaintiffs also claimed possession of certain culturable grove land which the widow had rented from the Appellant and of which he had taken possession as zamindar.

The Appellant in his written statement denied the Plaintiffs' title and contended that the widow had mortgaged the property to save it and that his title was good as being that of an auction-purchaser for arrears of revenue. The grove land he submitted was an occupancy tenancy of which he had been in adverse possession for more than 6 months after the widow's death; the claim was accordingly time-barred. The Subordinate Judge made a decree in favour of the Plaintiffs. He held that the widow might have made a more provident arrangement for meeting the liability of her estate and he negatived the contention that the mortgage was made for legal necessity. The title of Kishan Prasad was therefore bad and he was unable to pass any better title to the Maharaja of Dumraon.

On appeal the High Court (P. C. Banerji, Tudball and Sulaiman, JJ.) concurred with the Subordinate Judge in holding that no necessity was proved for the widow's alienation and they held that the suit in 1904 was brought by a reversioner in a representative capacity, as representing the whole body of reversioners, for the protection of the estate and Exp. VI of sec. 11 of the Code of Civil Procedure was applicable.

The judgment of the High Court is reported in I. L. R. 44 All. 19.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant.—The decree obtained by Dhanai Ojha was for

his own personal benefit and cannot operate as *res judicata* against the Appellant.

The present Plaintiffs were not parties to the former suit, nor do they claim title through the successful Plaintiff in that suit; they cannot therefore claim the benefit of the declaration then made. (Sec. sec. 43, Specific Relief Act, 1 of 1877). Similarly the Respondents cannot claim the benefit of Exp. VI of sec. 11 of the Civil Procedure Code, which provides that where persons litigate *bonâ fide* in respect of a common right all persons interested in such right may claim under them, because a reversioner has no "right," and the Respondents had no interest in 1904 in any "right" of Dhanai Ojha even supposing it to have existed.

There is no actual decision of the Privy Council that a decision in favour of one reversioner operates as *res judicata* in favour of another reversioner. *Venkata-narayana v. Subbammal* (1) was a decision under Or. 22, r. 3 and decided that the Petitioner there was the legal representative of the deceased within the meaning of sec. 2. The question of *res judicata* was not decided in that suit nor in *Janaki Ammal v. Narayanasami Aiyer* (2) on which the High Court relies.

The grove was land held for agricultural purposes and sec. 79 of the *Agrâ Tenancy Act, 1901*, is applicable and the right to sue is barred by limitation as no suit was brought within 6 months.

They referred to *Kaju Mal v. Salig Ram* (3) and *Murugesu Chetti v. Chinnathambi Goundan* (4).

(1) L. R. 42 I. A. 129: s. c. I. L. R. 38 Mad. 406; 19 O. W. N. 641 (1915).

(2) L. R. 43 I. A. 207: s. c. I. L. R. 39 Mad. 634; 20 O. W. N. 1323 (1916).

(3) L. R. 51 I. A. 11: s. c. 29 C. W. N. 395 (1923).

(4) I. L. R. 24 Mad. 421 (1901).



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Mr. Abdul Majid for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—This is an appeal against a decree of the High Court of Judicature at Allahabad of the 9th of July 1921, affirming a decree of the Subordinate Judge of Ghazipur of the 3rd of September 1918.

The suit was brought by the Respondents against the Appellant for the possession of certain lands described in the plaint. These lands consisted of a 2 anna 8 pie share in a permanently settled mouzah called Pachrokhia and a grove No. 526 in Mouza Balihar.

A decree has been passed substantially as prayed. The Defendant appeals.

The facts raising such questions in the suit as remain for their Lordships' consideration may be compendiously stated.

The Respondents have been found to be, as they alleged they were, the reversionary heirs of one Manohar Ojha who died without issue in 1856. At his death he was entitled as part of his estate to both properties in suit. In Pachrokhia, the Appellant, who is the present Maharaja of Dumraon, was also interested as the owner of an eight annas share.

Manohar Ojha left three childless widows him surviving. Oudha Koer was the last survivor of the three. She died in 1914. Thereupon, the succession to the estate of Manohar Ojha opened to the Respondents as his reversionary heirs. After Oudha Koer's death exclusive possession of both properties in suit was found to be in the Appellant under the following circumstances.

First, as to Pachrokhia. That Mouza was in great part diluviated, and in 1892 Oudha Koer, by this time in possession of

her deceased husband's share, failed to pay her proportion of the revenue assessed upon it. The Appellant had to pay the whole and he sued Oudha Koer to recover her proper proportion. In January 1894, a decree for Rs. 564-5-4 and interest was passed in his favour and to meet this debt Oudha Koer borrowed from one Kishan Prasad the amount due, viz., Rs. 587, together with a further sum, making in all Rs. 1,000, and she gave to Kishan Prasad by way of security a mortgage of Manohar Ojha's interest in Pachrokhia, dated the 25th of December 1899, for the whole sum borrowed.

On the 31st of March 1903, Kishan Prasad obtained a decree for the amount then due on his mortgage, and, in execution, he purchased, on the 16th of November 1904, Manohar Ojha's two and two-third annas share in Pachrokhia and he was placed in possession.

Later Kishan Prasad himself made default in payment of his share of revenue of Pachrokhia. The Appellant as before was compelled to pay the whole assessment. He then sued Kishan Prasad for his proportion and obtained a decree for Rs. 698-1-9. This decree he executed against the property, which was purchased by him at auction on the 20th June 1912. He was placed in possession, and he so remained at the death of Oudha Koer in 1914.

Such was the title to this property set up by the Appellant in the suit.

Their Lordships will deal separately with his claim to the Grove.

Now, so far, the question as to Pachrokhia, between the Respondents as reversionary heirs of Manohar Ojha and the Appellant would depend, primarily at least, upon the question whether the mortgage made by Oudha Koer, a Hindoo widow, in favour of Kishan Prasad, was

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for legal necessity so as to be binding on the estate of Manohar Ojha. And this issue was found in favour of the Respondents by the Subordinate Judge in the present suit.

In the High Court, however, the decision against the Appellant was based upon another ground, dependant upon a further fact which their Lordships now proceed to state.

Immediately upon Kishan Prasad obtaining, on the 31st of March 1903, as above mentioned, his decree for sale on the basis of his mortgage of the 25th of December 1899, Dhanai Ojha, the then presumptive reversioner to the estate of Manohar Ojha, sued Kishan Prasad and Oudha Koer for a declaration that the alienation to him by the widow was without legal necessity, that that alienation and the decree obtained thereon by Kishan Prasad could not affect Pachrokhia otherwise than for the life-time of the widow, and that neither was binding upon the reversionary body. And in that suit a decree was passed on 21st June 1904, in the Plaintiff's favour as against both the widow and Kishan Prasad.

This decree affects the Appellant's claim, it is said, in two ways. First of all, the purchase by the Appellant, on the 16th of November 1904, from Kishan Prasad was subsequent to the decree and it is suggested with great force that all that was then purchased by the Appellant consisted of the rights and interests of the widow in Pachrokhia, as these had been declared by the order of the 21st of June 1904. Their Lordships feel the force of this view but they do not propose to dispose of this part of the case in reliance upon it.

Like the Court of Appeal they will decide this question on the second ground which emerges from the decree of the 21st

of June 1904. In their Lordships' judgment that decree obtained by Dhanai as against the widow and Kishan Prasad is binding as between the parties to the present suit. No Court in India can now, as the Board think, go behind it, and, as it was therein held that the transfer to Kishan Prasad was not binding on the estate after the death of the widow, the Respondents as the reversionary heirs are, now in their Lordships' judgment, by virtue of that decree, entitled to possession. The Board agrees with the High Court in thinking that this result necessarily flows from the judgment of their Lordships in *Venkata Narayana v. Subbammal* (1) delivered by Mr. Ameer Ali. After pointing out that the Indian law permits the institution of suits in the life-time of the female owner for a declaration that an adoption made by her is invalid or an alienation effected by her is not binding against the inheritance, Mr. Ameer Ali there lays it down that the object of the second class of suit as of the first class

"is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. . . In both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights."

And the law is expounded in the same sense by their Lordships in the later case of *Janaki Ammal v. Narayanasami Aiyer* (2). They there observe as follows:—

" . . . a reversionary heir . . . is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life . . . a reversionary heir thus appeal-

(1) L. R. 42 I. A. 129; s. c. I. L. R. 38 Mad. 406; 19 C. W. N. 461 (1915).

(2) L. R. 43 I. A. 207; s. c. I. L. R. 39 Mad. 634; 20 C. W. N. 1323 (1916);

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ing to the Court truly for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion."

The operation

"is justified by the consideration of keeping the estate intact for the person to whom, as reversioner, it shall ultimately and at the proper time be determined that the estate shall go."

These words, in their Lordships' judgment, accurately describe in relation to this property the suit of Dhanai Ojha which eventuated in the decree of the 21st of June 1904. That decree is binding on the Appellant as the successor-in-interest of Kishan Prasad and of the benefit of it the Respondents are now possessed as the heirs of Manohar Ojha in the event "entitled to the reversion." To the present case the application of this principle is obvious and eminently salutary. It would be *per se* *exempli* that the Appellant, whose predecessor-in-interest failed on the same issue and was content to accept the adverse judgment against him, should be held entitled, years afterwards, when it might be, much of the relevant evidence was no longer available, to raise the same issue all over again. Their Lordships of course recognise that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which a Plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked.

But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion where, of course, further and different considerations would arise. In their Lordships' judgment there is no answer either in principle or in fact to the contention of

the Respondents that the decree of the 21st of June 1904 is conclusive of their claim to this property.

Their Lordships can dispose very shortly of the Appellant's claim to the second property in suit—the Grove No. 526. On the death of the widow the Appellant wrongfully took possession of it and he now contends that the property within the meaning of the Agra Tenancy Act is "land held for agricultural purposes" and that the period of limitation for a suit to recover it is, under sec. 79 of that Act, six months only. With the High Court their Lordships are of opinion that it is impossible to hold that that section has any application whatever to such a property as the Grove in fact is.

In their Lordships' opinion the appeal entirely fails: and they will humbly advise His Majesty that it be dismissed and with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Chapman, Walker & Shephard* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

VISCOUNT HALDANE
LORD BUCKMASTER.
LORD PARMOOR.

1923,
Heard, 11, 12, June.
Judgment, 6, July.

MA THAN THAN,
Appellant,

v.

MA PWA THIT,
Respondent.

Witness, credibility of—Appellate Court, if should reverse first Court's views thereon and when—Collusive award—Release given in pursuance of such award, if valid.

When the Judge, who has seen a witness and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of

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his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness and of the effect of his whole demeanour in the witness box.

A release granted in pursuance of an award which was found to have been obtained by collusion with the arbitrators is inoperative, the award itself being invalid.

This was an appeal from a judgment of the Chief Court of Lower Burma.

The facts of the case appear sufficiently from the judgment of the Board.

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Appellant.

Messrs. Montgomery, K. C. and B. Dubé for the Respondent.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD PARMOOR.—The question involved in this appeal is whether the Appellant is the *keittima* adopted daughter of Ko Po Kyaw and Ma Nyun. Ko Po Kyaw died at Edward Street, in Rangoon, on the 27th October 1916, leaving considerable property, worth from Rs. 1,00,000 to Rs. 1,50,000. Ma Nyun was the first wife of Ko Po Kyaw. The Appellant claims that she was adopted as *keittima* daughter in or about 1893, after the deceased and his first wife had been married 16 years without children. The Respondent was the fifth of the six wives of the deceased. She was married to the deceased about 1906, was divorced from him about six months later, but resumed living with him after the death of his sixth wife, and was living with him at the time of his death. The Appellant was born in 1892, being the daughter of Ma Gyoke, who was a cousin of Ko Po Kyaw, and married to Ko

Maung Gale. In the first Court the Judge, Mr. Justice Robinson, gave judgment in favour of the Appellant, but this judgment was set aside in the Court of Appeal.

At the trial of the action, there was a considerable conflict of evidence between the witnesses called respectively on behalf of the Appellant and Respondent. Mr. Justice Robinson held that implicit trust might be placed in the evidence of Maung So Naing, who had joined Ko Po Kyaw in business many years ago, and was the trusted manager of the business. He lived in Ko Po Kyaw's house, and was treated like a brother. There is no doubt of the importance of the evidence of Maung So Naing, but in the Court of Appeal his evidence was treated as unreliable, and the Chief Justice regrets that he cannot agree with the learned Judge's opinion of this man's impartiality. Before further considering the weight that should be given to the evidence of Maung So Naing, it will be well to state shortly certain facts which are either not disputed, or which, in the opinion of their Lordships, have been clearly established.

Ko Po Kyaw and Ma Nyun took the Appellant, when she was a child, aged about one year, away from her parents, and she lived in the house of Ko Po Kyaw in Edward Street for the next thirteen or fourteen years. She was taken to Ko Po Kyaw's house with the consent of the natural parents, and Ma Gyoke, the natural mother, states that she was taken to be adopted by Ko Po Kyaw and Ma Nyun; and this statement, which alone might be of little value, is in accord with the subsequent sequence of events. From the time that the Appellant was taken to the house of Ko Po Kyaw she appears to have been brought up publicly as his daughter, and to have lived openly and continuously

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under his protection. Their Lordships attach much importance to the evidence of Maung Po Lun, who kept a school in Rangoon, and who entered the Appellant's name in the School Register for the month of March 1899, according to the regulations prescribed for the students' names in native schools. The entry in the register was produced, and in the column in which the name and occupation of parent or guardian is entered, the name entered is:—

“ Maung Ba Kyaw,
Trader,
Edward Street.”

In the first place, it is clear that the name entered in the register is not the name of the natural parents, and secondly, their Lordships see no reason for doubting that the name actually entered was that of Ko Po Kyaw, although some doubt is thrown on this in the judgment in the Court of Appeal. Evidence was further given that the school fees were paid by Ko Po Kyaw during the time that the Appellant remained at school. A further exhibit from the school register was produced containing the entry of the Appellant's sister, Ma Than Kin, and in this case the name entered as parent is that of the natural father Mg. Mg. Gale. After the Appellant had left school she continued to sleep in Ko Po Kyaw's house until she was about fourteen years of age, after which she slept in the house of her natural mother Ma Gyoke. The reason given for this change is that, at this time, Ko Po Kyaw brought Ma Pwa Gya as a wife from Mandalay, and that, as she often went up to Mandalay, there was no female companion for the Appellant at Edward Street. The Appellant did not cease to visit Ko Po Kyaw's house frequently, and it is not suggested that, if she had become his adopted daughter, there was any action

which denoted repudiation of her adoption, even if such repudiation is possible; a matter not before their Lordships, and on which their Lordships give no opinion.

The facts stated above point directly to the conclusion that Ko Po Kyaw did adopt the Appellant as his *keittima* daughter. There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety, that the Appellant lived continuously in the house of Ko Po Kyaw from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. Moreover, there is evidence that the Appellant was given jewelry by Ko Po Kyaw to wear, and that Ko Po Kyaw also paid for her clothes. It is, however, suggested that this evidence is consistent with Ko Po Kyaw taking over the charge of the daughter of his relative, Ma Gyoke, and bringing her up in his house, as an assistance to his relative, but without the intention of adopting her as his *keittima* daughter. It is in reference to this suggestion that it becomes necessary to consider shortly the more important evidence adduced at the hearing. Undoubtedly, the most important witness is Maung So Naing. Mr. Justice Robinson, who saw Maung So Naing and heard his evidence, held that he was a credible witness, that is to say, a witness whose evidence could be trusted and who intended, within the best of his recollection, to tell the truth.

It may well be that although a witness is credible, yet that his recollection of a particular incident is not of such a character as to carry much weight, but in this instance, if Maung So Naing is to be accepted as a credible witness, it is hardly possible to reject the evidence which he gives as to the adoption of the

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Appellant. He states that he was present at the time of adoption, together with the members of the household of Ko Po Kyaw, and that a *kinmoodat* ceremony was performed, and that the *phoongyis* were invited and fed. If this evidence has been invented for the purpose of the case, Maung So Naing could not be regarded as in any sense a credible witness: and the Court of Appeal in rejecting it have directly differed from Mr. Justice Robinson on the question of credibility. In the Court of Appeal certain inconsistencies in the evidence of Maung So Naing were referred to in support of the view that he was not a credible witness, and he was further criticised for his conduct in withholding the key of the safe after the death of Ko Po Kyaw, but it appears to their Lordships that, in this respect, he acted rightly, and in accord with the responsibilities which he came under at the death of Ko Po Kyaw. Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness box. In the opinion of their Lordships there are no such exceptional circumstances in the present case, and accepting Maung So Naing as a credible witness, it is clear that the Appellant lived in the house of Ko Po Kyaw as his adopted daughter, and was publicly recognised by him as his adopted daughter. Evidence was given on behalf of the Respondent by three near relatives of Ma Nyun and by U. Maung Gyi, a Pagoda Trustee and rice miller, who

state that they knew nothing of the adoption of the Appellant by Ko Po Kyaw, but if the evidence of Maung So Naing is believed this negative evidence has little value.

There is a further special incident in the case to be considered. It is said that the dispute was referred by the parties to the arbitration of four *lugys*, or elders, each party nominating two elders, and that on the 10th November 1916, the parties executed an agreement of reference. There is a question as to what were the matters in dispute to which the deed of agreement referred, but on the same day the *lugys* made and delivered, what purported to be an award, finding that, under the Buddhist Dhammathats, the *keittima* daughter, Ma Than Than, is entitled to a fourth share of the estate of Ko Po Kyaw, or Rs. 30,000, and that in accordance with this award the Defendant, Ma Pwa Thit, shall, at the time of registration, in the Registration Office at Rangoon, pay the said sum in full into the hands of the *keittima* daughter, Ma Than Than. On the following day a sum of Rs. 30,000 was paid to the Appellant by the Respondent, and a deed of release was executed by the parties in the presence of witnesses. What is the effect of this award and release? Mr. Justice Robinson held that the arbitrators acted collusively with the Respondent, and that, by reason of such collusion, the award was invalid. It was not thought necessary to give any decision on this point in the Court of Appeal, but, in the opinion of their Lordships, the evidence is amply sufficient to maintain the finding of Mr. Justice Robinson. The result is that the award must be regarded as invalid. The finding in the award, that the Appellant was the *keittima* daughter of Ko Po Kyaw, is not a finding on which the Appellant can

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rely, and the payment of Rs. 30,000 under the terms of the award cannot be regarded as a valid release of the claims of the Appellant against the estate of Ko Po Kyaw. This sum is part of the terms of an award based on the collusive action of the arbitrators, and such an award is necessarily wholly invalid owing to their misconduct. Their Lordships are unable to attach importance to the subsequent inconsistent evidence given by the *luggs* at the trial, and agree with Mr. Justice Robinson that the release fails by reason of the decision that the award itself is vitiated by the collusive misconduct of the arbitrators.

In the result their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should be set aside with costs, and the judgment of Mr. Justice Robinson restored. In the Court of Appeal the Appellant is entitled to costs, and in addition to the ordinary costs, special advocate's fees of 10 gold *mohurs* a day for each day's hearing after the first. The Respondent will pay the costs of the appeal.

Solicitors: *Messrs. Sandersons & Orr, Dignams* for the Appellant.

Solicitors: *Messrs. Waterhouse & Co.* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 180 of 1924.

SUHRAWARDY, J.

DUVAI, J.

1925,

Heard 6 and

9, March.

Judgment,

9, March.

AGENT, BENGAL NAGPUR
RAILWAY, Defendant,
Appellant,

v.

BEHARI LAL DUTT,
Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), Or VI, r. 17—Suit by consignee against Agent of Railway

Company for loss of goods consigned—Suit, if may be ordered to proceed against Company Misdescription or suit against wrong party—Suit against wrong person—Substitution of proper party, after limitation, if should be allowed—Limitation Act (IX of 1908), sec 22—Remand order, appeal against—Civil Procedure Code (Act V of 1908), Or. XLI, r 23, Or. 43, r. 1 (n),

In a suit by a consignee for the value of goods lost brought against the "Agent Saheb Bahadur" of a Railway Company to which the same had been made over for carriage, the Agent for the time being who appeared objected inter alia that the suit as framed, viz., against him, did not lie, and that it was also barred by reason of non-compliance with secs. 75 and 77 of the Railways Act. The trial Court upheld all three objections in bar and dismissed the suit without determining the amount of the damages suffered. On appeal, the lower Appellate Court held that the intention of the Plaintiff was to sue the Railway Company and directed the plaint to be amended and the suit to proceed in the trial Court against the Railway Company. It also passed an order for refund to the Appellant of the court-fee paid on the memorandum of appeal:

Held—That the trial Court having dismissed the suit on preliminary points, the order of remand came within Or. 41, r. 23, C. P. C. and an appeal lay against the order under Or. 43, r. 1 (n), C. P. C.

Semble, per SUHRAWARDY, J.—The lower Appellate Court was not justified in remitting the suit without determining the other two preliminary questions on which the suit had been dismissed:

Held—That it was a case not of misdescription but of the substitution of one party for another who had been wrongly sued, and the amendment, having been applied for at a time when the suit, if instituted,

AGENT, BENGAL NAGPUR RAILWAY v. ~~BHARI~~ LAL DUTT.

would have been barred by limitation, should not have been granted.

RAMDAS SEIN v. MR. CECIL STEPHENSON (5), NUBBEN CHUNDER PAL v. MR. CECIL STEPHENSON (6), INDIA GENERAL STEAM NAVIGATION AND RAILWAY COMPANY, LIMITED v. LAL MOHAN SHAHA (4) referred to.

EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM (7) approved.

THE SARASPUR MANUFACTURING COMPANY, LTD. v. B. B. AND C. I. RAILWAY COMPANY (8) distinguished.

This was an appeal against the decree of Mr. Iradatullah, District Judge of Zilla Bankura, dated the 14th of March 1924, reversing the decree of Moulvi Ahmed Khan Bahadur, Munsif, 3rd Court, Bankura, dated the 19th of June 1923, and remanding the case for fresh trial.

The facts of the case will appear from the judgment.

Messrs. Nagendra Nath Ghose, Ramesh Chandra Sen and Jitendra Kumar Sen Gupta for the Appellant.

Messrs. Mohendra Nath Roy and Panchanan Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—This Miscellaneous Appeal (No. 180 of 1924) and the S. A. No. 1016 of 1924 are directed against the same decision of the Court below. There is also an application under sec. 115, C. P. C., filed by the Appellant against the same order. The explanation is that in the present unsettled state of the law the Appellant could not decide on the proper procedure.

The Miscellaneous Appeal was first

(4) I. L. R. 43 Cal. 441 (1915).

(5) 10 W. R. 366 (1868).

(6) 15 W. R. 534 (1871).

(7) I. L. R. 3 Pat. 286, [1924] Pat. 9 (1923).

(8) I. L. R. 47 Bom. 785 (1923).

heard and the learned Advocate for the Respondent took a preliminary objection on the ground that no appeal lay. The facts of the case are that the Plaintiff-Respondent brought a suit for recovery of the value of certain goods which he had despatched from one railway station to another on the Bengal Nagpur Railway but the goods were not delivered to the consignee. He accordingly raised the present suit and in the plaint filed the name of the Defendant was given as "Agent of the Bengal Nagpur Railway Saheb Bahadur." The Defendant Mr. Young, who was the Agent of the Bengal Nagpur Railway Company at the time, appeared and one of the objections that he took was that the frame of the suit was bad. He also took other objections under secs. 75 and 77 of the Indian Railways Act, on the grounds that the Plaintiff had not declared the value of the goods as he was legally bound to do at the time of the consignment and that notice under sec. 77 of the Indian Railways Act had not been properly served. The learned Munsif in the trial Court without going into the merits of the case held that the suit as framed was not maintainable. He also found against the Plaintiff on the objections under secs. 75 and 77 of the Indian Railways Act. In this view he dismissed the Plaintiff's suit. There was an appeal by the Plaintiff to the learned District Judge of Bankura who considered the first question only, namely, whether the frame of the suit was defective, and being of opinion that the intention of the Plaintiff was to sue the Railway Company, he directed the plaint to be amended and the suit to proceed. The learned District Judge did not consider the decision of the trial Court under secs. 75 and 77 of the Indian Railways Act. In the view which the learned Judge took he set aside the decree of the trial

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Court and passed the following order: "The case will go back to the lower Court for amendment of the title of the Defendant Company and for a fresh trial. The costs of the Court will abide the result of the suit. The court-fee paid on the memorandum of appeal should be returned to the Appellant." Against this judgment the Appellant has preferred this appeal and S. A. No. 1016 of 1924.

It is argued on behalf of the Respondent that this order not being an order under Or. 41, r. 23 is not appealable and therefore this appeal is incompetent. It is further argued that the decision of the first Court dismissing the Plaintiff's suit was not a decision upon a preliminary point. It is apparent that that Court did not enter into the merits of the case but held that the Plaintiff's suit could not proceed because of the defect in the description of the Defendant; and it also found that the suit was barred under secs. 75 and 77 of the Indian Railways Act. The decision of that Court must be taken to be a decision on a preliminary point and the remand order of the lower Appellate Court was one under Or. 41, r. 23, C. P. C. Moreover it has been held that though an order of remand passed by the Court of Appeal below may not be in strict accord with the provision of Or. 41, r. 23 read with Or. 43, r. 1 (n), if the order of the Appellate Court purports to be an order under Or. 41, r. 23, an appeal will lie from such an order. Strictly speaking, the order passed by the learned Judge is not in conformity with Or. 41, r. 23 but it is manifest from the form of his order that he purported to pass it under Or. 41, r. 23. One of the orders that he passed is that the court-fee paid on the memorandum of appeal should be returned to the Appellant and such an order can only be passed under sec. 13 of the Court Fees

Act in a case where the remand is made under Or. 41, r. 23. It has further been held that an order passed by the Appellate Court in the exercise of its inherent jurisdiction, which it possesses, as held in the Full Bench case of *Ghuznavi v. The Allahabad Bank, Ltd.* (1) is an appealable order even though it may not come within the scope of Or. 41, r. 23, *Bhairab Chandra Dutt v. Kali Kumar Dutt* (2) and *Radha Krishna v. Kamal Kamini* (3). In this state of the authorities I am of opinion that the appeal is competent. Even if there are any doubts as to the maintainability of the appeal in such cases the memorandum of appeal may be treated as an application under sec. 115, C. P. C., where we are satisfied that the order passed by the lower Court is not in accordance with law.

Now I come to the merits of the appeal. It has been observed that the trial Court found against the Plaintiff and held that the suit was not brought against the proper party and it is therefore not maintainable. It is not questioned before us that the description of the Defendant as appears from the plaint is not strictly in accordance with law. It cannot be disputed that the frame of the suit is in contravention of the provisions of Or. 29, r. 1 and Sch. A to the Civil Procedure Code and that it should have been brought against the Railway Company. In the case of *India General Steam Navigation and Railway Company, Limited v. Lal Mohan Shaha* (4) the suit was brought against two Companies through a certain person who was named as the joint agent of two Companies. It was held that the frame of

(1) I. L. R. 44 Cal. 929 : s. c. 21 C. W. N. 877 (F. B.) (1917).

(2) 87 C. L. J. 491 (1922).

(3) 85 C. L. J. 345 (1922).

(4) I. L. R. 48 Cal. 441 (1915).

AGENT, BENGAL NAGPUR RAILWAY v. BEHAR LAL DUTT.

the suit was in contravention of Or. 20, r. 1. But it is argued by the Respondent that the Plaintiff should be allowed to amend the plaint and to constitute the suit in accordance with the provisions of law. It appears that the plaint was filed on the 28th October 1922. The written statement on behalf of the Defendant was filed on the 2nd January 1923. In para. 2 of the written statement the Defendant pleaded that the suit as framed was not maintainable. On the 12th June 1923 the hearing of the evidence and the arguments of the pleaders were finished and judgment was reserved. Thereafter on that day the Plaintiff filed a petition for amendment of the plaint. The learned Munsif rejected it on the ground that the prayer could not be allowed at that stage. From these facts it cannot be said that the mistake that was committed was an accidental one. The Plaintiff adhered to his case that the suit as framed was in proper form until after the arguments of the pleader of the Defendant when he was convinced of his mistake and put in an application for the amendment of the plaint.

Besides the objection that the Plaintiff did not ask for any amendment of the plaint in time, there is another objection on the ground of limitation. It is conceded that the effect of now bringing the Railway Company on the record will be the addition of a party to the suit and sec. 22 of the Indian Limitation Act will apply. The Respondent, however, argues that the amendment sought was not to add a fresh party to the suit but to remove the misdescription of the Defendant in the plaint. The real question therefore is whether the present case is a case of misdescription of the Defendant or whether the amendment would practically add a party to the suit. On the authorities there is no room for controversy that the suit as

framed is not maintainable. In the case of *Ramdas Sein v. Mr. Cecil Stephenson* (5), the East Indian Railway Company was sued in the name of its Deputy Agent. It was held that the suit was bad and could not proceed in that form as the plaint did not disclose any cause of action against the Defendant. This decision was followed in the case of *Nubeen Chunder Pal v. Mr. Cecil Stephenson* (6). There also the same mistake occurred. It was held that the suit could not proceed against the Defendant. An attempt was made in that case to amend the plaint by bringing proper parties on the record. The learned Judges rejected the prayer on the ground that the Railway Company was no party to the suit and it could not be said that the Railway Company was likely to be affected by the result of the suit; and further under sec. 73, Act VIII of 1859, it was not imperative on the Court to admit parties to the record; it was discretionary to allow amendment and it was justified in not allowing the amendment at the stage at which it was asked. These cases are tried to be distinguished from the present case on the ground that in those cases the Defendant was sued by name as representing the Railway Company, whereas in the present case the Defendant is not named but described only as Agent of the Railway Company. In the case of *India General Steam Navigation and Railway Company, Limited v. Lal Mohan Shaha* (4) to which reference has been made, amendment was sought and allowed on the ground that as it was within time it would not affect the statute of limitation. Their Lordships observed thus: "In the circumstances of this case as no question of limitation arises even if the suit be

(4) I. L. R. 43 Cal. 441 (1915).

(5) 10 W. R. 366 (1868).

(6) 15 W. R. 534 (1871).

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taken to have been instituted against the two Companies on the date when the plaint was amended we are of opinion that the amendment may stand." From this observation it is clear that if the amendment was not asked for within the period of limitation the prayer could not be granted. In the present case there is no question that the application for amendment was made after the statutory period. All the cases on this point were considered by the Patna High Court in the case of *East Indian Railway Company v. Ram Lakhan Ram* (7) which is on all fours with the present case and where all the points arising in this case were discussed and answered in the way in which we propose to answer them in this case. Das, J., in his lucid judgment after quoting the words of Mookerjee, J., in the case of *India General Steam Navigation and Railway Company, Limited v. Lal Mohan Shaha* (4) said as follows: "I read the decision of Mookerjee, J., as containing a strong intimation to the effect that amendment would not have been allowed if any question of limitation arose in the case." In that case the Defendant was named "Agent of the East Indian Railway Company." Subsequently the Plaintiff sought to substitute the Railway Company for the Defendant originally sued. The learned Judge remarked: "When there were two known persons in existence and the Plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a Defendant on the ground that he all along intended to sue the other and that in substance he sued the other and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescrip-

tion." I fully agree with this observation. On behalf of the Plaintiff-Respondent much reliance has been placed on the decision in the case of *The Saraspur Manufacturing Company, Ltd. v. B. B. & C. I. Railway Company* (8). This case has been distinguished in the Patna case; and without accepting the correctness of that decision it may be distinguished from the present case on the following ground. In the suit brought in the Bombay case the Defendant was stated as the Agent of the Railway Company. But the Railway Company appeared, filed a written statement and raised several pleas in defence. They also objected that the Plaintiff's suit should not lie as it was filed against the Defendant's Agent. Some of the observations on which the decision in that case is based are that "the Defendant Company not only knew perfectly well that the various claims had been made against it, but also considered itself the party being sued. If the Company was not a party, no appearance should have been entered." Then again: "Though the description of the Company may not have been that which is in conformity with the Sch. A to the Code of Civil Procedure, nevertheless the Company was substantially on the record" "The Company was in substance the Defendant at the time the plaint was first filed and it was not a case of adding a new party, in which case, considerations of that kind might be relevant." I might hold the same opinion on the facts of that case. But here the Defendant at the very outset took objection to the frame of the suit and the Company, has not appeared or defended the suit. I hold that it is not a case of misdescription but if the amendment is allowed it will have the effect of adding a new party to the suit,

(4) I. L. R. 43 Cal. 441 (1915).

(7) I. L. R. 8 Pat. 230; [1924] Pat. 9 (1923).

(8) I. L. R. 47 Bom. 765 (1923).

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and sec. 22 of the Limitation Act will apply.

Another case has been referred to by the Respondent, viz., the case of *Nistarini Dasya v. Sarat Chandra Majumdar* (9). I had occasion to refer to that case in a recent judgment and with reluctance to follow it and tried to distinguish it, but that decision has no bearing on the present case. The view which the learned Judges took in that case was that the real Plaintiff in the suit was the son and that the suit as originally framed was for the benefit of the real Plaintiff; and therefore they thought that by the amendment of the plaint by bringing the real Plaintiff on the record there was substantially no change in the frame of the suit.

On the above considerations I am of opinion that the Plaintiff's suit as brought is incompetent and must be dismissed.

The order of the lower Appellate Court is also open to criticism on the ground that the Court was not justified in remitting the case to the trial Court after setting aside its decision on one of the points decided by it. The learned Judge should have gone into the questions decided by the first Court under secs. 75 and 77 of the Indian Railways Act. But as in my judgment the suit is defective and must be dismissed I do not consider this point any further.

The result of the foregoing conclusion is that this appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs.

It is not necessary to pass any order in second appeal No. 1016 of 1924.

DUVAL, J.—I agree with the judgment of my learned brother just delivered. It appears to me that there are only two points in this case—the first is whether

there is an appeal in this case and the second is whether as a matter of fact in the circumstances of this case the application to substitute the Company for the agent filed at such a late stage can legally be allowed. As to the first point, it appears to me to be perfectly clear that whatever else the learned District Judge might have decided he really intended to decide only one point, namely, the preliminary point; and it is also clear that the learned Munsif in the first Court did only decide the preliminary point, that is to say, he took no evidence of the fact as to whether there was any loss occasioned to the Plaintiff. I hold therefore that an appeal does lie to this Court against the order of the District Judge.

As to the second point, the weight of all the authorities is to the effect that substitution cannot be made at a late stage of the case. I had the plaint and written statement read to me and it appears quite clear that this objection was taken at the very first stage of the case. No attempt was made to rectify the mistake till at the very last stage of the case; and the first Court was right in dismissing the application. All the authorities except the decision in the case of *The Saraspur Manufacturing Company, Limited v. B. B. & C. I. Railway Company* (8) are in favour of this view. In the Bombay case, however, permission for substitution was given owing to the special circumstances of the case which do not apply to the present case. I refer to this case because the learned Advocate for the Respondent rested on it his whole case to justify the order of the District Judge. In this view I agree that the appeal must be allowed, the order of the District Judge vacated and that of the Munsif restored with costs of all Courts.

AGENT, BENGAL NAGPUR RAILWAY v. BEHARI LAL DUTT.

It is not necessary to pass any order in S. A. No. 1016 of 1924.

N. G.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1378 of 1922.

<p>SUHWARDY, J. COMING, J. 1925, Heard, 8 and 9, January. Judgment, 9, January.</p>	}	<p>BEJOY CHAND MAHATAB, Plaintiff, Appellant, v. KALI PRASANNA SEAL and ors., Defendants, Respondents.</p>
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Transfer of Property Act (IV of 1882), sec. 106
—Joint tenants—Notice to quit addressed to and served on one, if binds others.

In order to bind even a joint tenant, the notice to quit must be addressed to and served on him in one of the ways mentioned in the second clause to sec. 106 of the Transfer of Property Act, e.g., either on him personally or to one of the family or servants or affixed to a conspicuous part of the property.

The question whether service of notice on one of the joint tenants is sufficient notice on the other tenants is a question of fact.

Held—That where no notice was addressed to one of the joint tenants, the mere service of notice upon the other joint tenants is not a sufficient notice to quit according to law.

HARIHAR BANERJEE v. RAM SHASHEE RAY (1), MACARTNEY v. CRICK (2), DOE v. WATKINS (3) and RAJONI BIBI v. HAFISONNESSA BIBI (4) discussed.

This was an appeal against the decree of Babu Nani Gopal Mukerjee, Additional

Subordinate Judge of Zillah Burdwan, dated the 31st of March 1922, affirming the decree of Babu Rupamay Chatterjee, Acting Munsif, Additional Court at Kalna, dated the 25th of May 1920.

The facts of the case material to this report will appear from the judgment.

Dr. Dwarka Nath Mitter (with Babu Sarat Kumar Mitter) for the Appellant.—The principal Defendants form a joint Hindu family and service on one of them is service on all. *Harihar Banerjee v. Ram Shashee Ray* (1) is an authority for it. Quotes from the judgment (p. 481). So the Defendant No. 9 must be deemed to have been duly served. In the case of *Macartney v. Crick* (2), the notice was addressed to one of the joint tenants. In *Doe v. Watkins* (3) notice was served on one of the joint tenants and that was considered good service on the other who lived elsewhere. In the case of *Rajoni Bibi v. Hafisonnessa Bibi* (4) notice was served on one of the tenants.

Babu Harendra Nath Mukherji for the Respondents.—The observation of their Lordships of the Judicial Committee must be read with reference to the facts found. In that case it is found that notice was addressed to all the principal Defendants. In the present case the Defendant No. 9 was totally ignored as a tenant and no notice was addressed to him. The expression "intended to be bound" in sec. 106, Transfer of Property Act, clearly indicates that the notice must be addressed to every tenant, for one to whom notice is not addressed at all cannot be said to be intended to be bound by it. Sec. 106, Transfer of Property Act, lays down that

- (1) L. R. 45 I. A. 222; s. c. I. L. R. 48 Cal. 458; 23 C. W. N. 77 (1918).
- (2) 5 Esp. 196; 8 R. R. 848 (1805).
- (3) 7 East 551; 8 R. R. 670 (1806).
- (4) 4 C. W. N. 373 (1900).

- (1) L. R. 45 I. A. 222; s. c. I. L. R. 48 Cal. 458; 23 C. W. N. 77 (1918).
- (2) 5 Esp. 196; 8 R. R. 848 (1805).
- (3) 7 East 551; 8 R. R. 670 (1806).
- (4) 4 C. W. N. 373 (1900).

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the vicarious tender or delivery must be at the residence of the tenant. Here the finding of fact is that Defendant No. 9's residence is at Calcutta, not at Kalna. In all the cases cited, the notice was at least addressed to the tenant intended to be bound by it. In *Marcartney v. Crick* (2), the written notice was addressed to both the tenants. Oral notice bears no analogy to the Indian law. Whether the notice reached the Defendant No. 9 is a question of fact (Foa on Landlord and Tenant, p. 605). Here the finding is that the notice did not reach and could not reach the Defendant No. 9.

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J.—The suit out of which this appeal arises was one for ejectment after service of notice to quit on the Defendants. The Court of first instance found that the Defendants were permanent tenure-holders and in that view dismissed the Plaintiff's suit. The Plaintiff appealed and the lower Appellate Court was invited by both the parties to try the propriety and legality of the service of notice before going into the question of the status of the Defendants. The learned Subordinate Judge found that the notices were not duly served and dismissed the suit on that ground.

The Plaintiff has appealed to this Court and the only ground taken before us is that in the circumstances of this case it should have been held that the notices were legally served. On this point three grounds were taken before the lower Appellate Court. The first is that the Defendant No. 1 was the *karta* of the joint family and the service of notice on him was sufficient in respect of all the members of the family including the Defend-

ant No. 9, on whom notice was not proved to have been served. The second ground is that Defendant No. 1 being the registered tenant service on him alone was sufficient, and the third is that the Defendants being all tenants in common service of notice on one of them should be taken as service on all. The first two grounds have been finally disposed of by the learned Subordinate Judge by coming to certain findings of fact which cannot be challenged in second appeal. The learned Judge has found that Defendant No. 1 was not the *karta* of the family and that he was not the sole registered tenant in the Plaintiff's *sherista*. The ground which is pressed before us is the third ground, namely, that all the Defendants being tenants in common, or, more properly, joint tenants, service of notice on any one of them is good in law. The learned Subordinate Judge observes that it was virtually admitted and was proved, that no notice to quit was ever served on Defendant No. 9 who was all along ignored though his brothers were treated as tenants and that he was subsequently added as a Defendant in the suit. In support of the view urged by the Appellant reliance has been placed on the decision of the Judicial Committee in the case of *Harihar Banerjee v. Ram Shashee Ray* (1). The facts of that case are that the Plaintiff's *gomosta* had sent to each of the Defendants by registered letters addressed to them at their addresses duplicates of the notices signed by all the Plaintiffs. For this he received receipts of registration. The peon of the Post Office knew all their houses and got from all of them receipts for the letters delivered. The Munsif, however, held upon the evidence that there was no proof of

(1) L. R. 45 I. A. 222; s. c. I. L. R. 46 Cal. 458; 23 C. W. N. 77 (1918).

(2) 5 Esp. 196; 8 R. R. 848 (1806).


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service of notice to quit on any of the Defendants other than Defendants Nos. 1, 4 and 5. Their Lordships of the Judicial Committee examined the evidence on the point on the record and in their Lordships' view the evidence of delivery of notice to quit on all the principal Defendants was adequately proved and constituted good service on them within the meaning of sec. 106, Transfer of Property Act. In the course of their judgment their Lordships observe that "a notice under sec. 106, Transfer of Property Act, may be served either personally or to one of the family or servants of the person intended to be bound by it at his residence, or if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere, the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. The procedure in the case of joint tenants is that each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants." Their Lordships relied upon some of the English cases which will be considered later on. In this case it has been found by the learned Subordinate Judge that the place of residence of Defendant No. 9 was in Calcutta and not at the place where the notice was served. The only question therefore for consideration is whether service of notice upon Defendant No. 1 or any other Defendant can be taken in law as good service on Defendant No. 9. Sec. 106, Transfer of Property Act, requires that every notice under that section must be in writing and tendered or delivered over personally to the party who is intended to be bound by it or to one of the family or servants at the

residence, or if such tender or delivery is not practicable it can be affixed to a conspicuous part of the property. Reading the section as it stands without any help of the comments upon it by decided cases, it is manifest that it was the intention of the legislature that the notice must be served on the person who is intended to be bound by it. The notice must be addressed to and served on the person intended to be bound by it in any one of the modes suggested by the section. The section does not make any exception or lay down any special or peculiar procedure in the case of joint tenants. The law as to notice to quit is contained in sec. 106, Transfer of Property Act and it is not necessary to travel beyond it. Great stress has been laid upon the observation of the Judicial Committee in *Harihar's* case (1) and on the cases referred to therein for the view that in the case of joint tenants it is sufficient to serve the notice to quit on one of them alone and the service of notice on one of them is binding on the other tenants. We do not think that this contention can be sustained in view of the law laid down in those cases. In the Privy Council case, as we have observed, the notices were addressed to all the Defendants and their Lordships found that it was served on all of them. In the case of *Macartney v. Crick* (2), one of the cases referred to by the Judicial Committee, an oral notice to quit was given by the landlord to one of the two brothers who were joint tenants. This was followed by a written notice, dated the 8th April served on both the tenants. The suit in ejectment was resisted by the Defendants on the ground that the time allowed by law was not observed and that parole

(1) L. R. 45 I. A. 222; s. c., I. L. R. 46 Cal. 458; 23 O. W. N. 77 (1918).

(2) 5 Esp. 196; 8 R. R. 848 (1805).

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notice on one was not binding on the other. Lord Ellenborough held that the written notice was not necessary and, with regard to the oral notice, as the two Defendants appeared to hold the lands jointly, service of notice to quit on one was sufficient and that the notice given on the 8th April was within the statutory period. This case proceeded upon the English law then in force according to which oral notice was sufficient, but the law under the Transfer of Property Act is different. That case is therefore no authority for the view that if no notice is addressed to one of the joint tenants, the mere service of notice upon the other joint tenant is a sufficient notice according to law. The next case to which reference is made in the judgment of the Judicial Committee in the case of *Harihar Banerjee v. Ram Shashee Ray* (1) is the case of *Doe v. Watkins* (3). In that case also it appears that the notices to quit were addressed to both the Defendants who were joint tenants and partners of the business. The notices, however, were served through one of the tenants living on the premises. On these facts it was held that the notice to quit served on one of the two joint tenants on the premises, who held under a joint demise, is evidence that the notice reached the other who lived elsewhere. That case also is no authority for the view that it is not necessary to address a notice to a joint tenant and that service on any one of them is sufficient in law.

The case of *Doe v. Watkins* (3) is interesting in that it has been held in it that the question whether service of notice on one of the joint tenants was sufficient notice on the other tenant, who was not

served, is a question of fact and must be left to the jury. In the present case the learned Subordinate Judge has come to a finding of fact on evidence that there was no service or tender of notice to Defendant No. 9, nor was any notice addressed to him. The view we take is not supported by any reported authority in a direct form; but it is indirectly supported by the decision in the case of *Rajoni Bibi v. Hafsionnessa Bibi* (4). In that case a notice containing the names of all the joint tenants was delivered to one of the Defendants and the objection taken was that there ought to have been as many copies of the notice as there were tenants. This objection was overruled in the view that the notice was addressed to and contained the names of all the tenants, though it was served on one of them. On a plain reading of sec. 106, Transfer of Property Act, and on the consideration of the authorities on this point, we are of opinion that it is necessary in order to bind even a joint tenant that the notice must be addressed to and served on him in one of the ways mentioned in the second clause of that section. It should be addressed to him and may be served either on him personally or to one of the family or servants or affixed to a conspicuous part of the property. It is difficult to hold that a person whose tenancy or existence is ignored and not recognised, as was Defendant No. 9 in the present case, is a "party to be intended to be bound," by the notice under sec. 106, Transfer of Property Act. The notice in this case on Defendant No. 9 not having been thus served, the lower Appellate Court was justified in holding that the service of the notice was not good and sufficient in law to determine the tenancy.

(1) L. R. 45 I. A. 222: s. c. I. L. R. 46 Cal 456; 23 C. W. N. 77 (1918).

(3) 7 East 551; 8 B. R. 670 (1806).

(4) 4 C. W. N. 573 (1900).

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* In this view of the law the appeal fails and is dismissed with costs.

CUMING, J.—I agree.

H. N. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

NO. 1375 OF 1922.

SUHRWARDY, J.	}	SHAIKH TALEB ALI,
DUVAL, J.		Defendant, Appellant,
1925,		v.
Heard, 18 and		SHAIKH ABDUL
19, February.		REZACK and anr.,
Judgment,		Plaintiffs,
19, February.		Respondents.

Hindu law—Succession to stridhan property of degraded woman Point rebuttable by evidence not taken in the trial, if can be raised in second appeal.

Succession to stridhan property of a degraded Hindu woman is to be governed by the ordinary Hindu law of inheritance and a daughter is not to be preferred to the son in the line of succession. Under the Dayabhaga School, the son succeeds in preference to the married daughter.

HIRA LALL SINGHA v. TRIPURA CHARAN ROY (1) followed.

The presumption that a Hindu migrating from one place to another carries with him his personal law is a rebuttable one and where the Defendants did not attack the Plaintiffs' title on the ground of applicability of the Mitakshara law and the Plaintiffs were unable to adduce any evidence on the point the Defendants were not allowed to raise the point in second appeal.

This was an appeal against the decree of S. N. Ray, Esq., 1st Additional District Judge of Zillah Midnapore, dated the 5th of May 1922, reversing the decree of Babu Maya Tara Halder, Munsif, 2nd

Court, Midnapore, dated the 5th of September 1921.

The facts of the case will appear from the judgment.

Mr. Mohendra Nath Ray and Babu Apurba Charan Mukerjee for the Appellant.

Mr. Mohendra Nath Ray and Babu Santosh Kumar Pal for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

SUHRWARDY, J.—This appeal arises out of a suit for rent for the years 1926 to 1928. The Defendants denied the relationship of landlord and tenant between the Plaintiffs and themselves and set up their own title. They succeeded in the first Court but the learned Additional District Judge of Midnapore decreed the Plaintiffs' suit. The present appeal is by the Defendants and four points have been urged by the learned Advocate appearing on their behalf.

The property in suit, it appears, belonged to one Kirtibash Maity, who had in his keeping a woman of the name of Saraswati Devi. He executed a deed of gift of the property in suit in favour of his mistress in 1915. He left two children by Saraswati—a son Rampado and a daughter Haripriya. After that Saraswati died leaving these two children behind her—Haripriya having been married before her death. On the 16th October 1920 the Plaintiffs purchased the entire property from Rampado and on the 30th March 1921, the Defendants purchased the entire property from Haripriya. The Plaintiffs have brought this suit for recovery of arrears of rent on the allegation that the property devolved upon Rampado and as purchasers from him they are entitled to receive rent from the Defendants who admittedly were the tenants on

(1) I. L. R., 40 Cal. 650; s. c. 17 C. W. N. 679 (F. B.) (1913).

SHAIKH TALEB ALI v. SHAIKH ABDUL REZAQ.

the land under Saraswati and have since been in occupation of it. The defence as made out in the written statement was that Rampado was not born of the womb of Saraswati and therefore he was not her heir and that the purchase by the Plaintiffs from Rampado was not genuine. The trial Court dismissed the Plaintiffs' suit on the ground that Saraswati was an up-country woman and presumably governed by the Mitakshara School of law; and as under that school, the daughter is the preferential heir in respect of the *stridhan* property, Rampado did not inherit any interest in it and therefore the purchase by the Plaintiffs did not give them any title to the property. On appeal the learned Additional District Judge has not given effect to this plea on the ground that it was not raised in the pleadings and that it was only brought out in the cross-examination of one of the Plaintiffs' witnesses that Saraswati's father was an up-country man. The learned Judge notes that the witness after making the statement added that he did not know whether Saraswati's father was governed by the Mitakshara law or not.

In the first place, the learned Advocate for the Defendant pressed for our consideration the point that Saraswati being governed by the Mitakshara School of law, succession to her property should be governed by that law. I am of opinion that the view taken by the learned Judge is correct and that we should not allow the Defendants to raise this question at a late stage. I observe in the pleadings that the Plaintiffs' title was questioned only on the grounds—first, that Rampado was not a son born of the womb of Saraswati; and, secondly, that the purchase by the Plaintiffs was not genuine. No suggestion was made in the written statement that the Plaintiffs' right could

be challenged on any other consideration such as that the son of a person governed by the Mitakshara law has no right in preference to the daughter to succeed to *stridhan* property. It is undoubtedly a question of fact. The presumption that a Hindu migrating from one place to another carries with him his personal law is a rebuttable one. Since the Defendants did not attack the Plaintiffs' title on this ground, the Plaintiffs were unable to adduce any evidence to show by what law Saraswati was governed.

It is argued in the second place that even if the woman Saraswati was governed by the Dayabhaga School of Hindu law, she being a prostitute her daughter is to be preferred to her son according to the law of inheritance that governs Hindu women who have taken to prostitution. This point, too, was not raised in the pleadings and it was not taken in any of the Courts below. We have therefore not the advantage of the opinion of the Courts below who were in touch with the parties and the evidence. But it is urged that it is a pure question of law and the Plaintiffs in order to succeed in this suit must prove their title strictly. We have therefore allowed the learned Advocate for the Appellant to argue this point. No authority has been placed before us in support of this contention nor any text from any original authority on Hindu law. But reliance is placed upon certain observations in the Hindu Law of *Stridhan* and Marriage by Sir Gurudas Banerjee, 5th Ed., at p. 458. There the learned author deals with the succession of property of dancing women. It is not necessary to go into the cases in which a similar point came up for consideration as the question seems to have been set at rest by the Full Bench decision of this Court in the case of *Hira Lal Singha v.*

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Tripura Charan Roy (1) which holds that the mere fact that a Hindu has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood; and consequently her *stridhan* property passes upon her death according to the law of succession laid down under the Bengal School of Hindu law. The judgment of the Full Bench is based upon the theory approved by that decision that the Hindu law makes no distinction between rules of succession applicable to the property of a Hindu degraded woman and that of a respectable woman. This view so adopted in the Full Bench case has called for some severe criticism at the hands of the editor of Sir Gurudas Banerjee's book. But it is worthy of note that in the case of *Sarnamoyee Bewa v. Secretary of State for India in Council* (2) to which Sir Gurudas was a party, it was held that a woman of the town who is Hindu by birth does not cease to be a Hindu by reason of the degradation, and succession to her property is governed by the Hindu law. The law as regards dancing women has been properly characterised as peculiar to the Presidency of Madras as was observed in the case of *Swarnomoyee* (1) already referred to; and it is admitted by the Madras High Court in the case of *Meenakshi v. Muntandi Panikkan* (3) that the law of succession as obtaining in that Presidency to the estate of dancing women is based upon local custom and usage. As a matter of fact, as the learned Advocate for the Respondents rightly points out, there is no departure in that Presidency from the ordinary Hindu law of succession even in

the case of dancing girls, for in that Presidency Mitakshara School of Hindu law prevails; and according to that law as regards *stridhan* property the daughter is preferred to the son. The nearest approach to the facts of the present case is the case of *Tripura Charan Banerjee v. Harimati Dassi* (4), the decision of which covers a portion of the points raised in this case. This case was not approved of by the Full Bench in respect of some of the observations made by the learned Judge; but the rule of succession of degraded Hindu women leaving illegitimate children as laid down there has not been dissented from. In that case a Hindu prostitute died leaving six children, two of whom were sons and four daughters. It was held that each son would take 1/6th of the property left by the deceased. This being the state of the case-law, it may now be taken to be fairly settled that succession to *stridhan* property of a degraded Hindu woman is to be governed by the ordinary Hindu law of inheritance and that daughter is not to be preferred to the son in the line of succession. According to the Hindu law of succession to the *stridhan* property of a woman the son succeeds in preference to the married daughter under the Dayabhaga School of Hindu law. The daughter Haripriya having been married before the death of Saraswati, Rampado, her son, succeeded to the entire property left by her. The second contention of the Defendants fails accordingly.

The third point urged is that on the findings of the learned Judge, Rampado was a minor at the time when he executed the *kobala* in favour of the Plaintiffs on the 16th October 1920 and therefore the Plaintiffs derived no title under it. The

(1) I. L. R. 40 Cal. 880: s. c. 17 C. W. N. 879 (F. B.) (1918)

(2) I. L. R. 25 Cal. 254: s. c. 2 C. W. N. 97 (1897).

(3) I. L. R. 38 Mad. 1144 (1914).

(4) I. L. R. 38 Cal. 498: s. c. 15 C. W. N. 808 (1911).

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learned Judge remarked that in 1915, the date of the deed of gift by Kirtibash in favour of Saraswati, Rampado was 12 years of age and Haripriya was 11 years old. This point even was not raised in any of the Courts below nor even before the learned Judge. It is well-known that in this country in giving the age of a person the number of years he has completed is mentioned without taking into account the months by which he may have exceeded that age, so that a person nearing the age of 13 is said to be 12 years old though actually he may be very near 13. As this point was not raised and as it is a question of evidence, we do not think that we should be justified in holding that merely because he was said to be 12 years of age in 1915 he was below 18 on the 16th October 1920.

Fourthly and lastly, it is urged that there is no finding in the Judge's judgment that the Plaintiffs' *kobala* is genuine. There is doubtless no distinct finding on this point in the Judge's judgment, but it may be due to the fact that its genuineness was not disputed before him by the Defendant for the reason that the Defendant himself was one of the attesting witnesses to that *kobala*. On a perusal of the Judge's judgment it seems to have been conceded that the Plaintiffs' *kobala* was genuine as the learned Judge's finding with regard to certain rent-receipts filed by the Defendant is based upon the fact that the Defendant himself signed the *kobala* as an attesting witness. There is enough indication in his judgment to show that he believed the Plaintiffs' *kobala* to be genuine.

All the points raised by the Appellant fail and this appeal must be dismissed with costs.

DUVAL, J.—I agree.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 627 OF 1924.

SUHRAWARDY, J. DUVAL, J. 1924, Heard, 15, July. Judgment, 16, July.	} G. M. FALKNER, Official Assignee, Petitioner, v } <u>MIRZA MAHOMED SYED</u> <u>ALI and ors.</u> , Opposite Party.
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Court Fees Act (IV of 1870), sec. 7—Civil Procedure Code (Act V of 1908), Or. VII, r. 11—Sec. 115—Revision of Court's order determining value of suit

The Court is empowered under the law to revise the valuation put by the Plaintiff and if on such revision it is of opinion that the valuation is insufficient or arbitrarily low it has jurisdiction to fix the proper value; but when a Court determines the valuation according to its judgment or holds that Plaintiff's valuation is correct it does not commit such an error of law as to entitle the High Court to interfere under sec. 115, C. P. C.

This was a Rule granted on the 16th May 1924 against an order of the Munsif at Alipore (Babu Nishikanta Banerjee), dated the 11th April 1924, overruling the objection of the Defendant and declaring the valuation as put by the Plaintiff to be the correct valuation of the claim.

The facts of the case will appear from the judgment.

Dr. Sarat Chandra Basak and M. Nasim Ali for the Petitioner.

Babu Sitaram Banerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This Rule was issued at the instance of Defendant No. 1 in a suit pending in the Court of the Munsif, 1st Court at Alipore. The Rule is in these terms: "Let a Rule issue calling upon the Opposite Party to

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show cause why the suit complained of in the petition should not be dismissed on the grounds stated therein." The facts are that the Opposite Party has brought a suit in the Court of the Munsif on the allegation that the property in dispute was included in the *wakf* created by Prince Kamar Kadar Mirza (father of the Plaintiff), that the Plaintiff is the *matwalli* of that *wakf*, that one Saheba Khatun was the *benamdar* of the said Prince Kamar Kadar, the property having been purchased in her name and that she wrongfully sold it to one Suprasanna Roy Choudhury who was subsequently declared an insolvent and his properties became vested in Defendant No. 1, the Official Assignee. The Plaintiff prays in the suit that it may be declared that the property in dispute is one of the *wakf* properties of which he is the *matwalli* and is in possession under the deed of trust; and as the Defendant No. 1 is attempting without any right to sell this property as the property of the insolvent he prays that the Plaintiff's title to the property as *matwalli* of the *wakf* estate of Prince Kamar Kadar may be declared and a permanent injunction granted restraining the Defendant No. 1 from bringing the disputed property to sale as the property of any of the Defendants. He valued his claim in respect of the declaration sought at Rs. 100 and his claim in respect of the injunction prayed for at Rs. 75. He paid court-fees on these amounts.

An objection was taken before the learned Munsif by the Official Assignee on the ground that the suit was not maintainable in the Court of the Munsif inasmuch as the value of the property in suit exceeded the pecuniary jurisdiction of the Court. The learned Munsif went into the matter thoroughly and found that the property was as a matter of fact worth

Rs. 10,000; but as the Plaintiff was in possession of the property and derived a nominal income from it he held that the valuation by the Plaintiff of the reliefs sought was right and that accordingly he had jurisdiction to try the suit. Against this order this Rule has been obtained. It is difficult to understand what is meant by the Rule which calls upon the other side to show cause why the suit should not be dismissed. At the hearing, the learned vakil for the Petitioner conceded that he cannot ask for the dismissal of the suit, but he contends that the suit is beyond the jurisdiction of the Munsif and that the plaint should be returned for presentation to proper Court. The objection of the Petitioner as to the competency of the Munsif to hear the suit is based on the view of the law which has been laid down in several cases by this Court, that the Plaintiff should not be allowed to arbitrarily fix the value of his claim under sec. 7, cl. (iv) of the Court Fees Act, 1870. The leading case on the point is the case of *Umatul Batul v. Nanji Kuar* (1), which has been followed in a number of cases. See the cases of *Krishnadas Laha v. Hari Charan Banerjee* (2) and *Raj Krishna Dey v. Bepin Behary Dey* (3). The view taken in these cases is that though sec. 7, cl. (iv) of the Court Fees Act leaves it absolutely to the discretion of the Plaintiff to value his reliefs under cls. (c) and (d), the Court is competent to exercise its powers conferred on it by Or. 7, r. 11, C. P. C. There has been a divergence of judicial opinion upon this point. The High Courts of Bombay and Allahabad have given a strict meaning to the words of the Court Fees Act; whereas this Court and the High Court of Madras have taken

(1) 6 C. L. J. 427 (1907).

(2) 14 C. L. J. 47 (1911).

(3) 16 C. L. J. 194 (1912).

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a different view. The decisions in this Court too have not been uniform. See *Rupchand Ghosh v. Khiradamoyee* (4). It is not necessary in this case to examine all the conflicting authorities as we are of opinion that this Rule must fail under sec. 115, C. P. C. The case on which much reliance has been placed, namely, the case of *Umatul Batul v. Nanji Kuar* (1) was an appeal in which the Plaintiff complained against an order of the Court below fixing a value higher than that put by the Plaintiff in the plaint and the learned Judges in the course of the judgment made the following observation: "We do not think it can be affirmed as an inflexible rule of law that it is not open to the Court to revise the valuation put by the Plaintiff, when it is conclusively established that it is arbitrary and improper . . . It is open to the Court, if a question is raised as to the true valuation of the suit, to determine such question, and that it is not only within the power of the Court but it is also its duty to take action under sec. 54 (Or. 7, r. 11) of the Civil Procedure Code, if it is established that the valuation is improper." All the other cases that have followed this case are also cases in which the Courts below had fixed a valuation according to their judgment and different from that put by the Plaintiff. The result of these authorities is that the Court is empowered under the law to revise the valuation put by the Plaintiff and if on such revision, it is of opinion that the valuation is insufficient or arbitrarily low, it has jurisdiction to fix the proper value. But no case has been brought to our notice which has gone the length of holding that where a Court determines the valuation according to its judgment or holds that Plaintiff's valuation

is correct it commits such an error of law as to entitle the Court to interfere under sec. 115, C. P. C. What the learned Munsif has done in this case is that on an examination of the alleged facts of this case he has come to the conclusion that the valuation as put by the Plaintiff on the plaint is correct. That view may be right or may be wrong: but it cannot be said that the learned Munsif has exercised a jurisdiction not vested in him or has failed to exercise jurisdiction vested in him. There is another view of the matter, namely, that the decision of the Munsif on the present question may be challenged in appeal from the decree in the suit. This is an additional reason why we should not interfere in the exercise of our revisional jurisdiction. We therefore think that this is not a case in which we should interfere under sec. 115, C. P. C.

The Rule is accordingly discharged with costs—two gold mohurs.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD CARSON.

SIR JOHN'EDGE.

1924,

Heard, 30, July.

Judgment,

28, October.

COWASJI EDALJI

DADAHANJI,

Appellant,

v.

RATANBAI and anr.,

Respondents.

Indian Succession Act (X of 1865), sec. 107 and Exception—Gift of properties remaining after maintaining family, to son on attaining majority—Gift, whether vested or contingent—"Gift of fund," and "direction to make over properties remaining," difference between—Property and income both unascertainable—Exception to section, if applies

A testator by his Will directed the executor to maintain himself, the testator's wife and the son or daughter of the testa-

(1) 6 O. L. J. 427 (1907).

(4) 27 O. W. N. 457 (1917).

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tor out of the properties and effects of the testator (and not merely out of the income thereof), and, on the son coming of age, make over the whole of his remaining properties to the son. If the maintenance of the family did not exhaust the whole income; a discretionary power was given to the executor to spend the surplus income in giving encouragement to education, etc.:

Held—That the bequest to the son was contingent within the meaning of the first clause of sec. 107 of the Succession Act and did not fall within the Exception thereto, inasmuch as (i) there was no direct gift to the son but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son came of age, (ii) the remaining properties were not in any way ascertained or ascertainable, (iii) there was no definite ascertained income to arise out of the fund to be given to the son absolutely or so much of it applied for his benefit as might be necessary.

This was an appeal from a decree, dated the 2nd August 1922, of the High Court at Bombay, which varied a decree, dated the 4th February 1922, of that Court in its Original Jurisdiction.

The 1st Respondent in the appeal was the widow of a Parsi named Rustomji Edalji Dadachanji, and she took out an originating summons for the construction by the Court of certain questions arising under the Will of her deceased husband.

The Appellant is the testator's brother whom he had appointed under his Will as his sole executor, and the 2nd Respondent is his daughter by a predeceased wife.

The testator also left him surviving a son who died in infancy.

The material clauses of the Will are

set out in the judgment of the Judicial Committee.

There were three main questions on which the opinion of the Court was required, viz.:—

(1) Whether a bequest of the residuary estate in favour of the testator's son was vested or contingent on his attaining majority.

(2) Whether if the bequest was vested it was divested by the death of the son before attaining majority.

(3) Whether if the bequest was contingent there was a gift of the residuary estate to the Appellant, or the testator died intestate in regard thereto.

Both the Courts in India held that the bequest to the testator's son was contingent within the 1st clause of sec. 107 of the Indian Succession Act, X of 1865, but they differed as to whether it came within the Exception thereto.

The trial Judge (Kanga, J.) was of opinion that the Will did not purport to give the income to the son absolutely, or direct it to be applied to his maintenance during infancy. The appeal Court (Shah, Acting C. J. and Pratt, J.) came to a contrary conclusion.

They held on the second question that the residuary estate having vested under the Exception to sec. 107 there was nothing in the Will to direct it on the death of the testator's son and on the third question that on the occurrence of this event the estate passed to the 1st Respondent as his heir subject to her obtaining letters of administration.

Mr. Upjohn, K. C., Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant.

Messrs. M. R. Jardine and Gibson for the 1st Respondent.

COWASJI EDALJI DADACHANJI v. RATANBAI.

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—The only question which this Board is asked to decide is whether upon the true construction of the Will, dated the 10th July 1913, of a Parsi named Rustomji Edalji Dadachanji who died on the 17th July 1913, a bequest of the residuary estate in favour of his son since deceased was vested or contingent upon his attaining his majority.

The clauses of the Will which are material for the determination of this question are in the words and figures following:—

"5. My present surviving wife Ratanbai is now in the family way. And she has expressed in my presence her free will and accord to live as a member of the family with my executor (*i.e.*) my elder (or eldest) brother Doctor Kavasji Edaljee Dadachanji. As to whatever children (I child) that may be born of her womb, my brother shall bring up and maintain the same. And my said executor shall defray all the expenses in connection therewith out of my property and effects. And he shall maintain the family. (The expression maintenance of the family includes that of the maintenance of my said executor also.) Should a daughter be born of the womb of my wife Ratanbai, she shall be brought up and maintained and shall be educated properly and my executor or after his death his executors or executrices shall after making outlays in accordance with my circumstances get her married at a proper place (*i.e.*, in a suitable family). Should a son be born he also shall be cherished and maintained, and educated and brought up. And when he comes of age my executor or after his death his executors or executrices shall make over the whole of my remaining properties to the said son. Should the child (whether) daughter or son born of the womb of my wife, die in tender age (*i.e.*, a minor) and should my wife for any reason whatever be unwilling to live as a member of the family with my

executor, then my executor shall out of my property purchase Bonds for Rupees five thousand bearing interest at four per cent. at the market rate and shall transfer the same to the name of my said wife Ratanbai.

"14. After having defrayed all the household expenses out of the income of my Punji (property), as to whatever there may remain over my executor shall, if he thinks proper, expend the same in giving encouragement to education and the works of science and arts as well as in erecting troughs for cows (and) cattle to drink water from. In case my executor should not do that then he has absolute authority to do so. If he likes he may make outlays in this manner or he may not even make the same.

"15. As to my property (or properties) and lands at Nasik and Kherwadi and as to my share in my paternal property and Punji situated at Navsari, I bequeath the same also to my executor my brother Dr. Cawasji Edalji Dadachanji. And I annul and cancel the right of my heirs from all those.

"16. My executor shall make such use thereof as he may think proper. He is the owner of all those. As to the whole of the effects and furniture, chattels in my home and the goods and property whatever there may remain over after payment of the above Warsas, I bequeath the same to my said executor."

The parties are governed by the Indian Succession Act (X of 1865), the material section of which is in the following terms:—

"107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens . . . until the condition has been fulfilled, the interest of the legatee is called contingent.

* * * * *

"Exception—Where a fund is bequeathed to any person upon his attaining a particular age, and the Will also gives to him absolutely the income to arise from the

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fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent."

Both the Courts in India held that the bequest to the testator's son is contingent within the meaning of the first clause of sec. 107, a decision with which their Lordships agree.

The main contention, however, before this Board on behalf of the contesting Respondent was that the terms of the gift came within the Exception contained in sec. 107.

The trial Judge held that the case did not fall within the Exception to sec. 107. The Appellate Court, however, took a different view and held that by reason of the Exception "the bequest in favour of the son was vested in interest at the date of the testator's death." It is necessary, therefore, to examine the clauses referred to in the Will to see whether the fund is bequeathed to the son "upon his attaining a particular age, and the Will also gives to him absolutely the income to arise from the fund before he reaches that age or directs the income, or so much of it as may be necessary to be applied for his benefit."

In the first place it is to be noticed that there is no direct gift to the son, but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son comes of age. Nor is the income of such remaining properties to be employed in any way in accordance with the terms of the section absolutely for the son, nor is it directed that the income, or so much of it as may be necessary, should be applied for his benefit. That would be impossible, as the remaining properties are not

in any way ascertained or ascertainable [see *In re Gossling* (1)].

As the learned trial Judge states in his judgment in analysing the Will: "In this case the executor is directed to maintain the family of the testator and the maintenance of the family includes the maintenance of the executor. The direction to the executor is that he should maintain himself, the testator's wife and the son or the daughter of the testator out of the properties and effects of the testator. The executor, it seems, may, for the purpose of maintenance of the testator's family, spend the corpus; for the maintenance of the family was to be out of the property and effects and not out of the income only of the property. If the maintenance of the family did not exhaust the whole income; a discretionary power was given to the executor by cl. 14 of the Will to spend the surplus income in giving encouragement to education and works in science and arts as well as in erecting troughs for cows and cattle to drink water from." There is, therefore, no definite ascertained interest "to arise from the fund."

Their Lordships agree with the trial Judge that the case does not fall within the Exception to sec. 107 of the Indian Succession Act, and, as has been already stated, their Lordships agree that the bequest of the residue to the son is contingent on his attaining the age of majority. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the decree of the trial Court restored. The order as to costs made by the High Court in appeal will stand.

The Respondents will pay the costs of this appeal.

COWASJI EDALJI DADACHANJI v. RATANBAI.

Solicitors : *Messrs. T. L. Wilson & Co.*
for the Appellant.

Solicitors : *Messrs. Lattey & Hart* for
the 1st Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD DUNEDIN.

LORD ATKINSON.

MR. AMER ALI.

LORD SALVESSEN.

1924,

Heard, 30 and
31, October.

Judgment,
31, October.

RAJA SASI SEKHARFES-
WAR ROY BAHADUR,
Appellant,

v.

LALIT MOHAN MITRA,
since deceased,
Respondent.

*Civil Procedure Code (Act V of 1908), sec. 47—
Arbitration award, decree in terms of—Suit to re-
cover property allotted by award, if lies.*

An arbitration award allotted certain lands to Plaintiff and certain others to Defendant and a decree was passed in terms of the award. The Plaintiff instituted the present suit to get possession of certain lands which he alleged were his under the award and of which the Defendant had remained in unlawful possession.

Held—That the suit did not lie, the Plaintiff's remedy being by application for execution within the time allowed by law.

This was an appeal (No. 89 of 1923) from a decree of the High Court in Bengal, dated the 30th November 1921, which reversed a decree, dated the 28th February 1920, of the Court of the Subordinate Judge of Rajshahi.

The Plaintiff and Defendant in the action in which this appeal is filed were joint and undivided sharers in two mahals, from which they realized rents according to their respective shares.

Disputes having arisen between the parties as to their boundaries they appointed the District Magistrate of Malda arbitrator to effect a partition.

On the 10th June 1905 the arbitrator made his award which was filed in Court on the 19th March 1906. By it he decided that the parties should collect the rents and profits in the villages allotted to them from the 17th July 1905 and that each should deliver to the other within 3 months the zemindari papers connected with his allotment.

There was evidence that each party in pursuance of the award went down to the property and took possession "by the planting of bamboos," notice at the same time being given to the tenants.

The Plaintiff sued in 1917 for possession of certain lands which he alleged had been allotted to him under the award and of which he had been unable to obtain possession.

The Defendant pleaded that the award had been made a decree and that inasmuch as the Plaintiff had not executed that decree within 3 years his suit was barred by limitation. The Subordinate Judge was of opinion that the Plaintiff had no right to execute the decree directing the award to be filed on the ground that it was in the nature of a declaratory decree, and that, as the Plaintiff's suit was filed within 12 years of the date fixed in the award for the delivery of possession, there was no bar of limitation.

On appeal, the High Court (Woodroffe and Ghose, JJ.) considered that the cause of action in the suit was the same as that which was the subject-matter of the award, and that the Plaintiff's claim to possession was not based on subsequent dispossession. In their opinion the Plaintiff having failed to execute the award within 3 years of its being made

RAJA SASI SEKHARESWAR ROY BAHADUR. *vs.* HALIT MOHAN MITRA.

a decree his suit was barred by limitation. They accordingly reversed the decree of the trial Court and dismissed the suit.

Sir George Lowndes, K. C. and Dubé for the Appellant.—The decree of the 17th March 1906 was merely declaratory of the award and was not capable of execution.

The Court can only give delivery of immoveable property in execution, if the decree gives delivery.

Sec. 263 of the Civil Procedure Code, 1882.

The decree here does not give delivery but merely declares the validity of the award. At the time of the award the land in suit was waste. After 3 years when the period of execution had lapsed the Defendant entered on it and proceeded to cultivate; the Appellant was thus dispossessed and has a right to sue within 12 years.

Messrs. DeGruyther, K. C. and Parikh for the Respondent.—The Courts in India have all considered that the decree of 1906 was tantamount to delivery. The Subordinate Judge decided that it was not a decree within the meaning of the Code of Civil Procedure and was therefore incapable of execution. That is not the Appellant's contention.

[LORD DUNEDIN.—The Plaintiff is asking for possession. The whole question is, did he get possession under the decree, and could he have enforced that decree?]

Delivery of possession could only have been symbolical, *i.e.*, by a direction to collect rents and profits. The award did not merely apportion the properties, it also ordered the collection of rents together with the delivery of title deeds and that was tantamount to delivery.

Sir Geo. Lowndes replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—In this case a question has arisen between two Zemindars. They were in possession of certain properties in what may be called a very uncomfortable manner, that is to say, they possessed certain lands in common, and the way of possession was a very uncomfortable way. One got the rents of certain tenants, and the other got the rents of others, and sometimes they both went to the same tenant and each realised a portion of his rent. In order to get rid of this inconvenient situation, they agreed to arbitration; an arbitration was accordingly held, and the arbitrator allotted certain villages to one, and certain villages to the other. Thereupon possession to a certain extent was taken in accordance with the award. The present suit was instituted by the Plaintiff, and the object of the suit was to get possession of certain lands which he said were his under the award, and of which the Defendant was in improper possession. He makes a plain averment in the plaint. He says, after setting out the fact of the award and the finding, "But in spite of his"—that is the Defendant—"being bound in accordance with the provisions of the said award and the decree passed upon it to give up to the possession of the Plaintiff" certain lands, "the Defendant has not done so. The Defendant is not entitled and has no right to enjoy and possess the lands mentioned" in the three schedules annexed. For relief he asks "That on declaration that the lands mentioned in the three schedules are lands depicted in the Revenue Survey maps of mouzhas Lakshmipur, Bilborendra and Begpur respectively, and (on declaration) of the Plaintiff's right on the basis of the aforesaid award and the decree passed

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upon it to get possession of the same, the Plaintiff may get decree for *khas* possession of the same on eviction of the Defendant from all these lands." The answer that is made by the Defendant, and which has been given effect to by the Court below is that if what the Plaintiff says is true, the Defendant ought to have executed the decree which he got and not have allowed that decree to become null by reason of limitation. The question, therefore, resolves itself into this: Could he on the statement of the facts now made have at the time got execution upon the decree? The decree was filed in Court, and the order of the Court is this: "It is ordered that this suit be decreed in the terms of the award annexed herewith." The effect of that is not doubtful. It is a decree which so to speak sets out again the words of the award. The words of the award, after going into the matter of the boundaries of the land and describing them, are these: "I further decide that the parties will collect rents and other profits" from a certain date "and that each of the two parties above named will deliver respectively to each other all the Zemindari papers which they may have in their possession." If it is the fact, as the Plaintiff says in his plaint, that the Defendant did not give up possession, the way in which the Plaintiff was kept out of the lands which he ought to have had can only have been one of two ways: Either it was that a cultivating tenant was on these lands and paid rent to the Defendant instead of to the Plaintiff as he ought to have done, or else, if there was no tenant then it must have been that the Plaintiff was kept out of the lands in a physical sense, that is to say, he was not allowed to go on to them. It seems to their Lordships to be plain that in either of those cases an appro-

priate warrant could have been got from the Court upon a decree framed in the terms mentioned. That seems to end the case. It does not end perhaps all that might have been made of the case, because one can see that there might have been a case of this sort, and for aught their Lordships know this may really be the case: Some of these lands, how much exactly they do not know, but certainly a good proportion, were jungle lands, or lands under water, at any rate lands not in a fit state for cultivation. If after the award the parties went down to the ground and said: "Here are the boundaries that have been settled by the arbitrator; this is my land, and that is yours," and then went away and nothing happened as regards this waste or watery land, and neither party went on to it and possessed it, and then, after the expiry of the limitation years upon the judgment on the award, the Defendant by means of a tenant went in upon those lands and began to cultivate them, and took the rent from the tenant, who was so put in, it is quite clear that the Plaintiff could then have come and asked the assistance of the Court. He would have founded upon the award itself and not upon the decree following upon it, and to that there would have been no answer. But unfortunately, although there is, one may almost say, more than a hint that that is the true state of the case, that is not the case that was made, and it is a case obviously that would not only have had to be averred but proved, and there might and probably would have been a great deal of evidence on one side and on the other. It is too late now for their Lordships to take up that case. They will therefore humbly advise His Majesty that the appeal must be dismissed with costs.

RAJA SASI SEKHARSWAR ROY BAHADUR v. LALIT MOHAN MITRA.

Solicitors : Messrs. Barrow Rogers and Nevill for the Appellant.

Solicitor : Mr. E. Delgado for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 23 OF 1924.

SANDERSON, C. J.	}	
RANKIN, J.		G. M. HAY and anr.,
1925,		Defendants, Appellants,
Heard,		v.
6. February.		BONOMALI MULLICK,
Judgment,		Plaintiff, Respondent.
13. February		

Calcutta Rent Act (III of 1920, B C), sec 11, sub-sec (1), (4) and (5)—Deposit of rent with the Rent Controller—Tender on the re-opening day after the holidays—Inability to pay owing to refusal to accept rent by the cashier in the Rent Controller's Office effect of—Payment next day, effect of—Breach of terms of the tenancy by removal of fixtures when possession was given up, whether such removal disentitles the tenant to the protection of the Rent Act, during the period of holding over.

The tenants occupied certain premises and agreed to pay rent at Rs. 1,050 for a term of 10 years under a lease, dated the 10th April 1911, commencing from 1st January 1911. The rent was payable on the 5th of every month. The lease expired on 31st of December 1920 and the tenants continued to remain in possession until 31st January 1923 when they vacated the premises. In July 1920 the landlord had given notice to vacate the premises as the same was required for the purpose of re-building, and had refused to accept the rent after December 1920. The tenants, in consequence, deposited Rs. 1,155 a month being the standard rent payable in respect of the premises to the Controller of Rents regularly. Tender of the rent for September 1922 made on the 5th October was refused by the landlord, and the office

of the Controller having remained closed on account of holidays from before the 19th October, the tenants sent their clerk to deposit the rent on the 23rd October, the first day since the 19th available for the deposit of rent with the Controller, but as on that day there were many people waiting he was asked to come on the following day to make payment. On the 24th the rent was deposited and the receipt was dated 24th October 1922. The landlord sued for ejectment and mesne profits :

Held—That the rent became due on the 5th of the month succeeding that for which it was payable. As the landlord refused to accept the rent, it was the duty of the tenants to deposit the rent within 19th of the month. The deposit made on the 24th October under the circumstances as aforesaid was good payment under the Rent Act.

The lease provided that "the lessees should not remove any fixtures or buildings and will at the expiration or other sooner determination of the said term peaceably and quietly surrender and yield up to the lessor the said premises together with all erections, buildings, fixtures and things in good and substantial repair and condition." When the tenants left the premises in January 1923, they removed certain fixtures in breach of the terms of tenancy.

Held—That the fact that the Defendants had committed a breach of the covenant when they gave up possession of the premises was not sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the end of December 1920.

Held, under the circumstances, that the landlord was not entitled to any mesne profits in respect of the period during which the tenant was in possession.

G. M. HAY v. BONOMALI MULICK.

This was an appeal preferred against the judgment of Mr. Justice Pearson, dated the 10th January 1921, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts in detail will appear from the judgment.

Messrs. L. P. E. Pugh, J. Langford James and M. N. Kanjilal for the Appellants.

Sir Benode Mitter and Messrs. N. N. Sircar and S. C. Bose for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Defendants against the judgment of my learned brother Mr. Justice Pearson which is dated the 10th of January 1924.

The suit was brought for ejectment, mesne profits and damages.

The Defendants were the tenants and occupiers of the premises Nos. 171, 172 and 174, Dhurmtoollah Street, in Calcutta. The premises were held under a lease for a term of ten years from the 1st of January 1911, which term expired on the 31st of December 1920.

The Plaintiff is the lessor and Messrs. Breakwell and Co. were the lessees. In November 1918 the remainder of the term was assigned to Messrs. Hay and Porter, who are the Appellants in this case : and, the rent for the whole of the premises was Rs. 1,050 per month.

At the end of the term there were negotiations between the parties with a view to the renewal of the lease. But these came to nothing and, on the 20th of April 1921, this suit was brought.

The Defendants remained in possession until the 31st of January 1923, when they delivered vacant possession to the Plaintiff.

It is clear that the Defendants tender-

ed the rent for the month of January 1921 on the 4th of February 1921. The rent for one month was payable on the 5th of the following month. That tender was refused by the Plaintiff : and, there is no doubt that from that time onward the Plaintiff refused to receive any rent from the Defendants. Accordingly, the rent was paid to the Rent Controller with the addition of 10 per cent. in accordance with the provisions of the Calcutta Rent Act : and, with one exception the rent for each month was paid prior to the 15th of the following month. The exception to which I have referred, was with reference to the rent which was payable in respect of the month of September 1922.

It appears that the rent for September 1922 was actually paid on the 24th of October 1922 to the Rent Controller. The office of the Rent Controller was closed on account of certain holidays from some day before the 19th of October and the 23rd of October was the first day after the 19th October which was available for the deposit of rent with the Controller.

The learned Judge in his judgment stated as follows : " Subsequent to the termination of their lease and during the period up to the time they vacated the premises, the Defendants deposited rent with the Rent Controller at the rate reserved by the lease *plus* 10 per cent. This they did every month, payment being in every case prior to the 15th of the month."

When the case was argued in this Court, it was alleged that that finding of the learned Judge was wrong, and our attention was drawn to two rent receipts, which went to show that the rent in respect of the month of September 1922 was in fact paid on the 24th of October, as I have already mentioned.

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The learned Counsel for the Defendants stated that there was an explanation of that to the effect which I have already stated. The result was that we were of opinion that it was necessary for evidence to be given with regard to this matter: and the hearing of the appeal was adjourned in order that the Defendants might produce that evidence. The evidence was given to-day by Krishna Lal Chatterjee, who was an accountant employed by Messrs. Breakwell & Co and Atindra Nath Mukerjee, who was a clerk employed in that office: and, from their evidence it is clear that the explanation which was given by the learned Counsel for the Defendants was correct and was fully supported by the evidence.

The explanation shortly stated was that when the Defendants' clerk went to the Rent Controller's office on the 23rd of October, which was the first available date after the 19th of October, and presented a petition and obtained an order from the Rent Controller for the receipt of the money. He was not able to pay the money to the cashier because there were many others waiting to make payments on behalf of other people, and it appears that at or about 3 o'clock the cashier refused to receive any more money on that day and told the people, whose money had not been received, to come on the following day. The result was that Messrs. Breakwell & Co.'s clerk went to the Rent Controller's office on the 24th of October and paid the money. The receipt was dated the 24th. There are the facts with regard to this part of the case.

The learned Judge was of opinion that the Defendants ought to have deposited the standard rent on or before the 5th day of every month and as they had not done that, the Defendants were not entitled to the protection of the Rent Act.

The learned Counsel for the Defendants drew our attention to sec. 11, sub-secs. (4) and (5) of the Calcutta Rent Act. I will read sub-sec. (5), first: "(5) No tenant shall be entitled to the benefit of this section in respect of any premises, unless within three months of the date of the commencement of this Act he has paid all arrears of rent due by him in respect of the said premises, and also unless he pays the rent due by him to the full extent allowable by this Act within the time fixed in the contract with his landlord, or in the absence of any such contract, by the fifteenth day of the month next following that for which the rent is payable." Sub-sec. (4) is as follows: "(4) Where a landlord refuses to accept the rent referred to in sub-sec. (i) offered by a tenant, the tenant may deposit it with the Controller within a fortnight of its becoming due."

In this case the rent became due on the 5th of the month succeeding that for which it was payable. The landlord refused to accept the rent. Consequently, it was the duty of the tenant, under the provisions which I have just read, to deposit it within a fortnight from the 5th of the month: a fortnight from the 5th—the time when the rent became due in this case—would make the date by which the rent would be payable—the 19th of the month.

Having regard to this contention and the evidence which was given to-day Mr. Sircar, the learned Counsel for the Plaintiff, admitted that the ground upon which the learned Judge held that the Defendants were not entitled to the protection of the Rent Act could no longer be supported. But the learned Counsel argued that he could support the learned Judge's decision upon another ground: and, he relied on the first sub-section of sec. 11 which runs

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as follows :—“(1) Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays rent to the full extent allowable by this Act, and performs the conditions of the tenancy.”

His argument was that the Defendants had not performed the conditions of the tenancy.

In the first place, he drew attention to a report which was made by a Mr. Johnstone as to the state of the premises in March 1922 : and, he argued that that showed that the Defendants had not complied with the covenant of the lease to keep the premises in repair, and that consequently the Defendants had not fulfilled the conditions as required by sec. 11 (1) : and, even though they had paid rent to the full extent allowable by the Act, they had not performed the conditions of the tenancy by keeping the premises in repair.

In my opinion, we ought not to give effect to this contention.

The learned Judge came to no conclusion that the Defendants, so long as they were in possession of the premises, had committed any breach of the covenant : and, I am not at all satisfied that the Plaintiff relied upon that as a reason which would entitle him to a decree for possession at the trial. With regard to the evidence, it seems to me that there is evidence each way : there is the evidence of Mr. Johnstone that the premises had not been kept in repair in accordance with the terms of the lease : on the other hand, there is evidence that the premises had been kept in repair : and, it is not possible, in my judgment, for this Court to come to any conclusion as to whether the

Defendants, while they were in possession, committed any breach of the terms of the lease.

The learned Counsel then urged that the learned Judge had found that the Defendants had committed a breach of one of the covenants in that, at the end of January 1923, they removed certain fixtures which they had no right to remove and when they gave up possession the premises were not in good and substantial repair and condition in accordance with the terms of the lease and that the learned Judge had assessed damages in respect of the breach of that covenant at Rs. 1,500.

There is no doubt that that is the finding of the learned Judge, but I am not prepared to accept the learned Counsel's contention that the fact that the Defendants had committed a breach of that covenant when they gave up possession of the premises, was sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the end of December 1920.

In my judgment on the facts of this case there is no sufficient proof that the Defendants failed to comply with the terms of the lease until the end of January 1923, and consequently the Plaintiff was not entitled to a decree for possession until the end of January 1923 when in fact the Plaintiff got possession.

Consequently, the Plaintiff is not entitled to any mesne profits in respect of the period for which he has claimed.

In my judgment the Plaintiff is only entitled to a decree for Rs. 1,500 with regard to the damages assessed by the learned Judge in respect of the breach of the covenant not to remove fixtures and to deliver up possession of the premises at the termination of the term in good and substantial repair.

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The result therefore is that in my judgment this appeal should be allowed and the learned Judge's decree should be varied. In place of the decree passed by the learned Judge there will be a decree in favour of the Plaintiff for Rs. 1,500 as damages.

We give a direction that the four pieces of Government securities to which reference has been made be handed to the Defendants upon the Defendants producing a letter from the executors of Mr. Breakwell authorising them to receive the securities. The Plaintiff will be entitled to withdraw the money deposited by the Defendants with the Rent Controller.

As regards costs, we are of opinion that the Plaintiff should get the costs of the trial with the exception of the costs of Mr. Shorsbree, and that the Plaintiff should pay the Defendants the costs of the appeal (one set of costs to be set off against the other). These costs are to be ordinary costs which will carry two Counsel.

The war bonds deposited with the Registrar will be handed to the Defendants' attorney.

RANKIN, J.—I agree.

Mr. S. C. Niyogi, Solicitor for the Appellants.

Mr. C. C. Bose, Solicitor for the Respondent.

P. D.

Appeal allowed.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORDER

No. 179 OF 1924.

SUHRAWARDY, J. DUVAL, J. 1925, 13, March.	}	JOGENDRA NARAYAN DAS, Appellant, v. SATYENDRA CHANDRA GHOSH MOULIK, Respondent.
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Civil Procedure Code (Act V of 1908), Or. 34,

rr. 4 and 5, Or. 9, rr. 9 and 13, Or. 48, r. 1, cls. (c) and (d)—Appeal from interlocutory orders, preferred after the passing of the final decree, if maintainable.

The Appellant J applied under Or. 9, r. 13, of the Code of 1908 for setting aside an *ex parte* preliminary mortgage decree passed against him under Or. 34, r. 4, and his said application having been dismissed for default on 16th February 1924, the date on which the said preliminary mortgage decree was made final under Or. 34, r. 5, the Appellant made an application under Or. 9, r. 9 on 25th February 1924 for setting aside the order dismissing his application under Or. 9, r. 13 for default. This latter application was dismissed on 7th April 1924. The Appellant then preferred an appeal to the High Court on 15th May 1924 against both the interlocutory orders, dated respectively the 16th February 1924 and 7th April 1924:

Held—That the appeal from the interlocutory orders made under Or. 9, r. 13 and Or. 9, r. 9 respectively preferred after the passing of the final decree in the cause under Or. 34, r. 5 was not maintainable.

The right of appeal against interlocutory orders ceases with the disposal of the suit.

MADHUSUDAN SEN v. KAMINI KANTA SEN (1) and NANIBALA DAS v. ICHHAMOYEE DAS (2) followed and referred to.

This was an appeal against the order of Babu S. C. Basu, Subordinate Judge of Zillah Birbhum, dated the 16th of February and the 7th of April 1924.

The facts of the case are as follows:—

In this suit, based on a mortgage bond, an *ex parte* preliminary decree was passed against the Appellant on 24th July 1923 under Or. 34, r. 4 of the Civil Procedure

(1) I. L. R. 82 Cal. 1023: s. c. 9 C. W. N. 895 (F. B.) (1905).

(2) 40 C. L. J. 291 (1923).

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Code of 1908. The Defendant-Appellant then applied under Or. 9, r. 13 to have the said preliminary *ex parte* decree set aside. The Appellant's said application under Or. 9, r. 13 was dismissed for default on 16th February 1924. And on the Plaintiff-Respondent's application a final decree for sale was passed in the said mortgage suit on the said 16th February 1924 under Or. 34, r. 5 of the said Code. Then on 25th February 1924 subsequent to the passing of the final decree for sale under Or. 34, r. 5 on 16th February 1924, the Appellant applied, under Or. 9, r. 9 of the Civil Procedure Code, for setting aside the said order of dismissal for default passed on 16th February 1924. This application under Or. 9, r. 9 for setting aside the order of dismissal for default was disposed of on the merits on 7th April 1924. The present appeal was preferred by the Defendant on 15th May 1924 against the order, dated the 16th February 1924, dismissing his application under Or. 9, r. 13 for default as also against the order, dated the 7th April 1924, dismissing his application under Or. 9, r. 9 for the restoration of his previous application under Or. 9, r. 13.

The Plaintiff-Respondent took a preliminary objection at the hearing—that the appeal was incompetent as the final decree had been passed before the appeal was lodged.

Dr. Sarat Chandra Basak and *Babu Mukunda Behary Mullik* for the Appellant.

Babu Panchanan Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J. The facts of this case are that the Plaintiff-Respondent brought a mortgage suit against the Defendant-Appellant on the 4th May 1922.

After several adjournments the case was fixed for hearing on the 24th July 1923. On that day the Defendant's pleader stated that he had no instruction and an *ex parte* preliminary decree was passed in favour of the Plaintiff. The Defendant thereafter applied for a re-hearing of the case under Or. 9, r. 13. That application was registered and the 16th February 1924 was fixed for hearing of the re-hearing case. On that date the Defendant applied for time on the ground of illness. The prayer was rejected and the re-hearing case dismissed for default. On the same day, namely, the 16th February 1924, the Court on the application of the Plaintiff passed the final decree for the sale of the mortgaged properties. On the 25th February 1924 the Defendant filed an application for setting aside the order dismissing his application under Or. 9, r. 13. That application was registered and finally disposed of on the merits on the 7th April 1924. The present appeal was filed in this Court on the 15th May 1924 against the orders, dated the 16th February and the 7th April 1924, namely, the orders by which the lower Court dismissed his application under Or. 9, r. 13 and the application under Or. 9, r. 9 for the restoration of his previous application.

At the hearing of this appeal a preliminary objection is taken by the Respondent to the effect that the final decree having been passed before the appeal was lodged in this Court, this appeal is incompetent. In my opinion, this objection should succeed. So far as this Court is concerned it is taken to be concluded by authorities that if an appeal is preferred against the preliminary decree after the final decree has been passed, it cannot be heard. The principle upon which this view has been taken is that the right of

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appeal from interlocutory orders ceases with the disposal of the suit. It has been so held in the case of *Madhusudan Sen v. Kamini Kanta Sen* (1). There the appeal was preferred against an order of remand passed under sec. 562 of the Code of 1882 (corresponding to Or. 41, r. 23 of the new Code) after the suit on remand was heard and decided by the trial Court; but there was no appeal from the said decision in the suit. It was held that the appeal to the High Court from the order of remand after the suit was finally decided on remand was not maintainable. Maclean, C. J., observed thus: "If a party desires to avail himself of the privilege conferred by sec. 588 (Or. 43, r. 1) in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit." There are no doubt divergent decisions which have all been collected and considered in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (2) to which I was a party where it is laid down that in a suit for partition an appeal against the preliminary decree is incompetent if filed after the preparation of the final decree. It is not questioned that the same principle applies to the present case. But it is argued by the Appellant that the right of appeal conferred on a party by law under Or. 43 should not be taken away without any statutory enactment to that effect because he has not taken certain steps under some other proceeding; and it is argued on the authority of some of the cases cited on behalf of the Appellant that the final decree must be

considered to be dependent upon the preliminary decree and therefore if the preliminary decree is set aside on appeal, though filed after the final decree was passed, the final decree must accordingly be set aside. This question was considered in the cases which have taken the view affirmed in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (2). The learned Judges have stated that the principle underlying the cases which have been reviewed in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (2) is that the right of appeal against interlocutory orders ceases with the disposal of the suit and that the preliminary decree is said to be an interlocutory order because it is an order passed before the suit was finally disposed of. If the contention of the Respondent is given effect to, it may lead to many absurd results. Every decree depends upon the validity of the procedure followed in the suit and upon the legality of interlocutory orders passed in the suit; and if one of such orders is appealable, the aggrieved party may appeal against that order after the decree and cease to care for the decree in the suit which may be had at great waste of time and money. That is not a desirable procedure to follow. I may quote one instance in order to illustrate my view. Under Or. 23, r. 3 the Court may refuse to pass a decree in accordance with the compromise alleged to have been effected between the parties. There is an appeal provided against that order. The Defendant, if aggrieved by that order, may appeal from it even after a decree is passed on the merits. This I do not believe can be the policy of the law.

The present case is much weaker than the cases in which the question has been examined. Here the appeal is not against

(1) I. L. R. 32 Cal. 1023: s. c. 9 C. W. N. 895 (F. B.) (1905).

(2) 40 C. L. J. 291 (1923).

(2) 40 C. L. J. 291 (1923).

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the preliminary decree but against an order refusing to set aside the preliminary decree. The effect of the Petitioner succeeding in the appeal will be to revive the application for setting aside the preliminary decree, and if that application succeeds the preliminary decree may be re-opened and the final decree should be taken to be contingent upon the result of those proceedings. I therefore hold that this appeal cannot proceed and must be dismissed with costs, three gold mohurs.

DUVAL, J.—I agree.

H. D. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

NO. 877 OF 1922.

GREAVES, J.	}	ASUTOSH ROY,
CHAKRAVARTI, J.		Plaintiff, Appellant,
1924,		v.
25, August.		RAMPUR BOALIA MUNI-
		CIPALITY, Defendant,
		Respondent.

Joint possession—Co-sharer, if can change the state of possession of the co-tenant—Remedy when co-tenant unreasonably obstructs beneficial use of joint property Suit for infringement of rights of co-owner as distinguished from suit on ground of actionable nuisance—Discretion of Court, how to be exercised Interference by High Court

The Plaintiff and the Defendant Municipality were in joint possession of a certain piece of land. In spite of the protests of the Plaintiff the Municipality proceeded to construct on a portion of the land some houses and latrines for the use of sweepers and Methors. The Plaintiff sued for declaration of his right and for permanent injunction. The houses and latrines were constructed during the pendency of the suit. The Plaintiff's title as also possession was found but an injunction was granted limited to the removal of the latrines only:

Held—That one co-sharer has no justification to change without the consent of his co-tenants the state of the possession as enjoyed by the co-tenants.

In case a co-sharer is unreasonable and obstructs his co-tenant in making beneficial use of the joint property the remedy of the tenant-in-common is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharer.

That the Court below was wrong in thinking that the Plaintiff was seeking an injunction on the ground of actionable nuisance whereas in fact the case was based on the ground of infringement of the rights of a co-owner by another co-owner, and the Plaintiff's remedy should not have been limited but should have included the whole subject-matter of the suit.

The discretion of the Court must be exercised on recognised principles and should not be arbitrary. Where the circumstances of a case demand it the High Court has frequently interfered with the exercise by lower Courts of their discretionary power, if such exercise has been inconsistent with sound principles.

This was an appeal against the decree of Babu Srish Chandra Banerjee, Subordinate Judge of Zillah Rajshahi, dated the 17th of December 1921, affirming the decree of Babu Bhujagendra Mustafi, Munsif of Boalia, dated the 31st of May 1919.

The facts of the case will appear from the judgment.

Dr. Naresh Chandra Sen (Gupta) and Babu Jatindra Mohan Chowdhury for the Appellant.

Babu Nerode Bandhu Roy for the Respondent.

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The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This is an appeal by the Plaintiff against the Chairman of the Commissioners of the Rampur Boalia Municipality as the principal Defendant in a suit for an injunction against the Defendant.

The question which arises for decision in this second appeal relates to the rights of tenants-in-common, who are in joint possession of a certain piece of land, as to the mode of enjoyment of such joint rights.

The facts which gave rise to the litigation between the parties shortly stated are these :— That a tank called Bakultala tank within the Municipal limits of the Rampur Boalia Municipality belonged in equal shares to the father of the Plaintiff and the father of the *pro formâ* Defendant. The Municipality finding that the tank was insanitary, after serving the necessary notices, took possession of the tank and filled it up with earth at their own cost and it is not disputed that the Municipality was entitled to retain possession of the filled up site under the provision of sec. 200 (2) of the Bengal Municipal Act, after it was filled up in or about the year 1912. The owners were called upon to pay the costs of filling up the tank and take its possession back. The Plaintiff paid his half share of the costs and with the consent of the Municipality in 1916 took joint possession of the site which measures about 5 cottas in all. It is also not now disputed that since then both the Plaintiff and the Municipality were in joint possession of the reclaimed land, although the Plaintiff alleged that he was in sole occupation of it. In fact the site was left vacant and nobody exercised any visible act of occupation or user but it was in evidence that the Municipality kept

the place clear of jungles and shrubs although the Plaintiff also claimed to have cleared the jungles on the lands and made exclusive user of some sort. The Munsif however found, to quote his own words, " Thus eventually the Plaintiff and the principal Defendants are in the position of co-sharers in joint possession of the disputed land which was in fact *patit* land without any special or particular act of possession by any side in the same all these three years before suit, and the law of joint owners will apply in a case like this " This view of the Munsif has been accepted by the Subordinate Judge also.

The Municipality conceived the idea of constructing houses for the accommodation of their sweepers on about 1½ cottas of this site and when preparation for building the huts was being made " all the people of the locality headed by Harinath Sen " protested against the action of the Municipality and the Plaintiff opposed the intended user of joint land for accommodation of Methors as a nuisance to the neighbourhood and also on the ground that the site was close to his *Kalibari*.

The Municipality however decided to proceed with the work and before any work had been actually done, the present suit was instituted on the 25th September 1918 for declaration of the Plaintiff's right and for a permanent injunction restraining the Municipality from erecting the proposed huts and latrines for the accommodation of Municipal sweepers and Methors. An *ad interim* injunction was issued but was dissolved on the objection of the Defendants the Municipality. The houses and the latrines were constructed by the Municipality during the pendency of the suit.

The learned Munsif found Plaintiff's title and possession as I have stated before but disallowed the main prayer but gran-

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ted an injunction for the removal of the latrines and made no order as to costs.

On appeal by the Plaintiff, the Subordinate Judge dismissed the appeal with costs.

I shall first endeavour to state some of the principles which are necessary to consider for the determination of the question which arises in this case, namely, were the Municipality justified in building the houses on land which was in joint possession, in spite of the protest of their co-owner, the Plaintiff, and if not, is the Plaintiff entitled to the mandatory injunction prayed for.

In the case of *Dwijendra Narain v. Purnendu Narain* (1) following the case of *Ananda Chandra v. Parbati Nath* (2) Mr. Justice Mookerjee laid down the rule as follows :—

“ Each co-owner is in theory interested in every infinitesimal portion of the subject-matter and each has the right irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with the others.”

In the case of *Lokenath v. Dhakeswar* (3) it was laid down that “ every co-tenant has the right to enter into and occupy the common property and every part thereof provided that in doing so he does not exclude his fellow tenants or otherwise deny to them some right to which they are entitled as co-tenants.”

In the case of *Israil v. Shamser Rahman* (4) it was laid down : “ If a co-owner, with the tacit consent of his co-sharer, is in sole occupation of a portion of joint property, he is not entitled to change the

nature of that possession or to use the property in a mode different from that in which it had previously been used.”

From the principles I have just quoted it follows that one co-sharer has no justification to change without the consent of his co-tenant the state of the possession as enjoyed by the co-tenants. According to the findings of the Courts Plaintiff and the Defendants were in joint possession of these 5 cottas of the land and the moment the Municipality attempted to take this land into their exclusive occupation the Plaintiff protested. When the Municipality in disregard of this protest persisted in their determination the present suit was instituted. I do not see why the Plaintiff should not be restored to his original position. There was no acquiescence here nor is there any equitable consideration which would justify the Court to refuse to give the Plaintiff his just right.

The Courts below seem to think that the objections of the Plaintiff were not reasonable. Is the Plaintiff bound to justify the validity of his objections or to suit the convenience of his co-tenant? It was not his business. In the circumstances of this case, it appears to me the objections of the Plaintiff were not merely fanciful. He had a right to insist that his own property should not be put to an use which was repugnant to his feelings and in fact the whole neighbourhood objected to the erection of those houses. In case a co-sharer is unreasonable and obstructs his co-tenant in making beneficial use of the joint property, the remedy of the tenant-in-common is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharers.

It has been argued by the learned Vakil for the Respondent on the authority of the case of *R. Watson v. Ram*

(1) 11 C. L. J. 189 (1910).

(2) 4 C. L. J. 198 (1908).

(3) 21 C. L. J. 253 (1914).

(4) I. L. R. 41 Cal. 436 at p. 442; s. c. 18 C. W. N. 176 (1913).

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Chand (5) that here as in that case joint possession should not be awarded to the Plaintiff. I do not think that this case will help the Defendants. It is one of those cases which lie just near the borderline and that is the reason why both the District Judge and the High Court gave decrees enforcing the claim of the Plaintiffs in that case as to the 14 annas of the property to which the Watsons had no title. If the facts are closely examined it would appear that the strict rights of the Plaintiffs were modified on two main grounds. It appears that the Watsons were in possession of the entire land until the 14th of September 1893 when the leases of the 14 annas share to the Watsons under the Dutt's expired and after that the Watsons "continued in possession and to cultivate and sow it with indigo as they had done during the continuance of the leases." See p. 118.

Here, therefore, there was no change made by the Watsons in the nature of the existing possession, all that they did was to refuse to allow the Dutt's to come in and to take joint possession to the extent of their share. Therefore this case does not fall with the rule "that a co-sharer is not entitled to change the nature of existing state of things."

In the present case, joint possession of the parties was disturbed by the Municipality and that in spite of the protest of the Plaintiff. There can be no justification for such a high-handed proceeding.

Then their Lordships pointed out that it would be against public policy in Bengal to allow a large tract of valuable land to lie uncultivated "until all the shareholders can agree upon a mode of cultivation to be adopted or until a partition

by metes and bounds can be effected, a work which in ordinary course, in a large estate, would probably occupy a period including many seasons" etc. After expressing themselves in the language quoted above, their Lordships say: "In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience and if in a case of share-holders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another it would be scarcely consistent with the rule above indicated to restrain him."

Herein is the key to the judgment of their Lordships.

In the present case there are no grounds on which it can be said that the Plaintiff has lost his undoubted rights to insist upon the continuation of the existing state of the possession of the common lands.

It was next urged by the learned Vakil for the Respondent that there was no ouster of the Plaintiff because the Municipality did not deny the title of the Plaintiff.

It was held in the case of *Debendra v. Narendra* (6) that "when there is an actual turning out or keeping out of possession there is an ouster." This is what has happened in the present case. It was lastly urged on behalf of the Respondent that remedy by an injunction is a discretionary matter and this Court should not interfere with the decree of the Courts below. Injunction was granted in this case but it was limited to the latrines. It seems that the Courts below thought in the present case the Plaintiff was seeking an injunction on the ground of actionable nuisance forgetting that the case was

(5) L. R. 17 I. A. 110; s. c. I. L. R. 18 Cal. 10 (1890).

(6) 28 C. W. N. 900 (1919).

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based on the ground of infringement of the rights of a co-owner by another co-owner. The Plaintiff's remedy should not have been limited but should have included the whole subject-matter of the suit. The discretion of the Court must be exercised on recognised principles and should not be arbitrary. Where the circumstances of a case demand it the High Court has frequently interfered with the orders of the lower Courts if they were inconsistent with sound principles.

The Defendants cannot complain if they are now compelled to restore the property to its original condition by the removal of the huts built on the land which they persisted in building in spite of the institution of this suit.

In the result the judgments and decrees of the lower Courts are modified and the suit of the Plaintiff is decreed in full and the Defendants are directed to remove all the buildings and restore the land to its original condition. The Plaintiff will get his costs in all Courts. We direct that the building should be removed within two months from this date—in default the Plaintiff will be entitled to get this removed in execution of this decree.

GREAVES, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 553 OF 1924.

SANDERSON, C. J.	}	JATINDRA MOHAN
CHOTZNER, J.		BANERJEE, Petitioner,
1924,		v
8, August.		GOURI BALA DEBI,
		Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 488—"Living in adultery," meaning of—Single act of adultery, if sufficient to cause forfeiture of maintenance.

Under sec. 488, Cr. P. C., unless continuity of conduct is established it cannot

be inferred from a single act of adultery that the woman is "living in adultery" so as to be deprived of maintenance from the husband:

Held—That it was open to the trying Magistrate to find that, apart from the circumstance that the woman had given birth to an illegitimate child, she was not living in adultery, and the High Court refused to interfere.

This was a Rule granted on the 7th July 1924 against an order of the 3rd Presidency Magistrate of Calcutta (A. Z. Khan, Esq.), dated the 21st June 1924, refusing to discontinue the maintenance.

The facts of the case will appear from the judgment.

Babu Probodh Chunder Chatterjee for the Petitioner.

Babu Benoyendra Prosad Bagchi for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

CHOTZNER, J.—This is a Rule calling upon the Chief Presidency Magistrate and upon the Opposite Party to show cause why the order specified in the petition should not be set aside.

It is said that the Petitioner and the Opposite Party are husband and wife and that they have not been living together for nearly twenty years, and, it is admitted that during that period the Petitioner has been paying her a monthly sum of Rs. 10 under an order under sec. 488 of the Criminal Procedure Code.

The Petitioner's case is that the Opposite Party had been living in her father's house up till sometime in December 1923 when she gave birth to an illegitimate child and was driven away by her brother who was living with her and her mother in that house. The Petitioner thereupon applied to the Court of the

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Chief Presidency Magistrate for the cancellation of the maintenance order. The learned Magistrate, however, rejected the application. The Magistrate observed that though the child was illegitimate "there is nothing further to show that the woman has been 'living in adultery,' which alone would entitle the Petitioner to stop the maintenance." He referred to the case of *Kallu v. Kaunsilia* (1).

The learned vakil for the Petitioner has contended that when there is the undeniable fact of the woman being the mother of an illegitimate child and when other circumstances have been proved to show that she has been guilty of different acts of misconduct the learned Magistrate should have found that she was "living in adultery" within the meaning of sec. 488, Cr. P. C.

The learned vakil who has appeared for the Opposite Party, on the other hand, contends that although the birth of this child may show an act of adultery it does not establish that the mother has been "living in adultery" so as to make her amenable to the penalties laid down in sec. 488, cl. (5).

The expression "living in adultery" has been judicially interpreted more than once. In the case of *Gantapalli Appalamma v. Gantapalli Tellaya* (2), Shephard, J., said: "The words point to a continuous course of conduct, not to isolated acts of immorality." In the case of *Patala Atchamma v. Patala Mahalaksmi* (3), the learned Judges refer with approval to this case as well as to the case of *Kallu v. Kaunsilia* (1) and say: "These words refer rather to a course of conduct, or at least to something more than a single lapse from virtue."

We are of opinion that this is the proper and natural construction to be put upon the words and unless continuity of conduct is established, it cannot be inferred from a single act of adultery that the woman is "living in adultery." In the present case we think that although the woman has given birth to a child it was open to the Magistrate to find that, apart from that circumstance, she was not "living in adultery," and that we should consequently not interfere with his decision.

The Rule is accordingly discharged.

SANDERSON, C. J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 14 OF 1925.

NEWBOULD, J.	}	NITYAMANJAN MONDAL
B. B. GHOSH, J.		and ors., Petitioners,
1925,		v.
24, March.		THE KING-EMPEROR,
		Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 526—Grounds of transfer—Relationship between the Muktear and the trying Magistrate, if a good ground for transfer of the case.

In an application by the accused under sec. 526 of the Criminal Procedure Code for transfer of a case on the ground that the muktear appearing for the complainant was a near relation of the trying Magistrate and that the complainant was giving out that on account of such relationship, conviction was certain:

Held—That in the circumstances there was good ground for transfer of the case to another Magistrate.

"It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation."

This was a Rule granted on the 26th January 1925 on the application of the Petitioners for transfer of the case pending

(1) I. L. R. 26 All. 326 (1904).

(2) I. L. R. 20 Mad. 470 (F. B.) (1898).

(3) I. L. R. 30 Mad. 332 (1907).

NITYARANJAN MONDAL v. THE KING-EMPEROR.

against them under sec. 379, I. P. C., in the Court of Babu A. P. Mukerji, Honorary Magistrate of Rampurhat, to the file of some other Magistrate.

The application was under sec. 526 of the Criminal Procedure Code, for transfer of the case from the Court of an Honorary Magistrate of Rampurhat to some other Magistrate of the place. The Petitioners were charged under sec. 379 of the Indian Penal Code, on the ground that they caught some fish from the tank belonging to the complainant who was a pleader. The muktear who appeared for the prosecution was alleged to be not only a relation of the complainant but also a *baibahik* of the Honorary Magistrate—elder brother of the father-in-law of the muktear's son. The Petitioners further alleged that the complainant had been publicly giving out that the case would surely end in the conviction of the Petitioners as his muktear was a relation of the trying Magistrate. The Petitioners, therefore, apprehended that they would not get a fair and impartial trial before that Magistrate and applied before the District Magistrate of Rampurhat for the transfer of the case to some other Magistrate. The application was rejected.

Babus Dinesh Chandra Roy and Subodh Chandra Lahiri for the Petitioners.

Babu Patitpaban Chatterjee for the Opposite Party.

Mr. Asraf Ali, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The only serious ground on which this application for transfer is based, is that the muktear who is appearing for the complainant is, as admitted by the learned Magistrate, a close relation of his. It is

undesirable that a member of the legal profession should practise in a Court presided over by a near relation. The complainant in this case is a pleader and we are surprised that a member of that branch of the profession should have engaged a muktear whom he knew to be related to the Magistrate who would try the case. The *muktearnama* was not filed until the day on which the case was transferred to this Honorary Magistrate.

We accordingly make this Rule absolute. We transfer the case from the file of the Honorary Magistrate Mr. A. P. Mukerjee to that of any other Magistrate whom the District Magistrate may select.

P. D.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 26 OF 1925.

NEWBOULD, J.	} SHEIKH SADIR and ors., 2nd party, Petitioners, v. SABARALI, 1st party, Opposite Party.
B. B. GHOSE, J.	
1925, 13, March.	

Criminal Procedure Code (Act V of 1898), sec. 139A—Magistrate's bounden duty when the person against whom notice has been issued under sec. 133 appears.

Under sec. 139A, as soon as a person against whom a notice under sec. 133 has been issued appears, the Magistrate is bound to question him as to whether he denies the existence of a public right in the subject-matter of the proceeding and if he does so the Magistrate is bound to enquire into the matter before proceeding under sec. 137 or 138. The Magistrate is not to wait for the objection to be raised by one of the parties to the proceeding, nor can the Magistrate refuse to enquire into the matter because the objection was not taken until a late stage of the case.

This was a Rule against an order of the Sub-Divisional Magistrate of Naraingunj,

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against which order an application had been made to the Sessions Judge at Dacca, for a reference to the High Court but rejected.

On the application of the Opposite Party a notice under sec. 133, Cr. P. C., was drawn up by the Sub-Divisional Magistrate of Naraingunj. The Petitioners appeared before the Sub-Divisional Magistrate, filed a written statement in which he denied the existence of the public *khal* in respect of which the notice had been issued, set up a claim of title to the plots of land in question and suggested a reference to the Civil Court for the settlement of the dispute. Under orders of the Sub-Divisional Magistrate a Deputy Magistrate held a local enquiry and made a report. The case was then transferred to the file of the Deputy Magistrate who drew up a proceeding under sec. 133 asking the Petitioners to remove the obstruction or to show cause and asked the parties to adduce evidence. On the date fixed the Petitioners filed an application stating that the case raised a question of title and could not be tried by a Criminal Court and prayed for a stay of the proceedings. The Deputy Magistrate rejected the said application holding that it was too late to ask for a stay of the proceedings in the Criminal Court. At no stage of the case the Deputy Magistrate questioned the Petitioner under sec. 139A of the Code of Criminal Procedure, as to whether they denied the existence of the public right in the *khal*. The Petitioners moved the Additional Sessions Judge of Dacca against the order of the Deputy Magistrate but the Additional Sessions Judge rejected the Petitioners' application. The Petitioners moved the High Court and obtained a Rule.

Babu Prafulla Chandra Chakravarti for the Petitioners.

Babus Probodh Chandra Chatterji and Asitaranjan Ghosh for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

Under the Criminal Procedure Code now amended it is the duty of a Magistrate to proceed in accordance with the provisions of sec. 139A without waiting for the objection to be raised by one of the parties to the proceeding. Under that section, on the appearance before him of the person against whom the order is made, the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way, river, channel or place and if he does so the Magistrate shall before proceeding under sec. 137 or sec. 138 inquire into the matter. The Magistrate could not refuse to inquire into the matter because the objection was not taken until a late stage of the case.

We accordingly make this Rule absolute to this extent that we direct the Magistrate to follow the procedure of sec. 139A, Cr. P. C., before taking any further step in this matter.

S. C. M.

CRIMINAL APPELLATE JURISDICTION.)

APP. No. 233 OF 1924.

WALMSLEY, J.	}	MAHAMMAD YASIN,
MUKERJI, J.		Appellant,
1924,		v.
14, August.		THE KING-EMPEROR,
		Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 197—Sanction of Local Government, if necessary for prosecution of member of Union Committee—Sec 360—Reading over of deposition by literate witness himself, if sufficient compliance with section.

The sanction of the Local Government under sec. 197, Cr. P. C., is not necessary for the prosecution of the Chairman of a

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Union Committee who is not removeable from his office only by the Local Government.

Under sec. 360, Cr. P. C., both the witnesses whose statements have been recorded and the accused who is on his trial are to be given an opportunity of knowing what has been recorded and a mere reading over of the evidence by the witnesses cannot convey to the accused what has been recorded as the evidence given by the witnesses and is not a sufficient compliance with the section.

The Appellant who was the Chairman of the Union Committee of Chatmohor in the District of Pabna was convicted under secs. 218, 409, 477A, I. P. C.

It appeared that some of the witnesses for the prosecution were literate and they read themselves their depositions in the presence of the accused and admitted the correctness of the deposition as recorded by the Sessions Judge and signed their names under a certificate which was to the effect that the evidence was read over by the witness himself and admitted by him to be correct.

Mr. Monnier and Maulvi Syed Nousher Ali for the Appellant.

Babu Anil Chandra Roy Chaudhuri for the Crown.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Appellant was the Chairman of the Union Committee at Chatmohor in the District of Pabna, and he has been convicted under secs. 218, 409 and 477A of the Indian Penal Code. A concurrent sentence of three months has been passed under each of the secs. 218 and 409, I. P. C. There was also a fine imposed under sec. 409, I. P. C., and no sentence was passed separately on the accused under sec. 477A, I. P. C.

The first point which is urged on behalf of the Appellant is that the proceedings were bad because there was no sanction given by the Local Government as required by sec. 197, Cr. P. C. I do not think there is any substance in this objection because it appears that a member of the Union Committee can be removed under certain circumstances by a Commissioner, so that it cannot be said of him that he is not removeable from his office save by the Local Government.

The second objection is that there was no compliance with the provisions of sec. 360, Cr. P. C., regarding the depositions of several of the witnesses. Reference is particularly made to P. W. Nos. 1, 3, 8, 9, 10, 13, 14, 15, 16, 17 and 19. Reliance is placed upon the recent decision in the case of *Hira Lal Ghose v. Emperor* (1) and it is urged that, in accordance with that decision, the evidence of these witnesses cannot be treated as evidence on which a conviction can be founded. There is an affidavit to the effect that there was not strict compliance with the law in reading over the evidence given by these witnesses. On the other hand, there is a letter from the Sessions Judge sending up a report of the learned pleader who conducted the prosecution. The statements made by that pleader seem to me to support the case of the Appellant, because it is evident that the pleader failed to understand the true nature of the requirements of sec. 360. As I understand that section, both the witnesses whose statements have been recorded and the accused who is on trial are to be given an opportunity of knowing what has been recorded and obviously a mere reading over of the evidence by the witnesses cannot convey to the accused what has been recorded as the evidence

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given by the witnesses. It appears to me, therefore, that we must hold that the evidence was not duly recorded as required by sec. 360 and cannot, therefore, be used as the foundation of a conviction. The result is that the findings and sentences in this case must be set aside and the case remitted to the Sessions Court where it will be open to the authorities, if they think proper, to proceed against the accused *de novo*. The Appellant, we are told, is on bail. He may remain on that bail pending further orders by the District Magistrate.

MUKERJI, J.—I agree.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APP. NO. 1 OF 1924.

NEWBOULD, J.

MUKERJI, J.

1924,

10, July.

THE GOVERNMENT OF
BENGAL, Appellant,
v.
MUCHU KHAN,
Respondent.

Criminal Procedure Code (Act V of 1898), sec. 276—Selection of jurors from outsiders in case of deficiency of persons summoned

In case of deficiency of persons summoned, the number of jurors required may be chosen from such other persons as may be present in Court. These may not be chosen by lot and may not be at all in the jury list.

This was an appeal preferred by Government against an order of acquittal passed by G. C. Sen, Esq., Sessions Judge of Pabna.

The material facts appear sufficiently from the judgment.

Mr. Khundkar, Deputy Legal Remembrancer, for the Appellant.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of Govern-

ment against the acquittal of one Muchu Khan who was tried on the charge of murder. The ground that is pressed before us is that the jury was illegally selected. The facts, according to the affidavit which has been filed, are that on the day fixed for the trial, of the 14 of the special jurors three only appeared. The Sessions Judge waited for about an hour and no more came. Subsequently four gentlemen who happened to be in the precincts of the Court were called as jurors in the case. These were not chosen by lot and were not all in the jury list.

We are unable to accept the contention that there was anything illegal in the procedure adopted. Sec. 276, Cr. P. C., provides that in case of a deficiency of persons summoned the number of jurors required may with the leave of the Court be chosen from such other persons as may be present. This section being part of the proviso to sec. 276, the words that "the jurors should be chosen by lot" cannot be held applicable thereto. There is nothing in this proviso itself requiring that they should be chosen by lot or that they should be on the jury list. If we refer to a similar sec. 279, it is there provided in the second clause that the place of a juror may be taken by any other person present in Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury. This shows that the Legislature contemplated the possibility of a person not in the jury list being chosen to serve on the jury in the case of emergency. Also it must be inferred that if it was intended to limit the powers under the second proviso to sec. 276 to persons on the jury list it would have been expressly so stated.

The second ground of appeal relates to the fact that objections which were taken to one of the jurors were overruled. In

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this matter the Judge has a wide discretion and his decision is final. The third ground relating to misdirection on the evidence has not been seriously pressed.

The appeal is dismissed. The accused will be released if he be in custody.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD SHAW.	}	KIRKWOOD <i>alias</i> MA THEIN and ors., Appellants, v. MAUNG SIN and anr, Respondents.
LORD PHILLIMORE.		
LORD BLANESBURGH.		
SIR JOHN EDGE.		
MR. AMEER ALI.		
1924,		
Heard, 29, May and		
19, June.		
Judgment,		
7, August.		

Burmese Buddhist Law—Succession—"Orasa," who is—If confined to son.

The designation orasa in the Dhammathats is not limited to a son and it connotes the eldest or first born child who is competent to undertake the responsibilities of the deceased parent, the eldest born, if a son, on the death of the father, the eldest born, if a daughter, on the death of the mother, the other parent being living.

In either case the orasa succeeds to a fourth of the inheritance on the death of the surviving parent.

This was an appeal (No. 81 of 1923) from a decree, dated the 6th September 1921, of the Chief Court of Lower Burma, which reversed a decree, dated the 4th November 1918, of the District Court of Hanthawaddy.

The suit in which those decrees were passed was brought for the administration of the estate of U Baw and Daw Hmo by the Appellants who are the

children of their eldest son and eldest but one child against the Respondents who are the two surviving children of the deceased, and against the legal representatives of his eldest child, a daughter, Ma Nyein Aung, who survived her parents and attained majority but died before suit.

The Appellants claimed a one-fourth share in the estate on the ground that their father had become before his death the "orasa" child of the deceased, and had as such attained a right to a one-fourth share, which had passed to them on his death. The facts, together with a pedigree of the family, are more fully set out in the judgment of the Judicial Committee.

The trial Judge heard and decided the case on the single issue:—

"Does the fact that Daw Hmo died before U Baw operate to prevent their eldest son Mg Po Cho from inheriting as the orasa son?"

The District Judge decided that the Appellants' father was the "orasa" son of the deceased and came to that decision relying on the case of *Po Hman v. Mg Tin* (1). The Respondents appealed to the Chief Court who referred the matter to a Full Bench consisting of Robinson, C. J., Maung Kin, Pratt, Heald and Duckworth, JJ.

On the 29th August 1921 they delivered judgment and held that the eldest child in a family, whether son or daughter, if attaining majority and otherwise competent is the "orasa" child and that therefore Ma Nyein Aung was the orasa child of the deceased.

In accordance with that decision the Division Bench which had made the reference allowed the appeal and decreed that the Appellants were entitled only to

(1) 8 L. B. R. 113.

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a one-sixteenth share in the estate of their parents.

Mr. DeGruyther, K. C. and Hon'ble Geoffrey Lawrence for the Appellants.—The judgment of the Chief Court is contrary to a series of previous decisions. In questions of succession under Burmese Buddhist law there are two cardinal propositions—

(1) That a man is superior to a woman.

(2) That the eldest child of each sex gets a preferential right because it stands in the place of the parent of that sex.

A son is always to be preferred to a daughter as "*orasa*" even if the daughter be the eldest born child, for the word "*orasa*" means the eldest son who is competent to take his father's place. The *orasa* is entitled to preference both in his share of the estate and in the right of representation by his children. This contention is borne out by *Manugye* in clear and unambiguous terms and it is not permissible to refer to the other *Dhammathats*.

Ma Nhin Bwin v. U Shwe Gone (2).

Messrs. Dunne, K. C. and E. B. Raikes for the Respondents.—The decision here really turns on the true interpretation of sec. 162 of U Gaung's Digest of Burmese Buddhist law. This has been carefully

considered by the Full Bench who have determined that "*orasa*" means the eldest born child in the family, and that construction is fully borne out by a comparison of the sections of the Digest.

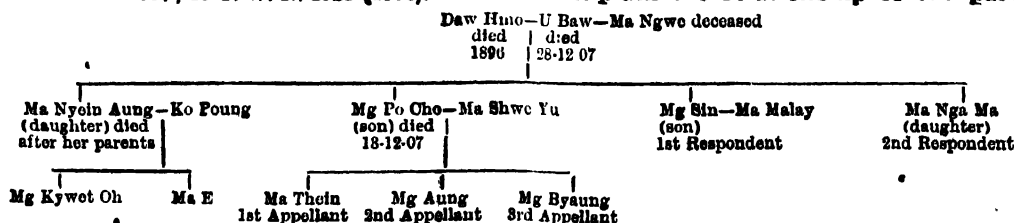
Throughout sec. 33 it is clear that "*orasa*" refers to the eldest child of both sexes. On the death of Daw Hmo, her daughter Ma Nyein Aung undertook the responsibilities of her deceased parent and helped in the care and control of the household. Those are the very reasons given in the *Dhammathats* why she becomes the "*orasa*" child and is entitled to a one-fourth share of the estate.

The decisions contrary to this view are based on a wrong conception of Burmese law and have been overruled by the Full Bench after very careful consideration.

Reference was also made to Richardson's Law of Menoo *passim*.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This appeal arises out of a suit for the administration of the estate of one U Baw, a native of Burma, subject to the Burmese-Buddhist law. U Baw died on the 28th December 1907; his wife, Daw Hmo, is said to have died some years before. U Baw had by her four children. The following table will explain the relationship of the parties:—



U Baw had a second or junior wife, but she does not enter into the present controversy.

Po Cho, the elder son of U Baw and Daw Hmo, died a fortnight or so before

the death of his father, leaving several children, who are the Plaintiffs in this action. They claim a one-fourth share of the estate of U Baw on the ground that their father, Po Cho, was the *orasa* son

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of his father, and was consequently, under the Burmese-Buddhist law, entitled to a preferential share of one-fourth in U Baw's estate. The claim is set out thus in the plaint:—

"That the said Ko Po Cho was the eldest son of the said U Baw and attained his majority and assisted the said U Baw in his business and kept up filial relations with the said U Baw up to his death, and the said Ko Po Cho attained the complete status of an 'Orasa' son of the said U Baw."

In para. 6 the Plaintiffs set out the basis of their own rights. They say that—

"As children and representatives of the said 'Orasa' son, they are entitled to an equal share in the estate of U Baw with each of their uncles and aunts, the said Ma Nyein Aung, Maung Sin and Ma Nga Ma, and that as the second or lesser wife Ma Ngwe has since died they claim a one-quarter share of the whole of the said estate of U Baw."

The Defendants deny the Plaintiffs' claim and the allegation that Po Cho was the *orasa* son.

In order to understand the controversy and follow exactly the decisions of the Courts in Burma in this case, it is necessary to explain that the Burmese-Buddhist law is contained in a series of books entitled *Dhammathats* which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not from before. This is lucidly set out in the Digest of U Gaung, printed under the auspices of the British Government. The author of this work, a distinguished Burmese jurist, describes a *Dhammathat* to be a "collection of rules which are in accordance with custom and usage" of the Burmese people. In his remarks on the treatment in these treatises of the subject of inheritance, Mr. Gaung observes that "the seven divisions of the Law of Inheritance

are treated in the *Dhammathats* in such a very unsystematic and unmethodical way that it becomes a tedious task for anyone who attempts to study the subject." In order to arrive at a definite conclusion on the points in controversy their Lordships have to embark on a survey of the law which, apart from its tediousness, is not free from inconsistencies.

In the Digest of U Gaung six classes of sons are said to be entitled to inherit the property of their parents. In the first category stands the son born of a union contracted with parental sanction, and is known as *orasa*. As religious formalities do not appear essential to lawful wedlock, this form of marriage is evidently regarded to constitute a valid marriage. The term *orasa* is admittedly borrowed from the Sanscrit *aurasa* used in works on Hindu law and has been corrupted into *auratha* or *orasa*, Mr. Richardson, the translator of the *Manugye Dhammathat* uses the word *auratha*, and Mr. Justice Heald, of the Chief Court, adopts the same spelling. Whether the word is spelt *auratha* or *orasa* it undoubtedly denotes a son born of a union contracted with parental sanction, in other words, a legitimate son. In course of time, judging from a comparison of the enunciations in the *Dhammathats*, it acquired a special meaning; it came to signify a son who, by virtue of his position in the family and his competency to assume the duties of the father, was vested with a defined right in the parental estate. Similarly, in the course of time, as the *Dhammathats* show, the word was extended to include a daughter standing in the same position and vested with the same right.

The Plaintiffs' case is that although Ma Nyein Aung was the eldest born daughter of U Baw and Daw Hmo, the Appellants' father, Po Cho, as the eldest son, possess-

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ed the qualifications necessary for being vested with the status of an *orasa* son. They contend, and their contentions have been urged with great force before the Board, that, in the first place a woman is inferior to a man, and secondly, that the *Dhammathats* do not lay down the rule that the son who is vested with the status of an *orasa* son and acquires a preferential right to a fourth share of the family estate should be the eldest born, or, to speak more correctly, the first born child. In support of their contention they rely on the provisions in the *Dhammathats* that in certain cases the younger son may be vested with the rights of the *orasa* or privileged son.

The suit was instituted in the Court of the District Judge of Hanthawaddy.

The substantial issue before him was whether Po Cho, who predeceased his father, acquired before his death the status of a privileged or *orasa* son and became thereby entitled to the preferential share of one-fourth in the parental estate, which he passed on to his children, the Plaintiffs.

In using the term "privileged" their Lordships do not wish to introduce another element of complexity to a sufficiently perplexing question. They use it simply as a synonym for *auratha* or *orasa*.

Admittedly the entire property in dispute was acquired as stated in the plaint "during the marriage of the said U Baw and Baw Hmo," and thus husband and wife under the Burmese-Buddhist law were entitled to equal shares in the property. If this fact is borne in mind much of the difficulty in the case would disappear.

The District Judge felt himself constrained by previous decisions in the Burma Courts to hold that the Plaintiffs had made out their claim and were entitled to a one-fourth share in the estate.

From the District Judge's decree the Defendants appealed to the Chief Court. The appeal was in the first instance heard by a Division Bench consisting of Robinson, C. J., and Duckworth, J. In view of the fact that the decisions in previous cases were by no means consistent and having regard to the complexity and importance of the controversy in the present litigation, the learned Judges felt it advisable to refer the points at issue to a Full Bench of their Court; and considering that the reference should be based on specific questions, they submitted to the Full Bench six questions, which appear to cover a far larger ground than perhaps was actually necessary for the decision of this case.

It is interesting, however, to note the questions, as they furnish the key to the major part of the decisions of the Full Court. They are as follows:—

1. In a family consisting of both sons and daughters, can any child acquire the full status of *orasa* prior to the death of either parent?
2. If so, in such a family where the eldest child is a daughter, can any son become *orasa* until his father dies?
3. In such a family, can the question which child is the *orasa* be decided before the death of either parent?
4. Can there be in such a family two *orasas*?
5. Are sons always to be preferred to daughters as *orasa*?
6. In such a family, can there be an *orasa* son who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?

The matter thus came before a Full Bench of five Judges. Although some of them considered the questions rather wide in view of the actual facts of the case, all concurred substantially in the answers

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which Mr. Justice Maung Kin gave. His answers are as follows :—

“ Question 1—in the affirmative.

“ Question 2—Where the eldest child is a daughter, no son can become *orasa*.

“ Question 3—in the affirmative.

“ Question 4—in the negative.

“ Question 5—in the negative, unless the son is the eldest born.

“ As regards Question 6, I may say that the word ‘transmit’ is not quite a happy term. The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment as laid down in the first paragraph of sec. 15 of the Manukye, or sec. 162 of the Digest. If the eldest born son died before he became competent to take his father’s place, a younger son, being fully qualified, may become *orasa*, and, if that son had predeceased his parents, his children will have a right to the same preferential treatment. But if the eldest born child was a daughter and predeceased her parents after she had become competent to take her mother’s place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter, younger than a son, can ever take the place of the eldest born daughter who is not competent or died before she became able to take her mother’s place.”

On receiving the answers to the questions submitted, the Division Bench reversed the decree of the District Judge and awarded a decree to the Plaintiffs in respect of a one-sixteenth share of the estate, in lieu of the one-fourth that had been given to them by the Court of first instance. From this decree the present appeal has been preferred, and the arguments which were pressed in the Chief Court have been forcibly addressed to their Lordships.

Three principal grounds have been urged in support of the Plaintiffs’ claim, and in these grounds the correctness of the judgments of the Full Bench is challenged. First, that the *Dhammathats* do not,

when speaking of an *orasa* son, lay down any rule that he should be the eldest or first born of the children. Secondly, that a daughter, by the rule in the *Dhammathats* relating to the inferiority of the female sex in relation to the male, can never be the *orasa* child; and, thirdly, that when there is a son, a daughter cannot be an *orasa* child, which appears to be only a branch of the second argument.

Before referring to the judgments of the Full Bench, their Lordships desire to state the result of their own examination of the *Dhammathats*.

In respect of the first proposition advanced on behalf of the Plaintiffs, *viz.*, that in the *Dhammathats* the status of *orasa* is not confined to the eldest or first born, it appears to their Lordships that the argument is based upon a misconception of the rules laid down in the Burmese-Buddhist law. Chap. 6 of the Digest deals with the subject of partition between parents and their own children, *i.e.*, descendants of the first degree. Sec. 30 relates to partition between mother and son on the death of the father. All the *Dhammathats* agree that on the death of the father the eldest son should be entitled to a one-fourth share of the estate, and that the mother should be entitled to the remaining three-fourths for herself and her younger children. The *Vilasa* states as follows :—

“ On the death of the father the rule of partition between mother and son is as follows :—

“ If the son is the eldest born and if he helps the parents in the acquisition of the family property, he shall get his father’s elephant and pony, together with their keepers; the cup, spear, tray and plates used by his father; the clothes, ornaments, and belt worn by him; the lands held as an appanage of his office; the town or village, the usufruct of which he enjoyed,

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and the office held by him. The mother shall get her belt, finger-rings, bracelets, ear-rings, necklaces, combs, betel-box, stool, and personal ornaments given her during the father's lifetime. The remainder, such as, gold, silver, bullocks, buffaloes, goats, pigs, fowls, ducks, clothes, paddy, rice, Indian-corn, peas, millets, barley, sessamum, cotton, and household furniture shall be divided into four shares; the mother shall get three shares and the son one share. Even if there are ten sons, only one-fourth shall be given them."

The *Kaingza* states the rule thus:—

"The reason why the mother gets three shares is that when the property was being acquired, the son was not yet born, and after he was born he could not (during his minority) do anything towards the retention of what was already acquired; even the father can merely acquire, but cannot prevent waste. It is the mother alone who takes care of the property."

In the *Myingun* the rule is stated in the following terms:—

"If the son is one who is competent to assume the father's responsibilities, and is known to the local authorities, he shall get his father's pony, drinking-cup, betel-box, sword, lands held as emoluments of office, lands worked by him, personal ornaments and wearing apparel, cups, trays, spoons and plates, spears, large and small, armour, and such other articles worn by men only. Stored-up grain, bullocks, buffaloes, slaves, fowls, pigs, and utensils shall be divided into four shares; the mother shall get three shares and the son one share."

The *Manugye* states the principle in identical terms.* It declares that on the father predeceasing the mother, the estate, after the apportionment of the specific articles as laid down in the *Dhammathats*, should be divided into four shares out of which the "eldest son" should be entitled to one share and the mother and "younger children" to three shares. In sec. 12 it declares that when

the mother dies in the life-time of the father the same rule should apply to the "daughter's" claim to share in the estate.

It is unnecessary to refer to the passages in the other *Dhammathats* as set out in the Digest relating to the right of the "eldest son" to a one-fourth share on the death of the father, as they state the rule substantially in the same terms.

On these rules the question arises, who is the son who becomes entitled to this right? The Respondents' contention is that this special right is given to the *eldest born* son, while the Appellants urge that the words "eldest son" are not restricted to "the eldest born," but applies equally to a son who, in a family consisting of a number of children of both sexes, stands in relation to them as the eldest son. And on this ground they contend that Po Cho was the "eldest son" and entitled to the one-fourth share as *orasa* son.

The answer to the question, however, is furnished by the *Dhammathats* themselves. The reason why the mother becomes entitled to a three-fourth's share in the estate in which she and the deceased father held equal shares explains also who "the eldest son" is who becomes entitled to the one-fourth share.

The *Mano Dhammathat* explains the reason why the mother gets the three-fourth's share in these terms:—

"The mother gets three shares because while the property was being acquired the son was not yet born, and when acquired the mother is the only person to take care of it and prevent it from being wasted."

The *Dhammathat-pyu* gives it thus:—

"On the death of the father the partition between mother and son shall be as follows:—

It states the question first, "Why

* Richardson's Translation, Book X, sec. 6, p. 278.

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should the mother get three shares?" and then gives the reply:—

"Because during the early days of her wedded life, while family property was being acquired the son was not yet born and whatever was acquired by his father the mother took care of and laid by. Hence the mother shall get three shares, she being the principal agent in the acquisition of the family property."

The *Vilasa* declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states: "If the son is the eldest born," and "if he helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares—the mother shall get three shares and the son one share;" and to the question, "Why should the 'eldest born child' get a fourth share?" the answer is:—

"The parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with *his* or *her* assistance."

What can all this mean, except that "the eldest son" referred to in all the *Dhammathats* is the eldest born child of the wedded pair.

In sec. 33 of Mr. Gaung's Digest the rules of the *Dhammathats* referring to the rights of the "eldest daughter" in the family estate on the death of the mother are set out at length. These rules require careful analysis and consideration in conjunction with the rules relating to the rights of the son on the death of the father, leaving the mother surviving him.

A comparison between these rules regarding the son's rights and the daughter's rights will elucidate still more clearly what is meant by the "eldest son" or the "eldest daughter" in the *Dhammathats*.

Sec. 33 deals with the subject of partition between father and the eldest daughter on the death of the mother, as happened in the present case. Daw Hmo died before her husband, leaving Ma Nyein Aung, the eldest born child of the marriage. Her status and her rights are clearly stated in the *Dhammathats*. The *Manugye*, the authority of which has been recognised by the Board, after setting out the specific articles belonging to the mother or in her sole use in her life-time, such as ear-rings, bracelets, belt, cups for eating and drinking, clothes and ornaments worn by women to which the eldest daughter became entitled, states the rule as to the partition of the residue of the family property between the surviving parent, the father, and the eldest daughter thus* :—

Partition between father and daughter on the death of the mother.

"Let the father have his riding elephant and horse, his goblet, the slave who carries his water and betel, his sword, betel apparatus, clothes, and ornaments. Let the daughter have her mother's ornaments, clothes, and the slave who cooked her rice; and having divided the residue into four shares, let the daughter have one and the father three."

In the *Kungyalinga* the rule is stated in the following terms :—

"The mode of partition between the *orasa* daughter and father on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father."—*The Digest*, p. 88.

In the *Warulinga* it is as follows :—

"The mode of partition between father and daughter on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father. The daughter shall get in addition her clothes, ornaments and gold flowers, one female slave, and her mother's personal be-

* Richardson's Translation of *Manugye*—Book A, sec. 3, p. 271.

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longings, just as the son gets his father's personal belongings."

The *Cittara* states the rule thus:—

"The mode of partition between father and *orasa* daughter on the death of the mother is, *mutatis mutandis*, the same as that between mother and son on the death of the father."

The *Kyetyo* gives the rule more fully:

"The mode of partition between father and *orasa* daughter on the death of the mother is as follows:—

"The daughter shall get her anklets, bracelets, ear-rings, belt, necklaces, etc., given her during the mother's lifetime, and by both parents, these having become her separate property. She shall also get her mother's belt, necklaces, combs, finger-rings, ear-rings, bracelets, betel-box, cushions, and other personal ornaments. The ornaments worn by the daughter during the mother's lifetime shall go to her. The rest of the property such as gold, silver, copper, iron, slaves buffaloes, bullocks, goats, pigs, fowls, ducks, paddy, rice, Indian corn, millets, barley, sessamum, cotton and household furniture shall be divided into four shares; the father shall get three shares and the daughter one share."

"The above rule applies when the daughter is the eldest born. The younger daughters shall get their shares only on the death of both parents."

And then comes this important question*:—

"Why should the mother get three shares and the eldest child only one share? Because the mother saves the property acquired by the father and thereby accumulates it at the early period of her wedded life, before the eldest child was born; and during the minority of the eldest child, before he or she could assist the parents the mother accumulates the property acquired by the father. The eldest child gets one share because he or she upholds the parent's position and rank and continues the family. Having to bear the children, the mother has not the heart to make them work, nor can

she see them suffer privation; she cherishes them and brings them up. Children lie under greater obligation to the mother than to the father. Hence the mother gets three shares and the son one share. Should the property enumerated above be exhausted by the mother for her sustenance or in performing works of merit, let it be so. The sons shall not also claim the residue of the property to which the mother alone is entitled."

It is to be specially noted that the words here used are "eldest child," clearly indicating that the expression includes children of both sexes.

This passage from the *Kyetyo* shows not only that on the death of the mother the eldest born daughter is entitled to a one-fourth share, but it also explains why she becomes so entitled. The eldest born daughter steps into the shoes of the mother, assumes her responsibilities, manages the household and takes care of the younger children like the mother, and is confirmed in the status of the *orasa* child. The status does not depend on the decease of the father, where the child is a son, or of the mother, where it is a daughter; it comes into existence on the fulfilment of three conditions, *viz.*, (1) that he or she is the first born child; (2) that it attains majority; and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties.

In their Lordships' judgment, although it is not easy always to reconcile the inconsistencies with which the *Dhammathats* bristle, upon a careful comparison of the different enunciations so laboriously brought together in the Digest, the following propositions clearly emerge from the

* *Kyetyo*, sec. 33.

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rules propounded in the *Dhammathats*, viz., that the designation *orasa* is not limited to a son and that it connotes the eldest or first born child who is competent to undertake the responsibilities of the deceased parent.

The grounds on which "the eldest child" may be "superseded" or displaced from his or her status are collected in sec. 62 (p. 117) of the Digest. When a son is incompetent to assume the duties and responsibilities of the father, either from physical defects or otherwise, it is declared that the next brother should step into his shoes. Supposing there is a daughter intervening between the two sons, viz., the first born and the next born son, she could not possibly be the *orasa* child. The law does not say that on the mother's death a daughter who was not the eldest or first born should become the *orasa* child and become entitled to a preferential share. As already observed, the provision is for the first born, whether male or female, if competent.

In the present case the mother died several years before the father; it is not disputed that the eldest daughter, the first born child, Ma Nyein Aung, assumed all her responsibilities. Nor is it disputed that she was quite competent to do so. It may be taken for granted that she looked after the conservation of the property as her mother did during her lifetime and took care of the younger children. She was thus the *orasa* child of the marriage of U Baw and Daw Hmo. The second son, Po Cho, could never become the *orasa* child and could never acquire the status in his own right. There was no eldest born son whom he had superseded for "incompetency" or into whose shoes he had stepped on his death before attaining majority.

It is contended, however, that the sec-

tions dealing with partition between an elder sister and a younger brother on the death of the parents (Digest, sec. 140) place the son on the same level as the elder daughter. The *Kyetyo* says:—

"If the eldest born is a daughter and the second child a son, let them share the estate equally between them"

The *Kyannet* makes the following statement:—

"If, after the establishment of a daughter as an *orasa*, a son is born they shall share the estate equally between them.

"If the elder daughter and the younger son are both childless, the estate shall not be divided equally between them, because the son is deemed the *orasa*"

Similar statements occur in other *Dhammathats*. Their Lordships do not propose to undertake the task of trying to reconcile transparent inconsistencies. Whether the prescriptions to which the Plaintiffs have referred as showing the superior right of a younger son to that of the elder daughter were actuated by a desire for a fair and equal division, it is difficult to say. It was certainly so in the case of one younger brother co-existing with the eldest born sister even after she was installed as *orasa*. Whatever may be the reason of these inconsistencies, it is clear that these arbitrary rules of distribution cannot override or control the previous express provisions relative to substantive right.

Secs. 162 and 163 of the Digest deal with the rights of the children of the eldest son or eldest daughter dying before the parents. Sec. 162 is headed thus:—

"The eldest son dies before the parents; the son of the deceased is entitled to the same share as his father's youngest brother."

And sec. 163 has the following heading, clearly indicating the subject dealt with in the section:—

"The eldest daughter dies before the

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parents; the deceased's child is entitled to the same share as the deceased's youngest sister."

The *Manugye*, in sec. 15, Book X, states the rule as to the devolution of the share of the eldest born son or eldest born daughter on his or her predeceasing the parents:—

"If the eldest son dies before his father and mother, the law of inheritance between his son and his son's uncles and aunts is this: because in case of the death of father and mother the eldest son is called father, let his son, and his (the eldest son's) younger brothers share alike.

"Should the eldest daughter die before the father and mother, this is the law for the partition of the inheritance between her daughter and her daughter's uncles and aunts: that the daughter of the eldest daughter and her (the eldest daughter's) younger sister shall share alike, because the eldest daughter, when grown up, stands in the place of a mother.

"In case of the death of the younger children occurring before the parents the law for partition of the inheritance between their children and the (co-heirs) relations of their parents is this: the children of the deceased have one-fourth of the share which would have come to their parents."

The *Vilasa* declares that "the eldest son of a deceased *orasa* shall receive as much of the inheritance as the youngest of his uncles. But the younger sons should receive only a quarter as much. Because a son is a nearer kin than a grandson, the latter shall not receive out of the estate of his grand-father as much as the co-heirs of his deceased father."

The prescriptions in most of the other *Dhammathats* are substantially the same.

These sections clearly refer to the rights of the children of the eldest born son or eldest born daughter. Po Cho did not belong to this category, and he had no right to the one-fourth of the estate to pass to the Plaintiffs.

Sec. 164 refers to the shares of the children of one of the younger children predeceasing the parents.

"The child of a (deceased) younger son shall receive one-fourth of the share to which the deceased was entitled. He or she shall not receive an equal share with the aunts and uncles.

"The child of a (deceased) co-heir who was not the eldest shall receive a quarter of the share to which the deceased was entitled. The remaining three-fourths shall revert to the estate."

This is the conclusion at which their Lordships have arrived upon an independent review of the *Dhammathats*, and the view of the law that has forced itself upon them is supported and confirmed by the detailed and scrupulously careful examination to which the provisions of the Burmese-Buddhist law have been subjected by the learned Judges of the Chief Court. Maung Kin, J., who is himself a Burmese, conversant with the Burmese language and customs, and well versed in the Burmese-Buddhist law, has fully discussed the rules of the different *Dhammathats* concerning the questions with which the Court had to deal. In the course of his judgment he says:—

"All the *Dhammathats* mentioned in sec. 30 of the Digest, when considered as a whole, lead to the inference that it is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. It appears that the *Dhammathats* take it for granted that the son, if competent to do so, will take his father's place and continue the family; but 'whether this duty is a mere moral obligation or can be enforced at law is at present undetermined so far as decisions go.' And this eldest born son, who is entitled to a quarter share, is by later *Dhammathats* called an *orasa*."

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and he then makes the following comment on the argument against the view he has just expressed :—

“It may be argued that what is material is the fulfilling of the conditions and not the order in which the sons are born, so that even where the eldest born is a daughter a son who fulfils the conditions would be entitled to the quarter share from the mother on the death of the father.

“In my judgment the argument is not sustainable. It can only be founded on the *Dhammathats* noticed above which do not call the son entitled to the share by any description, such as Tha-u, thagyi, thagyi auratha or auratha, but which describe him only as the son who bears the father's burden or responsibilities. It appears to me that these *Dhammathats* put the matter in a comprehensive form, because whether the claim is made by the eldest born son or by a younger son, the conditions must be fulfilled. These *Dhammathats* do not, in my opinion, contradict the proposition that the eldest born son, if competent, can claim the share from the mother, and if not competent, he will be superseded by another son who is competent; but that if the eldest born is not a son, the right to a quarter share does not exist in favour of a son though he may be the eldest of the sons. I have deduced this by a consideration of the *Dhammathats* alone.”

And his conclusion is as follows :—

“It has, however, been urged that, as the *Dhammathats* look upon the son as being superior to the daughter, the eldest born daughter cannot be allowed to claim the quarter share where there are sons. Among others, secs. 140 and 150 have been referred to in support of the contention. These sections and the others contain rules of distribution after both the parents are dead. These are the rules which this Court has disregarded in *Ma Kyi Kyi's* case. They do certainly show that the son is regarded as superior to the daughter. But they do not give him, unless he is the eldest born, any greater share than the eldest of the daughters. For if the eldest is a daughter and there is a son younger than

she is, that son, instead of getting a smaller share in accordance with the order of the births of the children, gets a share equal to the eldest daughter, and in my judgment wherever, in these rules, the word auratha is used, it is used to indicate the eldest child but not with reference to the right to claim a quarter share from the surviving parent. When both the parents are dead the question is not who is the eldest born but who is eldest of the surviving children, and all the surviving children get their fractional shares, larger or smaller, according to the priority of birth.”

Maung Kin, J., refers to his own experience of the meaning attached by the Burmese people to the position of the eldest daughter. His remarks deserve attention :—

“There is an additional reason why these rules of distribution of inheritance after both the parents are dead do not apply to cases where the eldest daughter claims a quarter share from her surviving parent, the father. It is that the claim is allowed her under very special circumstances, and as a reward for her past assistance in the acquisition of property and the possibility (which the lawgivers expected in the times they lived) of her taking her mother's place and continuing the family and controlling the younger children as her mother had done in her lifetime. In the extract from *Dhammathatkyaw* which is given in sec. 62 of the Digest we find the principle.

The eldest brother is in the position of the father, the eldest sister in the position of the mother. This is in the mouth of every Burman, and it is clear from the fact of the principle being recorded in that *Dhammathat* word for word the same as it exists in the mouth of the people that it is a well recognised principle. And so far as my experience goes the principle has never been taken to mean that in the case of the eldest daughter, only her younger sisters give her the position of their mother. The younger brothers also respect her as they had their deceased mother. This happy state of things exists to-day and long may it continue.

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"Another point is that even if those rules of distribution among all the children are applicable to the question of the eldest daughter's right to a quarter on the death of her mother, the younger son cannot take her place, he can only prevent her from claiming the right. Then in that case there would be no *orasa* at all, a position which the *Dhammathats* can hardly be held to have contemplated.

"In my judgment it is really unnecessary to go into the question of the applicability of these rules because it is perfectly clear, as shown above, that the *Dhammathats*, in giving a quarter to the eldest child, have in view the case of there being both sons and daughters in the family."

The Burmese adopted the Buddhist religion, which was imported from India, and with the religion they also seem to have received the Indo-Aryan conception of the superior rights of men. And Mr. Justice Maung Kin thinks that the Hindu notion of sex superiority found its way among some of the text-writers. There appears to be considerable force in his observations, as will be seen from the use in the *Dhammathats* of various legal terms borrowed from the Sanscrit. Gradually, as the compilers of the *Dhammathats* absorbed the national customs and usages, the sex equalisation, which is the dominant feature of the Burmese law, prevailed, and the later *Dhammathats* show that the eldest born son and the eldest born daughter stand on the same footing.

With reference to this subject the learned Judge makes the following remarks:—

"Among the Burmese-Buddhists equality of the sexes is recognized in the *Dhammathats* with occasional aberrations to the effect that the male is superior to the female. But when we come to consider what superior rights are given to the man we find that his rights are hardly superior to the woman's. Although they borrowed their laws from the

Hindu Institutes of Manu, the Burmese carefully refrained from adopting the sex inequalities of the Hindu law. For instance, in Hindu law, the term *aurasa* was applied originally only to the legitimate son. Next the Rishis evolved him into a son of a very superior type, namely, the son begotten by a man of a wife of the same caste who was espoused in an approved form of marriage with religious rites, was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man. This was done on spiritual grounds. In Hindu law a daughter is not called an *aurasa* and is not allowed to confer spiritual benefits on her father as the *aurasa* son is."

"The Burmese borrowed the word *aurasa* and Burmanized it as *auratha*, but gave their own meaning to it suitable to the conditions of family life which they approved. Thus they called a child (son or daughter) born in lawful wedlock an *auratha* child, putting the son and daughter generally on an equal footing," and he winds up by saying:—

"In the result I would hold that the eldest born legitimate daughter has the right to claim a quarter share on the death of her mother, whether she co-exists with sons or not, and that the eldest born child is the *orasa*, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son, he can only make the claim from the mother, on the ground that he steps into his deceased father's place; similarly, if a daughter, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two *orasas*, a male and a female, in the same family, because an *orasa* is either the eldest born or the one who supersedes the eldest born."

His decision is practically embodied in his answer to question 6, already quoted.

Pratt, J., who followed him in delivering judgment, substantially agreed with his Burmese colleague.

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Heald, J., deals with the facts and the law of the case with equal care and minuteness. He reviews in great detail the *Dhammathats* and the decided cases of the Burma Chief Court. He expresses his dissent from those which accorded the superior position to the younger son in preference to the eldest born daughter, and gives his reasons therefor. His experience of the country and of the people extends over twenty years. In his general conclusion he is in agreement with Maung Kin, J. He holds that *auratha* or *orasa* is applied to both eldest born son and eldest born daughter, and states that this view is clear from the enunciations of most of the *Dhammathats*. He reviews the *Dhammathats* according to their antiquity. He refers to the *Vilasa*, which was compiled in the twelfth century, and to the *Wagaru* in the thirteenth century, where the term *auratha* or *orasa* is applied to both eldest son and eldest daughter. He states that in the *Dhammathats Kyaw* and the *Kyangsa*, written in 1630, the same expression occurs, so also in the *Vaicchaya* of 1745. He refers to U Gaung's authority, who is, as already stated, the author of the Digest. Heald, J.'s conclusion is:—

“From the above survey of the *Dhammathats* I think that it is fairly clear that the word *auratha* is commonly used to mean the eldest child, whether son or daughter, and that if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being a daughter, is competent on the mother's death to take the mother's place, then he or she is *auratha*, and on the father's or mother's death is, according to the *Dhammathats*, entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and, further, that if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate his or her children are

entitled to share equally in the estate with the younger brothers and sisters of the deceased.”

Dealing with the inconsistent statements in some of the *Dhammathats* showing a certain preference for sons in relation to the eldest daughter, he says as follows:—

“The *Vicchedani*, when dealing with the partition between brothers and sisters after the death of both parents, actually says: ‘Though the eldest child be a daughter she does not reach the status of *auratha* and she must share equally with her younger brother,’ and one or two of the minor *Dhammathats* contain similar passages, which I have no doubt were taken from some old book and reproduced Hindu or possibly pre-Hindu ideas. But just as the *Dhammathats*, when translating passages which are evidently taken direct from what may be called the Hindu law books, use *auratha* in its original sense of ‘legitimate’ and, nevertheless, when they come to apply it to Burmese Buddhist law use it in the special sense of ‘an eldest born child who is competent,’ so, although they reproduce passages which follow the Hindu law in saying that a daughter can never be *auratha*, nevertheless when they come to the actual division of the property of the estate of a Burmese family they put the daughter practically, and in some cases entirely, in the same position as the son.”

Duckworth, J., and the Chief Justice adopted the views of Maung Kin, J. Duckworth, J., says:—

“It is perfectly clear that section 163 of the Digest applies to families consisting of both sons and daughters. Among the Burmese people generally, there is no doubt that the eldest legitimate child, whether it be a son or daughter, is regarded as taking the place of the parent of the same sex when the parent dies.”

Their Lordships do not feel called upon to discuss in detail the decisions of the Burma Courts cited at the Bar, as they agree generally with the observations of the Judges of the Full Bench.

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In so far as those decisions expressly or by implication are adverse to the rights of the eldest born daughter, their Lordships have no doubt they proceeded on an insufficient consideration of the status assigned to the first born child by the Buddhist-Burmese law as embodied in the *Dhammathats*, and, expressed in the existing customs and usages to which Mr. Justice Maung Kin so forcibly refers.

The eldest born child occupies an extraordinarily favoured position as compared with the younger children, inasmuch as the parents, to use the quaint language of the *Vilasa*, "obtained the child by their earnest prayers at the commencement of their wedded life, and acquired the property with his or her assistance."

These considerations have led their Lordships to the conclusion that in the present case Po Cho, being a younger child, although the eldest son, did not acquire the status of *orasa* and did not become entitled to the privileged position allotted to the eldest or first born son. In these circumstances the judgments of the Full Bench and the decree of the Chief Court appear to their Lordships to be perfectly right, and they are of opinion that this appeal fails and should be dismissed. In view, however, of the importance of the case and the difference of opinion prevailing until the decision of the Full Bench on the questions at issue, their Lordships think that the costs of both parties should come out of the estate. And they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Light & Fulton* for the Appellants.

Solicitor: *Mr. Douglas Grant* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD SUMNER.

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1924,

Heard, 27, October.

Judgment,

17, November.

RANODIP SINGH
and ors.,
Appellants,

v.
PARNESHWAR
PERSHAD and ors.,
Respondents.

Limitation Act (IX of 1908), secs. 6, 7, 8, Sch I, Art 126—Suit by Mitakshara sons to set aside father's alienation—One of sons born subsequent to alienation—Suit whether may be brought within three years of such son attaining majority.

A suit to set aside an alienation by a Mitakshara father was instituted by his sons in 23rd June 1920, the cause of action having arisen on the 23rd June 1893. Plaintiffs relied on sec. 7 read with secs. 6 and 8 of the Limitation Act to save limitation on the ground that one of them who was born on 30th November 1900, had attained majority within 3 years of the institution of the suit:

Held—That this Plaintiff's birth subsequent to the accrual of the cause of action did not create a fresh cause of action or a new starting point from which limitation should be reckoned.

The extension under the sections mentioned can be claimed only by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned.

Appeal from a judgment and decree (18th July 1921) of the Court of the Judicial Commissioner of Oudh, which affirmed a judgment and decree* (22nd March 1921) of the Subordinate Judge of Bahraich.

The four Plaintiffs-Appellants are the sons of the 6th Defendant, Thakur Pirthi Singh, and they constitute a joint and un-

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divided Hindu family governed by the Mitakshara law. The village in dispute, Mauza Sheopura, is the ancestral property of the joint family. By a sale, dated the 3rd June 1893, the Plaintiffs' father is alleged to have sold the village to one Manaj Ram without any legal necessity. The descendants of the vendee, Manaj Ram, who are Defendants Nos. 1 to 5, are in possession of the village, and Defendant-Respondent, Thakur Jagat Ambika Prasad Singh, is a subsequent mortgagee of the village on behalf of Defendants Nos. 1, 2 and 5.

The four Plaintiffs were born on the following dates—Ranodip Singh, Plaintiff No. 1, on the 23rd August 1886—Kali Bakhsh Singh, Plaintiff No. 2, on the 4th August 1891—Sitla Bakhsh Singh, Plaintiff No. 3, on the 1st October 1897, and Patmeshuri Bakhsh Singh, Plaintiff No. 4, on the 30th November 1900.

It would appear from the above that at the time of the sale of the village, Plaintiffs Nos. 1 and 2 were actually in existence, and that the remaining Plaintiffs Nos. 3 and 4 were born after the sale.

None of the Plaintiffs ratified the alienation of the ancestral property, and Plaintiff No. 4 attained majority in or about November 1918. The Plaintiffs instituted the suit out of which this appeal arose on the 23rd June 1920, in the Court of the Subordinate Judge of Bahraich. They asserted in their plaint that the sale of the ancestral village which had been made by their father in 1893 was not binding upon them, and they prayed for a decree for possession of the village with mesne profits and costs against the Defendants.

The Defendants filed written statements denying the claim of the Plaintiffs, and they pleaded, among other things,

that the Plaintiffs' suit is barred by limitation.

The Subordinate Judge framed a number of issues on the pleadings, but he tried only the following issues :—

(5th issue).—Is the suit within time under secs. 6 and 7 of the Limitation Act?

(8th issue).—Whether the Plaintiffs have no right to sue as alleged in para. 17 of the Defendants' written statement?

(Para. 17 is as follows :—Plaintiff No. 4, owing to his birth subsequent to the sale deed, has no *locus standi* to bring the suit, nor can any right accrue to other Plaintiffs owing to his minority.)

With the consent of both parties, the Subordinate Judge tried the question whether or not the suit of the Plaintiffs is barred by limitation on the assumption that the facts alleged in the plaint were true. After hearing the parties he delivered judgment on the 22nd March 1921. He found the issues against the Plaintiffs, and held that the Plaintiffs' suit was barred by limitation under Art. 126 of the Indian Limitation Act, IX of 1908.

The learned Subordinate Judge has taken the view that the suit of Plaintiffs Nos. 1 to 3 is clearly barred by limitation, inasmuch as they attained majority more than three years before the institution of the suit. He further held that the suit of Plaintiff No. 4 is also barred by limitation, observing as follows :—

“ Here no property existed in the father of the Plaintiffs. *i.e.*, Defendant No. 6, at the time of the birth of the Plaintiff No. 4. Hence the Plaintiff No. 4 acquired no interest in any property upon his birth except a right to recover the property in suit; but it has been held that subsequent birth into a Hindu family did not confer upon the person so born any right to bring a suit, the reason being that a right to bring a suit to challenge an alien-

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ation of the joint family property was in no sense a share in the ancestral estate of the father. [Vide *Ujagar Singh v. Pitam Singh* (1)]. I am, therefore, of opinion that the Plaintiff No. 4 has no right to sue, and as no joint right of suit has accrued to the Plaintiffs upon the birth of the Plaintiff No. 4, as I have already held, the Plaintiffs Nos. 1 to 3 have also no right to sue. I therefore find the issue in the affirmative."

The Subordinate Judge therefore made a decree dismissing the Plaintiffs' suit with costs, and from that decree the Plaintiffs appealed to the Court of the Judicial Commissioner of Oudh, and the appeal was heard by two Judicial Commissioners, Mr. Dalal and Mr. Wazir Hasan. The latter concurred with the order of dismissal of the appeal made by the former, remarking: "Personally I hold a somewhat different view on the question which my learned colleague has elaborately discussed in his judgment."

Mr. Dalal delivered his judgment on the 18th July 1921. He agreed with the view taken by the Subordinate Judge, and concluded his judgment in the following words:—

"Under the circumstances the after-born son does not acquire a fresh cause of action, and a fresh period of limitation does not start from the date of his birth. In the case of an after-born son the time from which the period of limitation is to be reckoned is the date of the transfer, and as he was not born on that date and was under no disability on that date, he cannot obtain the benefit of the provisions of sec. 6 of the Limitation Act. When he cannot save limitation for himself he can give no benefit under sec. 7 to his elder brothers.

(1) L. R. 8 I. A. 190; s. c. I. L. R. 4 All. 130 (1881).

"To sum up, my view of the law on the subject is that Ranodip Singh and Kali Bakhsh Singh could have brought the present suit up to 1912, and in that suit both Sitla Bakhsh Singh and Patmeshuri Singh could have joined effectively. After 1912 no suit by any of the brothers would lie, because Sitla Bakhsh Singh and Patmeshuri Bakhsh Singh were not entitled to the benefits of the provisions of sec. 6 of the Limitation Act, and for that reason the two elder brothers could not derive any benefit under sec. 7. I therefore hold that the suit in the lower Court was time barred and I would dismiss the appeal with costs."

Mr. Dubé for the Appellants *ex parte*.

The sale cannot be valid as against the 4th Plaintiff. Sec. 7 of the Limitation Act, 1908, provides that time shall not run against a person under disability until the disability has ceased. The period of limitation is therefore extended for the period of 3 years from the 4th Plaintiff's minority.

No discharge in conformity with the section could have been given by the other Plaintiffs.

Zmir Hasan v. Sundar (2), *Govindram v. Tatia* (3) and *Ganga Dayal v. Mani Ram* (4).

These cases were under the Limitation Act, 1877, in which sec. 8 corresponds with sec. 7 of the Limitation Act, 1908.

The sale was void *ab initio* and no suit was necessary to have it set aside.

The material article would be Art. 144 under which the 4th Plaintiff is entitled to sue any time within 12 years from the date when the possession of the Defendant became adverse to him.

Balwantrao Narsinha v. Ramkrishna

(2) I. L. R. 22 All. 196 (1899).

(3) I. L. R. 30 Bom. 383 (1906).

(4) I. L. R. 31 All. 155 (1908).

RANODIP SINGH *v.* PARMESHWAR PERSHAD, Baburao (5). The case of *Raja Ram Tewary v. Luchman Pershad* (6) relied on in the lower Court was decided under the Limitation Act, 1857, and it is now well established that the view taken in that decision is wrong.

See Mayne's Hindu Law, para. 342.

Ramkishore Kedarnath v. Jainarayan Ramrachhpal (7) and *Venkata Row v. Tuljaram Row* (8).

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree, dated the 18th July 1921, of the Court of the Judicial Commissioner of Oudh, affirming a decree, dated the 22nd March 1921, of the Subordinate Judge of Bahraich.

The suit out of which the appeal arises was instituted on the 23rd June 1920, by the four sons of the sixth Defendant, Thakur Prithi Singh, claiming possession of the village described in the plaint. The Plaintiffs and their father are a joint Hindu family governed by the law of the Mitakshara, and it is the Plaintiffs' case that the village is the ancestral property of the joint family.

On the 3rd June 1893, the Plaintiffs' father purported to sell the village to Manjee Ram, who is represented in this suit by his descendants Defendants Nos. 1 to 5. The seventh Defendant claims as a mortgagee from Defendants Nos. 1, 2 and 5.

The Plaintiffs contend that the sale is not binding on them as it was not made for legal necessity, and on this ground they claim a decree for possession.

(5) 3 Bom. L. R. 682 (1901).

(6) 8 W. R. 15 (1887).

(7) L. R. 40 I. A. 210, 221; s. c. I. L. R. 40 Cal. 906, 17 C. W. N. 1189 (1913).

(8) L. R. 40 I. A. 91, 98; s. c. I. L. R. 45 Mad. 298, 23 C. W. N. 846 (1921).

Of the many issues framed in the Court of the Subordinate Judge it is only necessary to consider whether the suit is barred by limitation, and for this purpose the dates at which the several Plaintiffs were born become important.

Ranodip Singh, Plaintiff No. 1, was born on the 23rd August 1886; Kali Bakhsh Singh, Plaintiff No. 2, on the 4th August 1891; Sitla Bakhsh Singh, Plaintiff No. 3, on the 1st October 1897; and Patmeshuri Bakhsh Singh, Plaintiff No. 4, on the 30th November 1900. It will thus be seen that the first and second Plaintiffs were in existence at the date of the sale, but the other two Plaintiffs were born after its completion.

The time from which the period of limitation began to run has throughout been treated as the 3rd of June 1893, on the assumption that the alienees then took possession of the property within the meaning of Art. 126 in the First Schedule to the Indian Limitation Act, 1908.

The prescribed period of 12 years from this date expired in 1905, but the Plaintiffs contend that limitation is saved by sec. 7 of the Limitation Act, read with secs. 6 and 8.

These sections so far as material are in these terms:—

6. (1) Where a person entitled to institute a suit . . . is at the time from which the period of limitation is to be reckoned a minor . . . he may institute the suit . . . within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

7. Where one of several persons jointly entitled to institute a suit . . . is under any such disability and a discharge can be given without the concurrence of such person time will run against them all; but where no discharge can be given time will not run as against any of them until one

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of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

8. Nothing in sec. 6 or in sec. 7. . . . shall be deemed to extend for more than three years from the cessation of the disability. . . of the person affected thereby the period within which any suit must be instituted.

It is conceded that the suit would not be saved by these sections if brought by the first three Plaintiffs alone; but it is contended that the fourth Plaintiff is entitled to the extended period for which the sections provide, and that the suit is therefore not barred by limitation. Both the Courts in India have decided adversely to this contention.

The cause of action arose on the 3rd June 1893, and it is from that date that the period of limitation is to be reckoned. The fourth Plaintiff's subsequent birth on the 30th November 1900, did not create a fresh cause of action or a new starting point from which limitation should be reckoned.

To the contention that by the cited sections the period of limitation is extended for three years from the cessation of the fourth Plaintiff's minority the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. The fourth Plaintiff does not come within this description, for at that time he was not in existence. He, therefore, is not entitled to the three years' extension, and his suit is consequently barred.

Their Lordships will accordingly humbly advise His Majesty that this appeal ought to be dismissed.

Solicitor: Mr. H. S. L. Polak for the Appellants.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 6 of 1925.

SANDERSON, C. J.	}	ANDERSON KIRKWOOD
RANKIN, J.		TENNENT
1925,		v.
19, February.		WALTER MITCHEL.

Civil Procedure Code (Act V of 1908), Or. 6, r. 16, exercise of jurisdiction under—Admissibility of contemporaneous oral evidence not to be decided on an application to strike out—Evidence Act (I of 1872), sec 92, proviso (3).

The Court should not, as a rule, decide an important point as to the relevancy of matters on an application to strike out.

Whether an oral agreement contemporaneous with a written document is admissible in evidence will depend to some extent as to how the case is presented at the trial.

The jurisdiction of the Court under Or. 6, r. 16 should be exercised with great care and caution. A written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations in it are such as cannot afford a defence to the action, and which if not struck out would unnecessarily delay the suit.

This was an appeal against an order of Mr. Justice Buckland made on the 6th January 1925 in the exercise of Ordinary Original Civil Jurisdiction.

The material facts are sufficiently set out in his judgment which was as follows:—

BUCKLAND, J.—This is an application made on behalf of the Plaintiff for an order under Or. 6, r. 16, that the written statement may be struck out on the ground that it is embarrassing and will delay the fair trial of the suit.

The suit is a simple one to recover the sum of Rs. 11,000 on four cheques, which are dated the 1st October, the 1st Novem-

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ber, the 1st December 1923, and the 1st January 1924, for Rs. 2,500, Rs. 2,500, Rs. 2,500 and Rs. 3,500 respectively. The cheques were given by the Defendant to the Plaintiff in April 1923, when the Plaintiff lent to the Defendant the sum of Rs. 11,000. The cheques in due course were presented and were dishonoured, and the Plaintiff now sues to recover the money.

In his defence, stating it shortly, the Defendant alleges that the Plaintiff is a Turf Commission Agent and that on the 2nd April 1923, he commissioned the Plaintiff to place bets on a certain race horse at the Barrackpore Races which the Plaintiff agreed to do. The horse won but unfortunately the Plaintiff had not placed the bets with the result that the Defendant lost Rs. 20,000 to which he would otherwise have been entitled, and this sum, he says, became due and payable to him by the Plaintiff. It further appears from the written statement that the Plaintiff has denied having received instructions to back this horse and that the matter was reported by the Defendant to the Stewards of the Royal Calcutta Turf Club. In April while the dispute between the parties with reference to this matter was pending the Plaintiff left for Bombay having told the Defendant that he would return to Calcutta in or about the middle of September 1923. The money was advanced and the post-dated cheques were handed over before the Plaintiff went away.

The Defendant admits the loan but says the Plaintiff promised to settle the dispute on his return to Calcutta. He then states as follows :—"The Defendant on the said date made over the four post-dated cheques referred to in the plaint, and it was orally agreed by and between the Plaintiff and the Defendant that on the

dispute being settled as aforesaid, the said cheques would not be presented for payment." I quote this in full because it is the only part of the written statement which raises a difficulty in dealing with this application. The Defendant then goes on to say in effect that nothing has been done and he denies that the Rs. 11,000 are due and asks for a decree for the balance of Rs. 9,000 which can only be if he sets off the Rs. 20,000 which, he alleges, are due to him by the Plaintiff.

This written statement bears two aspects : first in so far as it claims a set off, and I will deal with that first. The set off claimed is for damages for breach of an agreement whereby the Plaintiff agreed to place certain bets for the Defendant on a certain race horse at Barrackpore.

I do not decide this application so far as that part of the written statement is concerned upon the ground that a person may not sue an agent for damages for failure to place a bet or upon similar grounds, for although I have been referred to an authority on the point it has not been very fully argued. Rather I base it on this, that in order to entitle a Defendant to claim a set off, the set off must either be a liquidated sum or it must arise out of the same matter as that upon which the Plaintiff's cause of action is founded. In this case, according to the pleadings, it is neither. It sounds in damages and though the damages, as has been suggested by Mr. Surita, may be easy of assessment, nevertheless the claim is one for damages and not for an ascertained sum. Nor does it arise out of the matter on which the suit is based. Consequently the Defendant cannot be allowed to claim his set off in this suit.

The Defendant has definitely admitted that at the beginning of April 1923, the Plaintiff advanced him the sum of

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Rs. 11,000. Undoubtedly, therefore, there was consideration for the cheques.

The point, which then arises, is whether or not the Defendant is entitled to plead, in the words which I quoted just now *in extenso*, an agreement which would have the effect of postponing the legal obligation to pay the cheques or of making payment conditional on the happening of a certain event. If the defence has any value at all that is its nature, but it has been submitted by Mr. Amir Ali on behalf of the Plaintiff that such a defence is one that cannot be entertained. In support of this contention he has referred me to the case of *Ramjiban Serowgy v. Oghur Nath Chatterjee* (1) in which it was decided that in the case of a promissory note purporting to be payable on demand, sec. 92 of the Evidence Act precluded evidence being given of a contemporaneous oral agreement constituting an undertaking on the part of the Plaintiff not to enforce the note by suit until the happening of a certain event or implying that the legal obligation of payment was to be postponed or made conditional upon the happening of a certain event.

It does not, in my opinion, make any difference that the cheques were post-dated. The agreement relied upon by the Defendant was contemporaneous, according to his case, with the making of the cheques. It obviously could not have any effect until the liability on the cheques accrued, in other words, until the dates for payment had arrived. But in so far as it is pleaded that it was intended to have effect after these dates had arrived it is, in my opinion, within the principle laid down in that case. In effect it is pleaded that there was a contemporaneous oral agreement between the parties that

the legal obligation to pay the cheques was to be postponed or was conditional upon the dispute being settled as aforesaid and that in these circumstances, notwithstanding the absolute liability to pay, the cheques were not to be presented for payment. Such a defence is one which, in my opinion, it is not open to the Defendant to prove, under sec. 92 of the Evidence Act.

In these circumstances I feel bound to strike out this written statement as embarrassing. It may possibly be urged that a question of this sort is one of the admissibility of evidence which ought to be decided at the hearing. But if upon a perusal of the written statement one finds that it contains no defence of which evidence may be given, it obviously will be embarrassing to a Plaintiff to allow it to remain on the file, and the proceedings will be delayed if they are allowed to continue as if the Defendant had a good defence which he was entitled to prefer. In these circumstances I am of opinion that the Plaintiff is entitled to the order for which he asks and I direct that the written statement should be struck out.

Reverting to the set off I desire to say that the order I make on this application is without prejudice to any suit which the Defendant may be advised to bring for the purpose of claiming any sum which he alleges to be due to him from the Plaintiff in the circumstances stated in the written statement, and if in the circumstances of this matter it is necessary that leave to file such suit should be given, I give such leave, needless to say without expressing any opinion on the matter. The Defendant will pay the costs of the application. I certify for Counsel.

Messrs. Langford James and F. Surita
for the Appellant.

Mr. L. P. E. Pugh for the Respondent.

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The JUDGMENT OF THE COURT was, as follows :—

SANDERSON, C. J.—This is an appeal by the Defendant against the judgment of my learned brother Mr. Justice Buckland which was delivered on the 6th of January 1925, by which the learned Judge directed the Defendant's written statement to be struck out as embarrassing. Inasmuch as this appeal is in the nature of an interlocutory appeal, the hearing of it was expedited.

The application was made by the Plaintiff under Or. 6, r. 16 of the first schedule of the Civil Procedure Code. That rule is as follows: "The Court may, at any stage of the proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit:" and it is upon the ground that the written statement would embarrass and delay the fair trial of the suit, that the order has been made.

The suit was brought by the Plaintiff to recover the sum of Rs. 11,000 and it was alleged that that sum was advanced to the Defendant on the 4th of April 1923 and that in return for that advance the Defendant gave the Plaintiff four cheques, which were post-dated and bore the dates respectively the 1st of October, the 1st of November, the 1st of December 1923, and the 1st of January 1924.

The plaintiff further alleged that the Defendant promised to repay the sum of Rs. 11,000 on the aforesaid dates.

The plaintiff then alleged that the cheques were duly presented; but payment was refused on the ground endorsed upon the cheques. The endorsement was "payment stopped by the drawer."

The Defendant in his written statement set up the defence that the Plaintiff was

a Turf Commission Agent; that the Defendant had given him instructions to back a horse called "Better Hope," and that the Plaintiff had failed to carry out his instructions, whereby the Defendant had lost a sum of about Rs. 20,000 inasmuch as the horse, which the Defendant desired to back, had won the race. It was then alleged that the Plaintiff denied that he had received these instructions; that a dispute arose and the matter was reported by the Defendant to the Stewards of the Royal Calcutta Turf Club; that the Plaintiff was intending to leave Calcutta; and, it was then arranged that the settlement of that dispute should be postponed until his return which, it was anticipated, would be about September 1923.

The Defendant then alleged as follows :—"The Defendant on the said date (i.e., the 1th of April 1923) made over the 4 post-dated cheques referred to in the plaint to Plaintiff and it was orally agreed by and between the Plaintiff and the Defendant that on the dispute being settled as aforesaid, the said cheques would not be presented for payment."

The learned Judge decided that evidence of the oral agreement, which the Defendant alleged would not be admissible under sec. 92 of the Indian Evidence Act; consequently he came to the conclusion that the written statement in that respect was embarrassing and would delay the fair trial of the suit: acting upon that opinion the learned Judge ordered that the written statement should be taken off the file.

With great respect to the learned Judge, I am of opinion that the written statement ought not to have been struck out on that ground.

It is clearly established that the Court should not, as a rule, decide an important

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point as to the relevancy of matters on an application to strike out.

The jurisdiction which is given to the Court by Or. 6, r. 16, is one which, in my judgment, ought to be exercised with great care and caution: and it follows that a written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations, which the Defendant has put upon the record, are such as cannot afford a defence to the action, with the result that if they are allowed to stay upon the record, the trial of the suit must be unnecessarily delayed.

In this case, there is a matter which, in my judgment, is decisive of this appeal. It was referred to by the learned Counsel for the Plaintiff in the course of his argument. The question whether the alleged oral agreement, upon which the Defendant relies, is admissible in evidence, will depend to some extent upon the way in which the Defendant's case is presented at the trial. The allegation in the written statement as to the oral agreement is open to the criticism that the meaning thereof is not clear, and I could well understand the learned Judge making an order that the pleading should be amended and made more explicit. That however was not done. As the pleadings stand the allegation is susceptible of the meaning that when the Defendant handed the four cheques to the Plaintiff, it was agreed between them that the cheques should not be presented for payment until the dispute which had arisen between the parties should be settled in the manner which was stated in the written statement.

Under these circumstances I am not prepared at this stage of the proceedings to hold that evidence of such an agreement would be inadmissible having regard

to the provisions of sec. 92, proviso (8) of the Indian Evidence Act.

It has been held that evidence is admissible which shows a contemporaneous verbal arrangement, upon the faith of which an instrument was handed over, that it would not be effective or operative until a certain condition has been fulfilled.

In my judgment, therefore, the learned Judge ought not to have exercised the jurisdiction which was vested in him by Or. 6, r. 16, by striking out the written statement.

With regard to the other part of the written statement, namely, that which alleges that "there is a sum of Rs. 9,000 due and owing to the Defendant by the Plaintiff being the difference between the said sums of Rs. 20,000 and Rs. 11,000 all or any portion of which sum the Plaintiff has failed to pay to the Defendant," and that part of paragraph seven which prays for a decree in favour of the Defendant against the Plaintiff, I agree with the learned Judge that those allegations should be struck out of the written statement for the reasons which the learned Judge has stated.

I do not mean to say that the previous paragraphs which set out the alleged facts upon which the Defendant relied and which led up to the allegation of the oral agreement should be struck out: I confine my decision solely to paragraphs 6 and 7 of the written statement which in my opinion should be struck out. This is without prejudice to any right which the Defendant may have to institute a suit in respect of these allegations.

For these reasons in my judgment this appeal must be allowed, and the learned Judge's order so far as it directs that the written statement should be taken off the file must be set aside. The written statement will stand, except that paragraphs 6

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and 7 so far as they relate to the Defendant's claim for Rs. 9,000 must be struck out. Each party will pay his own costs of the application before Mr. Justice Buckland.

The Plaintiff must pay the Defendant's costs of this appeal.

Having regard to the fact that it might be somewhat embarrassing to my learned brother Mr. Justice Buckland to try this case in view of the opinion which he has already expressed, we think it desirable that this case should be tried by another Judge. I therefore direct that this case should be placed in Mr. Justice Page's list, with liberty to the parties to apply for a speedy trial.

RANKIN, J.—I agree.

The learned Judge has not merely objected to the lack of clarity in certain words in the middle of paragraph 4 of the written statement, and accordingly gone on to tell the Defendant that he ought to have pleaded better, and given him upon certain terms a few days in which to make the matter clearer; but he has struck out the written statement altogether, having come to a finding that the defence disclosed in paragraph 4 is one which must be inadmissible in evidence in view of sec. 92 of the Evidence Act. Before that could be done, it must be very clear that the defence put forward is inadmissible in evidence. Far from thinking that that is very clear, I am disposed to think that it may very well be that the oral agreement as expressed in paragraph 4 is within proviso (3) to sec. 92. For this reason it seems to me that the order of the learned Judge with regard to this matter cannot be upheld.

I agree also with regard to the alleged counter-claim for Rs. 9,000 which is set up in paragraphs 6 and 7 of the written

statement, that those ought to be struck out without any opportunity to amend, having regard to the fact that this counter-claim cannot be tried in this suit.

Messrs. Sanderson & Co., Solicitors for the Appellant.

Messrs. Leslie & Hinds, Solicitors for the Respondent.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1921 OF 1920.

SUHWARDY, J.	{	SHYAMA BIBI and ors.,
CUMING, J.		Defendants, Appellants,
1924,		v.
12, November.	{	MADHU SUDAN DAS
		MAHANTA, Plaintiff,
		Respondent.

Civil Procedure Code (Act V of 1908), sec. 105—Order setting aside abatement and allowing substitution, if may be questioned in an appeal from the decree — "Affecting decision of case," meaning of.

The Code of Civil Procedure does not allow an appeal from an order setting aside an abatement and allowing substitution, and such an order cannot be challenged in an appeal from the final decree. Such an order is not one which affects the decision of the case with reference to its merits within the meaning of sec. 105, C. P. C. The fact that such an order was made in the same judgment as the decree in the suit makes no difference.

This was an appeal preferred on the 26th July 1920 against a decree of the District Judge of Zilla Bankura (Babu Girish Ch. Sen), dated the 28th April 1920, affirming a decree of the Munsif of that place (Babu Aswini Kumar Das), dated the 21st November 1919.

The facts of the case will appear from the judgment.

M. Nuruddin Ahmed and M. A. S. M. Akram for the Appellants.

SHYAMA BIBI v. MADHU SUDAN DAS MAHANTA.

Dr. Dwarkanath Mitter and Babu Narendra Krishna Basu for the Respondent.

Babu Birajmohan Majumdar for the minor Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal raises an interesting question which requires some consideration. In a mortgage suit, the Plaintiff (predecessor of the present Respondent) died on the 28th January 1916 and the Defendant died on the 8th July 1916. After the preliminary decree was passed by the High Court on the 13th July 1915 no application for substitution of the deceased parties seems to have been made till the 15th July 1918 when an application was made by the heirs of the deceased Plaintiff for substitution of their names in place of the deceased Plaintiff and for substitution of the heirs of the deceased Defendant after setting aside the abatement and for a final decree. That application was dismissed for default on the 4th September 1918. But during the interval between the filing of the application and its dismissal the heirs of the Plaintiff had parted with their interest in the mortgage in favour of the present Respondent. The Respondent thereupon filed an application on the 3rd September 1918 for setting aside the abatement and for substitution of himself in place of the deceased Plaintiff and of the heirs of the Defendant in place of the deceased Defendant and final decree. The prayer for substitution as well as the prayer for final decree were considered together and the learned Munsif by his judgment, dated the 21st November 1919, set aside the abatement and passed the final decree in favour of the Respondent. The substituted Defendant appealed to the District

Judge who dismissed the appeal on the merits. With regard to the question that the application for setting aside the abatement or of the substitution of the heirs of the deceased parties was made after the period of limitation, the learned Judge observes that the Code of Civil Procedure does not allow an appeal from an order setting aside an abatement and allowing substitution and therefore such an order cannot be challenged in an appeal from the final decree.

The Defendants have appealed and the only point urged on their behalf is that the view of the learned Judge that the order setting aside abatement and directing substitution of the heirs of the deceased parties cannot be challenged in an appeal from the final decree is wrong. Reliance has been placed in support of this contention upon sec. 105, C. P. C. That section says that where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. The whole question, therefore, turns upon the interpretation of the words "affecting decision of the case." The learned vakil who has ably argued the case for the Appellants urges that the expression "decision of the case" means any question which will influence the ultimate decree to be passed by the Court. This contention is supported by the view taken by the Madras High Court in the case of *Gopla Chetti v. Subbier* (1) and by the observations of Mr. Justice Karamat Hossein in the case of *Nund Ram v. Bhopal Singh* (2). We are, however, confronted with other decisions of this Court which assign to the expression "affecting the decision of the case" the meaning "affecting the

(1) I. L. R. 36 Mad. 604 (1903).

(2) I. L. R. 34 All. 522 (1912).

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merits of the case or affecting the decision of the case with reference to its merits." Reference may be made in support of the view to the cases of *Baroda Charan Ghose v. Gobind Pershad Tewary* (3) and *Krishna Chandra Goldar v. Mohesh Chandra Saha* (4). The Allahabad High Court has also taken the same view as this Court. See the cases of *Gulab Kunwar v. Thakur Das* (5) and *Tasadduq Hossein v. Hayatunnessa* (6). If we were untrammelled by authorities we might have felt disposed to reconsider the meaning of the expression but as they stand we feel ourselves bound to follow them. The point which really arises in the case and which has been forcibly pressed upon our attention by the learned vakil for the Appellants is that where the order setting aside the abatement is passed in the same judgment as the decree in the suit, such order can be attacked in an appeal from the decree. In support of this contention our attention has been drawn to the decision of the Allahabad High Court in the case of *Hem Kunwar v. Amba Prosad* (7). In that case it has been held that where the matters relating to setting aside of abatement and the merits are dealt with in the same judgment and the findings of the Court as to both are embodied in the decree, the decree may be impugned in appeal on the ground that the order setting aside the abatement was bad in law. This case is no doubt in favour of the Appellants, but it is the judgment of a single Judge and is not in consonance with the view consistently taken by that Court. There is no other case directly on the point which decides the question that has arisen

in this case, namely, where the order setting aside an abatement and the final decree are passed by the same judgment, the order setting aside the abatement can or cannot be attacked in appeal from the decree except the case to which reference has been made. But the principle on which the Courts have barred the Plaintiff's right to challenge the order setting aside the abatement of an order restoring a suit, in an appeal from the decree in the suit, is that such an order is not one which affects the decision of the case with reference to its merits. The mere fact that the order setting aside the abatement and the order disposing of the case were passed in the same judgment does not by parity of reasoning affect the consideration which led the Courts to hold that such an order cannot be attacked in an appeal from the decree. The character of such an order as being one not affecting the merits of the case remains the same whether it is passed before the decree or is passed along with the decree. Our attention has been drawn to another decision of the Allahabad High Court, *Niddhalal v. Collector of Bulandshahr* (8). Similar circumstances happened there with the difference that the order setting aside the abatement was passed sometime before the final decree in the case was passed.

By denying the right of appeal against an order restoring a suit or setting aside an abatement while granting it in the case of refusal to pass such order, the legislature may be taken to have intended that it is desirable in the interests of justice that a case should be tried on the merits where the trial Court is of opinion that it should be so tried and so such opinion should not be subject to revision by another Court. By allowing such a decision of the trial Court to be challenged in

(3) I. L. R. 22 Cal. 984 (1895).

(4) 9 C. W. N. 584 (1905).

(5) I. L. R. 24 All. 464 (1902).

(6) I. L. R. 25 All. 280 (1903).

(7) I. L. R. 22 All. 430 (1900).

(8) 14 All. L. J. 610 (1916)

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appeal after the termination of the trial, may be after enormous expense of time and money occasioned by the act of the Court, is to defeat the intention of the legislature and put the party winning on the merits to unnecessary loss for which he is not responsible. In our judgment the order setting aside the abatement cannot be questioned in appeal from the decree in the suit whether such order is passed before or simultaneously with the decree.

In this view of the law we think that the decree of the lower Court should be upheld and this appeal dismissed with costs.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

Full Bench Reference

IN

APP. NO. 111 OF 1923.

SANDERSON, C. J.
WALMSLEY, J.
RANKIN, J.
BUCKLAND, J.
MUKERJI, J.
1925,
Heard, 7, April.
Judgment,
21, April.

FRANCIS HIGGINS PELL,
Appellant,
v.
MINNIE GREGORY,
Defendant, Respondent.

Limitation Act (IX of 1908), Sch. I, Arts. 181 and 183—Civil Procedure Code (Act V of 1908), Or. 34, r. 6, application for a personal decree under, limitation governing—Mortgage suit—Personal covenant—Execution of decree.

An application under Or. 34, r. 6, for a personal decree for the balance of the mortgage money not recovered by sale of the mortgaged properties is an application for a new decree in the suit and cannot be said to be an application for enforcing a judgment or decree within the meaning of Art. 183 and consequently is not governed by that article.

Art. 181 of the Limitation Act does apply to such an application and the case of BISWAMBHAR SHAHA v. RAM SUNDAR KAIBARTA (1) in so far as it decided that Art. 181 does not apply to such an application was not rightly decided.

MAHAMMAD ILTIFAT HOSSAIN v. ALIM-UNNISSA BIBI (7) followed.

This was a Reference to a Full Bench made on the 15th of July 1924 by Sanderson, C. J. and Walmsley, J., made in Original Side Appeal No. 111 of 1923, which had been preferred against a judgment of Greaves, J., passed in Suit No. 323 of 1911 and dated the 28th May 1923.

The facts of the case are fully set out in the Order of Reference.

The judgment of the Original Court was as follows:—

GREAVES, J.—On the 8th July 1913 a final decree for sale was passed and the mortgaged premises were sold. On the 8th March 1923 the assignee of the 2nd Defendant applied for a personal decree for the balance. When the matter came on before me on the 8th May various questions were argued before me on behalf of the 1st Defendant, but no question of limitation was raised and on that day I passed a decree for personal payment by the first Defendant to the assignee of the second Defendant of a sum of Rs. 48,942-2-4.

This decree it is now sought to vary on the ground that the application of the 8th March 1923 was barred by limitation.

It is urged on behalf of the first Defendant that as the deficiency arising on the sale was ascertained on the 8th June 1914, the application of the 8th March 1923 was barred under Art. 181 of the Limitation Act, as not having been made within

(1) 1. L. R. 43 Cal. 294 (1914).

(7) 1. L. R. 40 All. 551 (1918).

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three years of the time when the deficiency was ascertained. It is contended on behalf of the assignee of the second Defendant that the application is not barred and that Art. 183 applies.

Now the application of the 8th March 1923 was an application under Or. 31, r. 6 of the Code of Civil Procedure for a decree in the form in Appendix D, Form XI and apart from authority I should have thought that the article applicable was Art. 181 and not Art. 183 which relates to enforcement of judgment, decrees or orders.

But reliance is placed by the assignee of the second Defendant on *Biswambhar Shaha v. Ram Sundar Kaibarta* (1), where it was held on the Appellate Side of this Court that applications under Or. 31, r. 6 are not governed by Art. 181 of the Limitation Act. It was further urged that as applications under Or. 31, r. 3 (2) for foreclosure are not governed by that article, [see *Madhabmoni Dassi v. Pamela Lambert* (2)], similar considerations apply to applications under Or. 31, r. 6. This case was decided in 1910.

On the other hand the Judicial Committee in *Abdul Majid v. Jamahir Lal* (3) held that the period of limitation for making absolute a decree for sale was three years under Art. 179 of the Limitation Act, 1877, which corresponds with Art. 182 of the present Act and not 12 years under Art. 180 of that Act which corresponds with Art. 183 of the present Act. In *Amlook Chand Parrack v. Sarat Chunder Mukerji* (4) the question arose whether an application for a decree absolute for sale was barred as not having

been made within 12 years of the decree nisi. Sir Lawrence Jenkins in delivering the judgment of the Appeal Court stated that he saw no reason why Art. 183 should not apply and held the application was barred as not having been made within 12 years.

There was an appeal to the Judicial Committee, *Munna Lal Parrack v. Sarat Chandra Mukerji* (5), but the appeal was dismissed, their Lordships seeing no reason to interfere with the decisions of the Courts below.

Having regard to the fact that a period of more than 12 years had elapsed it was not necessary for their Lordships to decide whether the article applicable was Art. 181 or 183, and although Sir Lawrence Jenkins indicated an opinion that Art. 183 applied he did not, I think, finally decide this and in view of the decision in *Abdul Majid v. Jamahir Lal* (3), it would appear that Art. 181 applies and not Art. 183. But be this as it may, in any case I do not think that the same considerations would apply to an application under Or. 34, r. 3 as to an application under Or. 31, r. 6 where it is necessary to obtain a decree.

I am not prepared to follow the decision in *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) and accordingly I hold that the article applicable is Art. 181 and not Art. 183 and that the application of the 8th March is barred by limitation. I accordingly allow the application for review—the application of the 8th March fails and must be dismissed, but under the circumstances I make no order as to costs.

[The assignee of the second Defendant

(1) I. L. R. 42 Cal. 294 (1914).

(2) 12 O. L. J. 325 (1910).

(3) I. L. R. 36 All. 350; s. c. 18 C. W. N. 963 (P. C.) (1914).

(4) I. L. R. 38 Cal. 913; s. c. 16 C. W. N. 49 (1911).

(1) I. L. R. 42 Cal. 294 (1914).

(3) I. L. R. 36 All. 350; s. c. 18 C. W. N. 963 (P. C.) (1914).

(5) L. R. 42 I. A. 88; s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (1914).

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Pell preferred the above appeal against the said judgment of Greaves, J., and the Order of Reference was made at the hearing of the said appeal.]

The ORDER OF REFERENCE was as follows :—

SANDERSON, C. J. (WALMSLEY, J., concurring).—This is an appeal by Francis Higgins Pell against the judgment of my learned brother Mr. Justice Greaves which was delivered on the 28th of May 1923.

The suit was brought by S. A. Nathan and another against Minnie Gregory, and one Harry Jones Nathan and another were the mortgagees, Minnie Gregory was the mortgagor and Harry Jones was the puisne mortgagee of certain property, the details of which it is not necessary for me to mention. The Appellant is the assignee of Harry Jones.

In the first instance the learned Judge made an order on the 8th of May 1923 in favour of the Appellant against the Defendant Minnie Gregory. But an application was made to him to vacate that order, and upon the hearing of that application the learned Judge delivered the judgment against which this appeal is directed. The learned Judge dismissed the application on the ground that the application was within Art. 181 of the Limitation Act of 1908 and was out of time.

The learned Judge in his judgment referred to the application as dated the 8th of March 1923. The notice of application was dated the 18th of April 1923. The mistake obviously arose by reason of the fact that the petition, on which his application was based, was sworn by the Appellant on the 8th of March 1923. The correct date of application is the 18th of April 1923.

The application was that the cause title of the suit should be amended by striking out the name of Harry Jones and substi-

tuting the name of the applicant F. H. Pell in the place and stead thereof and that the Defendant Minnie Gregory should be ordered and decreed to pay to the applicant a sum of Rs. 48,442, being the balance due under the preliminary and final decrees made in the suit and dated respectively the 28th day of July 1911 and the 8th day of July 1913 with interest. The latter part of this application was made under Or. 34, r. 6 of the Code of Civil Procedure, 1908.

The facts which it is necessary for me to mention are as follows :—A mortgage suit was instituted on the 29th of March 1911 and there was a preliminary decree which was made by consent, dated the 28th of July 1911. The decree absolute for sale was dated the 8th of July 1913 and the sale took place on the 8th of June 1914. The preliminary decree which was in the usual form adopted in suits by a mortgagee against the mortgagor and a puisne mortgagee provided for the taking of accounts in the usual form and for sale in default of the amount found due being paid and it contained the following passage : " And it is further ordered and decreed with the like consent that if the money to arise by such sale shall not be sufficient for the payment in full of the amounts payable to the Plaintiffs and the said Defendant Harry Jones under this decree the Plaintiffs or the said Defendant Harry Jones, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance."

It is clear that so far as the Plaintiffs were concerned it was intended that they should be at liberty to make an application under Or. 34, r. 6 of the Code of Civil Procedure. Our attention was drawn to the fact that that order provides merely for a Plaintiff obtaining a decree for recovery of the balance due from the mort-

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gagor in the event of the money realized by the sale not being sufficient to pay the amount due to the Plaintiff and it was urged that Mr. Jones, being a Defendant, would not be entitled to make an application under Or. 34, r. 6, and that the Appellant, his assignee, would be in no better position than Mr. Jones.

The learned Judge, however, came to the conclusion that inasmuch as the decree was made by the consent of the parties, it was not open to the mortgagor to contend that Mr. Jones or his assignee was not entitled to apply for a personal decree in pursuance of the preliminary decree, dated the 28th of July 1911, and on that point I agree with the learned Judge's conclusion.

The real point, which has been argued in this Court, is whether the application of the 18th of April 1923 is barred by any article of the Limitation Act. It is to be noted that the sale took place on the 8th of June 1914 and it could then have been ascertained whether the money to arise by the sale was sufficient to pay the amounts in full to the first and the second mortgagees. The fact was that the amount so realized was not sufficient to pay the amount due to the puisne mortgagee. Therefore, the right of the Defendant Jones to apply for a personal decree against the mortgagor arose at that time.

It has been argued on behalf of the Appellant that the article which is applicable to this application is Art. 183 which provides that where the application is "to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council, the period of limitation is twelve years and the time from which it begins to run is when a present right to enforce the

judgment, decree or order accrues to some person capable of releasing the right." There is no doubt that if that article is applicable to this case the application was made in time.

On the other hand it has been argued on behalf of the Respondent that this application does not come within the terms of Art. 183 and that consequently Art. 181 applied. Art. 181 applies to applications for which no period of limitation is provided elsewhere in this schedule or by sec. 48 of the Code of Civil Procedure, 1908. The period of limitation is three years running from the time when the right to apply accrues. It is clear that if that article applies to this application then the application was out of time.

The learned Counsel for the Appellant has stated that there is no decision of this Court to the effect that Art. 183 would apply to an application under Or. 34, r. 6.

The first question which this Court has to decide is whether it can be said that this application having regard to the facts of this case and the terms of the preliminary decree of 28th of July 1911 can be said to be an application for the enforcement of a judgment, decree or order of this Court. In my judgment the argument of the learned Counsel for the Appellant in this respect ought not to be accepted.

The preliminary decree of the 28th of July 1911 did not contain a decree for the payment by the mortgagor personally of the balance which would be found due if the sale did not realize a sufficient sum to pay the amount due under the decree although, as the learned Counsel for the Respondent pointed out, the decree might have contained such a provision in view of the decision of the Privy Council in the

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case of *Jeena Bahu v. Parmeshwar Narayan Mahtha* (6).

The preliminary decree of the 28th of July 1911 merely gave to the Defendant Jones liberty to apply for a personal decree for the balance due. Having regard to the terms of the preliminary decree in this case, I am of opinion that the application of the 18th April 1923 was really an application in the original suit for a new decree. I am confirmed in that opinion by the decision of the Allahabad High Court in *Mahammad Utifat Hossain v. Alimunnissa Bibi* (7). The result is that in my judgment Art. 183 does not apply to the application in question.

The question still remains whether Art. 181 applies. *Primâ facie*, I should have thought that if Art. 183 did not apply then it must follow that Art. 181 would apply inasmuch as sec. 48 of the Code of Civil Procedure is not applicable to this case and there is no other article in the schedule which is applicable.

But on this point I find that there is a decision of a Division Bench of this Court in the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) that Art. 181 does not apply to an application under Or. 31, r. 6.

With much respect to the learned Judges who decided that case, I am not prepared to agree with the conclusion at which they arrived.

The basis of the decision was that where there has been a preliminary decree in a mortgage suit with liberty to apply for a personal decree against the mortgagor in case the sale did not produce sufficient to satisfy the claim of the mortgagee no exception by way of limitation would arise

with the result that an application for a personal decree against the mortgagor might be more than twelve years after the right to apply for that decree accrued.

Apart from the decisions to which our attention has been drawn I should not be prepared to adopt that reasoning but I am relieved from any difficulty upon that point because the learned Counsel for the Appellant frankly admitted that he could not support that reasoning in view of the decisions of the Privy Council.

It is due however to the learned Counsel to say that he did not admit that the above-mentioned reasoning was the sole ground of the decision in the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1).

In my opinion the reasoning to which I have referred was the real ground of the decision and the result is as I have already said that I am unable to agree with the decision in that case. In my judgment Art. 181 applies to the application; consequently the application is barred by the Act of Limitation.

Inasmuch as my conclusion differs from the decision of two learned Judges of this Court, sitting in a Division Court, it is necessary to refer this case to a Full Bench, because the rule of this Court is as follows:—"Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the forces of law, the case shall be referred for decision by a Full Bench."

The learned Counsel for the Respondent in the first instance submitted that it was not necessary for me to refer this to a Full Bench inasmuch as this Court is hearing appeals from a Judge of this Court sitting in the Original Side, and the learned Judge's decision in the case of *Biswambhar Shaha v. Ram Sundar Kai-*

(1) I. L. R. 42 Cal. 294 (1914).

(6) L. R. 46 I. A. 294; a. c. I. L. R. 47 Cal 370; 23 C. W. N. 490 (1918).

(7) I. L. R. 40 All. 551 (1918).

(1) I. L. R. 42 Cal. 294 (1914).

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barta (1) was given when they were hearing an appeal from a lower Appellate Court. At the end of the argument however he did not press that contention in view of the fact that this Court referred a case to a Full Bench in circumstances which were identical with those of the present case. I refer to the case of *Mani Lal Singh v. Trustees for the Improvement of Calcutta* (8). In that case my learned brother Mr. Justice Greaves, sitting on the Original Side, construed the provisions of a section of the Act in question in one way and the late Mr. Justice Mookerjee and my learned brother Mr. Justice Cuming sitting on the Appellate Side construed the section in another way. When the appeal from Mr. Justice Greave's judgment came to this appeal Court, this Court was of opinion that the view which Mr. Justice Greaves expressed was right and Mr. Justice Woodroffe, Mr. Justice Chitty and I who were members of the Appeal Court felt bound to refer the matter to a Full Bench.

The learned Counsel for the Respondent drew our attention to cl. 15 of the Letters Patent and to the fact that this Court sitting to hear appeals from a Judge on the Original Side is a Division Court and in my opinion the matter clearly comes within the rule regarding a reference to a Full Bench, to which I have referred.

This Court therefore having held that Art. 183 of the Limitation Act does not apply to the Appellant's application for a decree under Or. 34, r. 6, differs from the decision in the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) upon the questions.

(1) Whether there is any period of limi-

(1) I. L. R. 42 Cal. 294 (1914).

(8) I. L. R. 45 Cal. 343 : s. c. 22 C. W. N. 1 (F. B.) (1917).

tation in respect of an application for a decree under Or. 34, r. 6.

(2) Whether Art. 181 of the Limitation Act applies to an application under Or. 34, r. 6, Civil Procedure Code, where no other article applies and refers to the decision of a Full Bench, the question whether the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) so far as it decides that Art. 181 of the Limitation Act does not apply to an application under Or. 34, r. 6, Civil Procedure Code was rightly decided.

[The Reference was heard on the 7th April 1925 before a Bench constituted as above.]

Sir Benode Mitter (with *Messrs. B. C. Ghose and S. C. Mitter*) on behalf of the Appellant argued that the right to apply under Or. 34, r. 6 arises out of the preliminary decree. Under sec. 11, Exp. V of the Civil Procedure Code, if the relief is not granted by the decree, it will be deemed to have been refused. It is only enforcing the decree for the balance under Or. 34, r. 5 (2) and r. 4 (1). The application for order absolute for the sale of the property is an application in execution. It is a judicial relief under the decree asked for.

The application for personal execution in a mortgage decree is not an application for a fresh decree but is merely enforcing the decree which is already passed. That being so, this is an application for the execution of the same decree. If this contention is sound then Art. 183 will apply.

[*Amlook v. Sarat Chandra* (4), *Munna Lal Parrack v. Sarat Chandra* (5), *Harendra Lal v. Maharani* (27), *Apurba v. Rash-*

(1) I. L. R. 42 Cal. 294 (1914). •

(4) I. L. R. 38 Cal. 913 : s. c. 16 C. W. N. 49 (1911).

(5) L. R. 42 I. A. 88 : s. c. I. L. R. 42 Cal. 776 : 19 C. W. N. 561 (1914).

(27) L. R. 28 I. A. 89 : s. c. 5 C. W. N. 536 (1901).

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behary (33), *Batuk Nath v. Munni Dei* (9), *Abdul Majid v. Jamahir Lal* (3), *Jeuna Bahu v. Parmeshwar Narayan* (6), *Mahamed Hussain v. Abdul Karim* (29) and *Md. Iltifat Hossain v. Alimunnissa* (7), referred to.]

Mr. Pugh (with Mr. Page) on behalf of the Respondent argued that having regard to the frame of the question referred to the Full Bench the only point that is for decision is as to whether Art. 181 applies; the Division Bench has already decided that no other article applies to the case, and that matter cannot be further considered now.

If that is so the case of *Biswambhar Shaha* (1) was wrongly decided. The application to obtain a decree under Or. 34, r. 6 is an application made under a liberty granted by the decree *nisi* to get a fresh decree.

[*Manekbai v. Manekji* (23), *Apurba v. Rashbehary* (33), *Munna Lal v. Sarat Chandra* (5), *Amlook v. Sarat Chandra* (4), *Tilack v. Parsotum* (19), *Rahamat Karim v. Abdul Rahim* (30), *Ram Sarup v. Ghaurani* (13) and *Md. Iltifat Hossain v. Alimunnissa* (7) referred to.]

(1) I. L. R. 42 Cal. 294 (1914).

(3) I. L. R. 36 All. 350: s. c. 18 C. W. N. 963 (P. C.) (1914).

(4) I. L. R. 38 Cal. 913: s. c. 16 C. W. N. 49 (1911).

(5) L. R. 42 I. A. 88: s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (1914).

(6) L. R. 46 I. A. 294: s. c. I. L. R. 47 Cal. 370; 23 C. W. N. 480 (1913).

(7) I. L. R. 40 All. 551 (1918).

(9) I. L. R. 36 All. 284: s. c. 18 C. W. N. 740 (P. C.) (1914).

(13) I. L. R. 21 All. 453 (1899).

(19) I. L. R. 22 Cal. 931 (1895).

(23) I. L. R. 7 Bom. 213 (1890).

(29) I. L. R. 39 Mad. 544 (1915).

(30) I. L. R. 34 Cal. 672: s. c. 11 C. W. N. 674 (1907).

(33) I. L. R. 47 Cal. 746 (1920).

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a Reference by my learned brother, Walmsley, J., and me to a Full Bench.

The facts of the case are set out in the referring judgment and it is therefore not necessary for me to state them again.

My learned brother and I decided that Art. 183 of the Limitation Act of 1908 does not apply to the Appellant's application for a decree under Or. 34, r. 6 of the first schedule to the Code of Civil Procedure, 1908.

We were of opinion that Art. 181 is applicable, but we found that there is a decision of a Division Bench of this Court, *viz.*, *Biswambhar Shaha v. Ram Sundar Kaibarta* (1), to the effect that Art. 181 does not apply to an application under Or. 34, r. 6. The basis of that decision was that, in a mortgage suit in which there has been a decree for sale and in which the Plaintiff had his personal remedy at the date of the institution of the suit, no exception by way of limitation would arise with regard to an application under Or. 34, r. 6 and that such an application is not covered by Art. 181.

As my learned brother and I were unable to agree with the decision in the above-mentioned case, we referred the matter to a Full Bench.

The Reference is as follows:—

"This Court therefore having held that Art. 183 of the Limitation Act does not apply to the Appellant's application for a decree under Or. 34, r. 6, differs from the decision in the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) upon the question:

"(1) Whether there is any period of limitation in respect of an application for a decree under Or. 34, r. 6.

(1) I. L. R. 42 Cal. 294 (1914).

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"(2) Whether Art. 181 of the Limitation Act applies to an application under Or. 34, r. 6, C. P. Code, where no other article applies, and refers to the decision of a Full Bench—the question whether the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) so far as it decides that Art. 181 of the Limitation Act does not apply to an application under Or. 34, r. 6, C. P. C., was rightly decided."

Having regard to the fact that my learned brother and I decided that Art. 183 did not apply and no question with respect thereto having been referred to the Full Bench, it might be said that it was not open to the learned Counsel, who appeared for the Appellant on the Reference, to argue that Art. 183 did apply. He submitted however that his argument was that Art. 181 did not apply, because Art. 183 did apply, and the learned Counsel was allowed by the Court to argue the point.

The learned Counsel for the Appellant admitted, in view of the decisions of the Judicial Committee of the Privy Council, that it was not open to him to argue that there was no period of limitation as was stated in *Biswambhar Shaha v. Ram Sundar Kaibarta* (1), but he argued that the application for a personal decree under Or. 34, r. 6 was an application to enforce a judgment as being either a proceeding in execution or a proceeding for judicial relief under a decree, and consequently that Art. 183 applied.

On behalf of the Appellant reliance was chiefly placed upon the decision in *Amlook C. Parrack v. Sarat Chandra Mukerjee* (4) which was affirmed by the Judicial Committee of the Privy Council in *Munna Lal Parrack v. S. C. Mukerjee* (5).

(1) I. L. R. 42 Cal. 294 (1914).

(4) I. L. R. 38 Cal. 913: s. c. 16 C. W. N. 49 (1911).

(5) L. R. 48 I. A. 88; s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (1914).

In the first place it is to be noted that the argument in the above-mentioned case was that the application was "free from the law of limitation" to use the words of the learned Chief Justice; that is the argument which it has been admitted cannot be supported.

In the second place the learned Chief Justice pointed out that the decree in that case was "in a sense peculiar" for it included not only a decree for personal payment by the mortgagor but also a provision for sale of the property in default of payment. It was assumed however for the purpose of the judgment that the decree was within the Transfer of Property Act, and that it was a decree made under sec. 88 of that Act; and the learned Chief Justice drew attention to the fact that if it were a decree under sec. 88 of the Transfer of Property Act no further decree was necessary and that all that was required was, under sec. 89, an order for sale.

The conclusion arrived at was that the application for the order for sale might be regarded as an application for the realization of the decree, and that being so it was not unfair to say that it was an application to enforce a judgment as being a proceeding in execution or a proceeding for judicial relief under a decree.

It was not contended that the present case is governed by the Transfer of Property Act, and it was argued on the basis that the Code of Civil Procedure is applicable.

It is therefore material to draw attention to the concluding portion of the learned Chief Justice's judgment in *Amlook C. Parrack v. S. C. Mukerjee* (4) where he referred to the alterations created by the Code of 1908, and to the terms thereof,

(4) I. L. R. 38 Cal. 913 at p. 921; s. c. 16 C. W. N. 49 (1911).

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whereby it is now provided that the application which follows a preliminary decree is not for an order for sale, but for a decree for sale.

It is interesting to observe that in the report of the case in the Judicial Committee of the Privy Council [*Munna Lal v. Sarat Chandra* (5)], the interpretation placed upon that part of the learned Chief Justice's judgment is as follows: "The learned Chief Justice was also of opinion that if the decree had been an incomplete one, a further decree being required, then Art. 181 of the Act of 1908 would have barred the application since the difficulties of applying the corresponding article of the Act of 1877 to an application for an order to sell had been removed in the case of Art. 181 by the provisions of the Code of Civil Procedure, 1908."

It is not necessary for me to express any opinion in this case upon the question whether that is a correct interpretation of the learned Chief Justice's judgment, and I do not express any opinion.

It is, however, clear, in my judgment, that the decision in the above-mentioned case is not any authority for the proposition advanced on behalf of the Appellant that Art. 183 applies to an application under Or. 34, r. 6.

Further, it cannot reasonably be argued, in my judgment, that there is any analogy between an application for a final decree for sale under Or. 34, r. 5 (2) and an application for a personal decree against the mortgagor for the balance if legally recoverable under Or. 34, r. 6.

In the case of the final decree for sale, Or. 34, r. 5 (2) provides that where such payment is not so made the Court shall on application made in that behalf by the Plaintiff pass a decree that the mortgaged

property be sold and that the proceeds of the sale be dealt with as is mentioned in r. 4.

R. 4 deals with the preliminary decree or sale, which in itself contains a direction for the sale of the property if the payment directed thereby is not made on or before the date specified in the decree (see Form 4 in 1st Schedule, App. D). In the case therefore of an application for a final decree for sale, if it is made within the specified time, it may be said that the Court is bound as a matter of course to make the final decree for sale if the payment, which has been directed by the preliminary decree is not made, and that the Court is merely giving effect to the order contained in the preliminary decree.

In the case of an application for a personal decree under Or. 34, r. 6 the position is different. The rule provides: "Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the Plaintiff, if the balance is legally recoverable from the Defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

On such an application the Court has to be satisfied that the balance is legally recoverable from the Defendant otherwise than out of the property sold, and if so satisfied the Court may pass a decree for such amount.

Form 11 of the 1st Schedule, Appendix D, is the form of a decree against the mortgagor personally. This read with the rule makes the point clear; the form contains the sentence "and whereas it appears to this Court that the Defendant is personally liable for the said balance."

For these reasons, in my judgment the application under Or. 34, r. 6, dated the 18th April 1923, was an application for a new decree in the suit and it cannot be

(5) L. E. 42 I. A, 88 at p. 89; s. c. I. L. E. 42 Cal. 776; 19 C. W. N. 561 (1914).

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said to be an application for enforcing a judgment or decree within the meaning of Art. 183, and consequently Art. 183 is not applicable to an application under Or. 34, r. 6.

It was admitted by the learned Counsel, who appeared for the Appellant, that if Art. 183 does not apply, Art. 181 must apply.

In my judgment, therefore, there is a period of limitation in respect of an application for a decree under Or. 34, r. 6, and the answer to the question submitted to the full Court should be as follows:—Art. 181 of the Limitation Act does apply to such an application and the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) in so far as it decided that Art. 181 of the Limitation Act does not apply to such an application, was not rightly decided.

WALMSLEY, J.—I agree with my Lord the Chief Justice.

RANKIN, J.—The special facts of this case need not be again detailed, but the facts which give rise to the single question argued before us may be stated as these:—

That the suit is a suit brought in 1911 to enforce a mortgage on the Original Side of this High Court. That by consent a preliminary decree for sale was made therein which provided that if the money to arise by such sale should not be sufficient the present Appellant (mortgagee) should be at liberty to apply for a personal decree for the amount of the balance. That the present Appellant made his application for a personal decree some nine years after the mortgaged property had been sold.

The application is made under Or. 34, r. 6 of the Code of 1908. Unless there is no period of limitation prescribed for such an application, or Art. 183 of the Limita-

tion Act, 1908, applies, the present Appellant is clearly out of time. Learned Counsel on his behalf disclaims and rejects the contention that no period of limitation has been prescribed. In that view it is clear that the case falls either under Art. 181 or Art. 183. If it falls under Art. 181 the Appellant is too late. It is contended on his behalf that it falls under Art. 183, and this is the only contention which he desires to raise.

I am of opinion that the terms of reference to the Full Bench do not preclude us from deciding as to the correctness of this contention. Having regard to the frame of the schedule to the Limitation Act, it would be quite impossible to hold that Art. 181 is applicable without deciding that Art. 183 is not, or to hold (in the abstract) that there is a period of limitation prescribed without stating the article or articles by which it is prescribed. Whether it is ever right to decide a point of law on an hypothesis of law which may or may not be correct, may be doubted; but it would not be right in this case. The alternatives are to decide upon the applicability of Art. 183 or to make no answer to the reference. In my judgment we have jurisdiction to decide the question and should do so.

The Appellant's argument is that an application under Or. 34, r. 6 is an application to enforce the preliminary or final decree for sale. He supports this argument by citing decisions to the effect that applications under sec. 89 of the Transfer of Property Act for an order absolute come within the articles of the Limitation Act, which are now numbered 182 and 183. This argument from analogy takes us to debateable land. This High Court for years held that Arts. 182 and 183 did not apply to applications under sec. 89.

(1) 1, L. R. 42 Cal. 284 (1914).

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Other High Courts held that they did. In 1914, some years after the present Code had altered the aspect of the question, the Judicial Committee in two cases from Allahabad applied what is now Art. 182 [*Batuk Nath v. Munni Dei* (9) and *Abdul Majid v. Jamahir Lal* (3)], Lord Moulton in the latter case describing the application under sec. 89 as being "for an order absolute to sell the mortgaged properties, in other words, for an order directing enforcement of the order nisi." Meanwhile in 1911 this Court in *Amlook Chand v. Sarat Chandra* (4) dealt with a case in which a mortgagee applied for an order absolute for sale some 23 years after his suit had been decreed on the Original Side. The mortgagee's contention was that the case was governed by the Transfer of Property Act and that there was no limitation whatsoever. Treating the case as one outside the present Code, Jenkins, C. J., laid stress upon the fact that no further decree was requisite and that all that was required was an order for sale. He regarded the application as a petition for realisation of the decree following Lord Davey in a previous case who had spoken of a similar proceeding as a matter of execution, i.e., as if Art. 182 would cover it. It was held accordingly that in a High Court Art. 183 would apply. This case was affirmed in very general terms by the Judicial Committee in 1914 very shortly after the decision in the Allahabad cases already mentioned, *Munna Lal v. Sarat Chandra* (5).

Now if there were good and reliable

authority in cases under sec. 90 of the Transfer of Property Act, for holding that applications thereunder were governed by the articles now numbered 182 and 183, it would be unnecessary to trouble with analogies drawn from cases under sec. 89. What was provided for by sec. 90 was a decree and it has frequently been called a supplementary decree. It is true that at different times in Madras, *Mallikarjuna v. Lingamurti* (10) and in Allahabad, *Durga Dai v. Bhugwat Pershad* (11), *Musaheb v. Inayetullah* (12) and *Ram Sarup v. Ghaurani* (13), decisions have been given to the effect that an application under sec. 90 is an application in execution, but these decisions never became accepted law, and decisions to the contrary were not lacking. In the case of *Purna Chandra v. Radha Nath* (14) these cases were dissented from, Mookerjee, J., expressly stating that "even if the view maintained by the other High Courts as to the true nature of an application under sec. 89 were adopted, it seems to me that an application under sec. 90 stands upon an entirely different footing" (p. 148). Curiously enough in *Biswambhar Shaha v. Ram Sundar Kaibarta* (1), the Court proceeded on the view that an application under sec. 90 or r. 6 of Or. 34 was exactly parallel to an application under sec. 89 or r. 3. The real question is which of these two views is right? The Allahabad High Court in 1918 [*Md. Iltifat Hossain v. Alimunnissa* (7)] decided that Art. 181 was applicable to Or. 34, r. 6, holding that such an application is one made in the original suit for a new decree

(3) I. L. R. 36 All. 350: s. c. 18 C. W. N. 963 (P. C.) (1914).

(4) I. L. R. 38 Cal. 913: s. c. 16 C. W. N. 49 (1911).

(5) L. R. 42 I. A. 88: s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 561 (1914).

(9) I. L. R. 36 All. 284: s. c. 18 C. W. N. 740 (P. C.) (1914).

(1) I. L. R. 43 Cal. 294 (1914).

(7) I. L. R. 40 All. 551 (1918).

(10) I. L. R. 25 Mad. 244 (F. B.) (1902).

(11) I. L. R. 13 All. 356 (1891).

(12) I. L. R. 14 All. 513 (1892).

(13) I. L. R. 21 All. 453 (1898).

(14) 4 C. L. J. 141 (1906).

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and that it cannot be regarded as an application in execution. This is exactly the view taken by Mookerjee, J., of sec. 90 in the case already cited and in my opinion it is the correct view both in substance and in form.

In India a mortgage does not necessarily import a personal obligation to repay. *Prima facie* this obligation is present in simple mortgages and of course in English mortgages. *Prima facie* it is not present in mortgages by conditional sale and in usufructuary mortgages. In each case the question is one of construction of the mortgage instrument and the personal liability to repay may become barred before the right of recourse to the mortgaged property is barred. In these circumstances a decree for sale made in a mortgage suit, unless it contains an express decision as to personal liability, is not in any way an affirmation that such liability exists or ever has existed. Even where it exists, the mortgagee is not in India allowed in a suit to enforce the security to have recourse to the personal covenant until he has first exhausted the security and given credit for its proceeds. This is the real meaning of sec. 90 and of r. 6 of Or. 34, and this is very different from a mere claim to have the decree for sale enforced. Execution against the mortgagor's person or against his general assets cannot begin in the absence of any decision as to his liability. To decide that he is personally liable is not to enforce or execute a decree for sale. There seems to be no force in the contention that an application is to enforce a decree because it is made under a liberty to apply reserved by the decree.

This is the substance of the matter but in form there are, since the Code of 1908, still further difficulties in the way of the Appellant's contention. I take it to be quite clear now that in the subordinate

Courts an application for final decree for sale is governed by Art. 181 and not by Art. 182 [*cf. Gajadhar v. Kishan* (15) and *Saiyid Jowad Hussain v. Genda Singh* (16)]. In *Amlook Chand's* case (4), Jenkins, C. J., whose authority is very special on this subject, observed :—" One object in view when the present Code was passed was to end as far as possible the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points :— First, whether an application for an order under sec. 89 of the Transfer of Property Act was an application in execution or not ; and, secondly, whether, if it was not an application in execution, Art. 181 constituted a bar on the ground that the application was one not contemplated by the Civil Procedure Code. And so it is now provided that the application which follows a preliminary decree for sale is not for an order for sale but for a decree for sale. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code."

Now before one gets to Art. 181 one must exclude Art. 182. How did the Code of 1908 settle in the negative the old controversy as to whether Art. 182 was applicable to sec. 89 of the Transfer of Property Act? Entirely by the new provision as to preliminary and final decrees—" A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication, completely

(4) I. L. R. 38 Cal. 913 : s. c. 16 C. W. N. 49 (1911).

(15) I. L. R. 39 All. 641 (1917).

(16) I. L. R. 1 Pat. 444 (1922).

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disposes of the suit" (sec. 2). Accordingly, when it was provided by Or. 34, r. 5 that the application which follows on a preliminary decree for sale is not for an order for sale but for a decree for sale, all question of "execution" was removed. It was an undoubted part of the intentions of the Code of 1908 to prevent matters which might and should be decided in the suit from being left to Courts of execution.

It is now contended, as I understand, that applications for final decree are not in the subordinate Courts governed by Art. 182, but that in the High Courts they are governed by Art. 183. Indeed it is from this position that the whole argument on behalf of the Appellant proceeds. It is not easy to wedge so great a difference in result between the words "for the execution of a decree" and the words "to enforce a decree." If a final decree for sale is necessary to dispose of the suit, the considerations applicable under Art. 183, which allows for indefinite revivor, seem strangely out of place. I am content to say that as at present advised I am in no way satisfied that Art. 183 does apply in a High Court to an application for final decree under Or. 34.

I concur in the answers proposed by the Chief Justice.

BUCKLAND, J.—The substantial question to be decided, once that learned Counsel for the Appellant has been permitted to argue, as has been done, that Art. 183 of the 1st Schedule to the Limitation Act is applicable, is whether that article or Art. 181 prescribes the period of limitation for an application for a decree under Or. 34, r. 6 of the Civil Procedure Code.

It was held by the Judicial Committee of the Privy Council in *Munna Lal Par-*

rack v. Sarat Chandra Mukerji (5) that an application for an order absolute for sale under sec. 89 of the Transfer of Property Act was within Art. 183.

Or. 34, r. 5 now takes the place of that section but in lieu of an order absolute it is provided that upon application made in that behalf by the Plaintiff the Court shall pass a decree that the property be sold.

It is contended on behalf of the Appellant that in substance there is no distinction between an application for a final decree under r. 5 and an application for a personal decree under r. 6 and that therefore upon the authority of the case cited above Art. 183 applies.

For the Respondent it has been argued that the law has been altered by the Civil Procedure Code and that in consequence *Munna Lal Parrack v. Sarat Chandra Mukerji* (5) is no authority for the Appellant's contention. There is no need to consider this aspect of the case unless one first comes to the conclusion that applications under rr. 5 and 6 are such that no distinction can be made between them for the purpose of deciding which article is the correct one to be applied.

For the principles of the decision in *Munna Lal Parrack v. Sarat Chandra Mukerji* (5) one must turn to the judgment of Sir Lawrence Jenkins, C. J., in *Amlook Chand Parrack v. Sarat Chandra Mukerji* (4) which their Lordships of the Judicial Committee affirmed by a judgment which is contained in a few lines of the report. There one finds:—"If, and so far as this can be regarded, in the words of Lord Davey as 'an application for realization of a decree,' it is not unfair to say that it is an application to enforce a judgment as

(4) I. L. R. 38 Cal. 913; s. c. 16 O. W. N. 49 (1911).

(5) L. R. 42 I. A. 86; s. c. I. L. R. 42 Cal. 776; 19 O. W. N. 561 (1914).

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being either a proceeding in execution or a proceeding for judicial relief under a decree."

The language used is wide and at first sight might appear to cover the point with which we are now concerned. But if the appropriate rules of Or. 34 are analysed it becomes clear that the analogy upon which the argument of learned Counsel for the Appellant depends is barely superficial.

If an application under r. 6 is to be regarded as an application to enforce the preliminary decree made under r. 4, similarly to an application made under r. 5, the relation which decrees made under rr. 5 and 6 respectively bear to such preliminary decree becomes important. The preliminary decree proceeds upon the footing of r. 2, cls. (a), (b) and (c) and directs that in default of payment of the amount found due upon taking the account the property shall be sold and the proceeds shall be applied in paying such sum to the Plaintiff. That decree is made after adjudication upon all question which can be determined prior to a sale to be held for the purpose of realising the security, and nothing is left upon which adjudication for such purpose is requisite. Hence it is only to be expected that it should be provided by r. 5 (2) that the final decree shall be made upon the Plaintiff's application. Once the amount due has been ascertained and the Defendant is in default nothing remains to be done and the final decree for sale goes as a matter of course.

Though the relation of a decree under r. 6 to the preliminary decree under r. 4 is by no means the same as that which the decree under r. 5 bears to the preliminary decree yet the one has a relation to the other, that relation is due to the fact that by reason of the preliminary decree and proceedings subsequently taken

thereunder the amount for which a personal decree may be made has been ascertained. Moreover, excluding cases where under Or. 2, r. 2 the Plaintiff has been permitted to postpone a suit on his security, no personal decree may be made until the Plaintiff has exhausted his rights under his security and to obtain it he must proceed as provided by Or. 34.

A decree made under r. 6 involves that the sale ordered by the final decree shall have taken place, for otherwise it would not have been ascertained whether there was any balance still due which could form the subject-matter of a decree under that rule. The preliminary decree has been succeeded by the final decree, and without the interposition of the final decree, no decree under r. 6 for an ascertained sum could be made. I do not overlook the fact that a decree may take the form found in *Jeena Bahu v. Parmeshwar Narayan Mahtha* (6), but that does not affect the point under discussion. It is clear that the position is not, as suggested, that of there being two co-ordinate, even if not wholly concurrent, methods of enforcing the preliminary decree.

But there is the further difficulty that a decree under r. 6 involves an adjudication upon matters which up to that point have not been determined for it is not in every case of mortgage that a Plaintiff has a right to a personal decree. The sum due to him no doubt has been ascertained but for the purpose of a decree under r. 6 matters have yet to be determined which would not have been relevant to an adjudication upon the Plaintiff's rights against the property. Upon such further adjudication as the case may require a decree under r. 6 may be made but that is not by way of enforcing any existing judgment

(6) L. R. 46 I. A. 294; s. c. I. L. R. 47 Cal. 370; 23 C. W. N. 400 (1918).

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or decree. This to my mind is the explanation of the use of the word "may" in r. 6, which does not of itself necessarily exclude the application of Art. 183.

The same comment may be made on the argument that because the application is for a decree, Art. 183 cannot apply. Though the form of relief asked for may be a factor in determining the nature of the application it is not the sole or a conclusive factor when the real question is whether the application is to enforce an existing judgment or decree.

I concur with the learned Chief Justice in the replies to be given to the questions referred.

MUKERJI, J.—The facts of the case which has given rise to this Reference are clearly set forth in the Order of Reference and need not be re-capitulated. The question referred for our decision is whether the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1), so far as it decides that Art. 181 of the Limitation Act does not apply to an application under Or. 34, r. 6, C. P. C., was rightly decided. The learned Judges who have made this Reference differed from the decision in that case upon the following questions:—

1. Whether there is any period of limitation in respect of an application for a decree under Or. 34, r. 6 : and

2. Whether Art. 181 of the Limitation Act applies to an application under Or. 34, r. 6, C. P. C., where no other article applies.

Much of the contentions of the parties in the case proceed upon the analogy or otherwise as between an application under Or. 34, r. 5 (2), C. P. C., or rather what may be said to be its predecessor, that is to say, sec. 89 of the Transfer of Property Act, and an application under Or. 34, r. 6, C. P. C. Consequently, it is neces-

sary to examine the state of the law as regards limitation which relates to the former.

There were conflicting decisions on the question as to whether an application for an order absolute for sale under sec. 89 of the Transfer of Property Act was governed by Art. 178 or Art. 179 of the Limitation Act of 1877 or whether there was any period of limitation for such an application. These articles corresponded to Arts. 181 and 182 of the Limitation Act of 1908. The preponderance of authority was in favour of the view that such an application was not governed by any article of the Limitation Act; see *Ajudhia v. Baldeo* (17), *Tiluck v. Parsotein* (18), *Tara Prosad v. Bhobodeb* (19), *Akikunnissa v. Rooplal* (20), *Ranbir v. Drigpal* (21), *Mahabir v. Sital* (22) and *Manekbai v. Manekji* (23). For a contrary view reference may be made to the cases of *Oudh Behari v. Nageswar* (24), *Chunni v. Harnam* (25) and *Bhagwan v. Ganu* (26). The former view proceeded mainly upon three propositions:

Firstly, that such an application was not one under the Code of Civil Procedure to which only Art. 178 applied:

Secondly, that it relates to an action which the Court ought to take of its own motion whether the party applies or not;

and *thirdly*, that it is not an application for the execution of a decree, because until the order absolute was made under sec. 89 of the Transfer of Property Act, there was no decree capable of execution,

(17) I. L. R. 21 Cal. 818 (1894).

(18) I. L. R. 22 Cal. 924 (1895).

(19) I. L. R. 22 Cal. 931 (1895).

(20) I. L. R. 25 Cal. 138 (1897).

(21) I. L. R. 16 All. 23 (1893).

(22) I. L. R. 19 All. 520 (1897).

(23) I. L. R. 7 Bom. 313 (1890).

(24) I. L. R. 13 All. 278 (1890).

(25) I. L. R. 20 All. 802 (1895).

(26) I. L. R. 23 Bom. 644 (1899).

(1) I. L. R. 42 Cal. 294 (1914).

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and it was of the nature of an application in a pending suit the cause of action for which arose from day to day until the suit was at an end.

To take the last ground first, the Privy Council in the case of *Harendra Lal Roy Chowdhury v. Maharani Dasi* (27) took the view that an application under sec. 89 was a petition for realization of the decree by the sale of the mortgaged properties. In so far as it could be so regarded, "it was," to quote the words of Sir Lawrence Jenkins, C. J., "not unfair to say that it is an application to enforce a judgment as being either a proceeding in execution of a decree or a proceeding for Judicial relief under a decree," *Amlook Chand Parrack v. Sarat Chandra Mukerji* (4). This was a case in which the decree had been passed by the High Court and it was held in the case that the application came under Art. 183 of the Limitation Act of 1908. An appeal was preferred to the Privy Council against this decision, but it was dismissed; *Munna Lal Parrack v. Sarat Chandra Mukerji* (5). An application for an order absolute under sec. 89 has also been held by the Judicial Committee to be an application for the execution of the preliminary decree or decree *nisi* under sec. 88, *Batuk v. Munni* (9) and *Abdul Majid v. Jamahir Lal* (3) and so governed by Art. 179 of the Limitation Act of 1877; and in the latter case an application for an order absolute for sale under sec. 89 was treated as an application for directing enforcement of the

order *nisi*. The third ground, therefore, can no longer be maintained as sound.

Then as to the second ground, if the application be one for the execution of the decree *nisi* or for enforcement of a relief granted thereby, it stands to reason that it is optional with a party to seek for it or not. In this connection I entirely agree with the opinion expressed by Coxe, J., in the case of *Beni Singh v. Brahmdeo Singh* (28), where he observed as follows:—"Under Or. 34, r. 5 the Court not only is not bound to proceed with the case but cannot do so unless an application is made to it. The parties are at perfect liberty to drop the proceedings, the Court has no jurisdiction to direct the sale."

As regards the first ground, the provisions as to mortgage suits having been removed from the Transfer of Property Act to the Code of Civil Procedure, 1908, it is no longer possible to contend that applications of this class are not under the provisions of the Civil Procedure Code.

Some of the results of the decisions of the Judicial Committee referred to above may thus be summed up:—The preliminary decree or decree *nisi* passed under sec. 88 of the Transfer of Property Act is executable: in order to obtain the order absolute under sec. 89 steps have to be taken in execution; and to such an application Art. 182 or Art. 183 will apply as the decree happens to be of a Mofussil Court or of the Original Side of the High Court [*Hussain v. Karim* (29)]. The result attained by the transference of the provisions of the Transfer of Property Act relating to suits on mortgages into Or. 34 of the Civil Procedure Code, 1908, and the amendments made by requiring a decree for sale to be passed in Or. 34, r. 5 (2) instead of an order absolute for sale in

(3) I. L. R. 36 All. 350: s. c. 18 C. W. N. 363 (P. O.) (1914).

(4) I. L. R. 38 Cal. 913: s. c. 16 C. W. N. 49 (1911).

(5) L. R. 42 I. A. 88: s. c. I. L. R. 43 Cal. 776; 19 C. W. N. 531 (1914).

(9) I. L. R. 36 All. 284: s. c. 18 C. W. N. 740 (P. O.) (1914).

(27) L. R. 28 I. A. 89: s. c. 5 C. W. N. 536 (1901).

(28) 22 C. L. J. 66 (1915).

(29) I. L. R. 39 Mad. 544 (1915).

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sec. 89 and the distinction made in the explanation to the definition of "decree" as contained in sec. 2 as between a preliminary and a final decree has been to make, in the case of a Mofussil decree, Art. 181 applicable instead of Art. 182, to an application for a decree for sale under Or. 34, r. 5 (2), C. P. C.; such an application being an application in the suit for a final decree and not an application for execution [*Gajadhar Singh v. Kishan Jiwan Lal* (15)].

Similar conflict existed as to the period of limitation, if any, for a decree for the balance under sec. 90 of the Transfer of Property Act. In Allahabad the view was taken that an application to obtain a decree under sec. 90 cannot by any straining of language be considered to be an application for the execution of a decree under sec. 88; that it is an application for a subsidiary decree, that it is undoubtedly an application in execution proceedings but is not an application for the execution of the principal decree, and that Art. 178 of the Limitation Act of 1877 applied to it; *Ram Sarup v. Ghaurani* (13) and the cases cited in the judgment in that case. In *Muhammad Ilifat Hossain v. Alimunnissa* (7), it has been held that an application under Or. 34, r. 6, C. P. C., is not one for the execution of the original decree for sale but is an application in the original suit for a new decree. This Court in the case of *Rahmat Karim v. Abdul Karim* (30) held that that article was not applicable as the application was not under the Civil Procedure Code. In the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1), which was a case de-

cided under the Code of 1908, it was contended that the decision in the case of *Rahamat Karim v. Abdul Karim* (30) could no longer be regarded as good in view of the transference of the provisions relating to mortgage suits from the Transfer of Property Act to the Civil Procedure Code in 1908. This contention was overruled on the authority of certain observations contained in the decision of *Madhab Moni Dasi v. Pamela Lambert* (31). In that case it was laid down that previous to the passing of the Limitation Act (IX of 1908) and the Civil Procedure Code (V of 1908) there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under sec. 86 of the Transfer of Property Act (IV of 1882) that the Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever, that it does not apply to an application to a Court to do what the Court has no discretion to refuse and that it is not applicable to an application to the Court to terminate a pending proceeding the final order in which had been postponed for the benefit of the Defendant or the convenience of the Court. As regards these propositions it may be observed that the reasons that were given by the learned Judges as to why the Limitation Act (IX of 1908) should not be taken as applying to an application of this nature, can no longer be regarded as sound in the view that has been taken of an application under sec. 89 as mentioned above, with regard to which it used to be held upon similar reasons at one time that no period of limitation was applicable. The judgment in the case after expressly stating that it was not necessary to decide whether the Civil Procedure Code and

(1) I. L. R. 42 Cal. 294 (1914).

(7) I. L. R. 40 All. 551 (1918).

(13) I. L. R. 21 All. 453 (1899).

(15) I. L. R. 39 All. 641 (1917).

(30) I. L. R. 34 Cal. 672 (1907).

(30) I. L. R. 34 Cal. 672 (1907).

(31) I. L. R. 37 Cal. 796; A. C. 15 C. W. N. 387 (1910).

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Limitation Act of 1908 applied to the case or not, went on to lay down that Art. 181 of the Limitation Act of 1908 did not govern an application for order absolute under Or. 34, r. 3 of the Civil Procedure Code of 1908. This part of the decision therefore was clearly *obiter*. The learned Judges who decided the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) were of opinion that what had been held in *Madhab Moni Dasi's* case (31) to apply to Or. 34, r. 3 was also applicable to Or. 34, r. 6 as both the cases were strictly parallel and the rule of law and justice which was the *ratio decidendi* applied equally to both the cases. The decisions in the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) is founded upon the observations in *Madhab Moni Dasi's* case (31) to which I have already referred and which for the reasons I have given cannot now be regarded as sound.

Thus then we arrive at the conclusion that it is no longer possible to contend that there is no period of limitation for an application under Or. 34, r. 6 just in the same way as it cannot be contended that there is none for an application under Or. 34, r. 5 (2). The application is governed by the Limitation Act; and sec. 48 of the Civil Procedure Code not applying to it, Art. 181 would apply unless some other article applies.

Sir Benode Mitter appearing for the Appellant conceded that he was unable to contend that there was no period of limitation in respect of an application for a decree under Or. 34, r. 6. He however contended that Art. 181 was not applicable, because Art. 183 applied to the case.

The question referred to us is not whether the decision in *Biswambhar Shaha's*

case (1), in so far as it decides that there is no period of limitation for such an application, is right. If that was the question we might have answered it without any further discussion. The question is whether that decision is right in so far as it says that Art. 181 does not apply. To decide this question we must go further and decide whether Art. 183 applies or not; for sec. 48, C. P. C., admittedly not applying, we must find that no other article applies, and Art. 183 is said to be the only article which applies.

Art. 183 runs thus:—"To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council."

To attract the operation of this article there must be a judgment, decree or order capable of being enforced; and the real question therefore is whether an application for a decree under Or. 34, r. 6 is one for enforcing the preliminary decree passed under Or. 34, r. 4. It is contended that the relation between a decree under r. 4 and one under r. 5 (2) is the same as between a decree under the former rule and one under r. 6, and it is urged that if an application for a decree under r. 5 (2) may be regarded as one for enforcement of the judgment or decree under r. 4, as it must be in view of the decision in *Amlook Chand Parrack v. Sarat Chandra Mukerji* (4) affirmed by the Judicial Committee in *Munna Lal Parrack v. Sarat Chandra Mukerji* (5), an application for a decree under r. 6 must also be similarly regarded. It is urged that if there is no liberty reserved in the preliminary decree for applying for a decree for the balance,

(1) I. L. R. 42 Cal. 294 (1914).

(31) I. L. R. 37 Cal. 796; s. c. 15 C. W. N. 337 (1910).

(4) I. L. R. 38 Cal. 913; s. c. 16 C. W. N. 49 (1911).

(5) I. L. R. 42 I. A. 88; s. c. I. L. R. 42 Cal. 776; 19 C. W. N. 501 (1914).

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that relief must be treated as having been refused and would be barred in view of sec. 11, Expl. 5 of the Code; and that therefore when the mortgagee makes the application for a decree under r. 6 he exercises the liberty granted to him by the judgment or decree previously passed and is therefore enforcing the same.

Now, we are not concerned in the present case with a decree of the character that was before the Judicial Committee—a combined decree not following the forms in the Appendix in the first schedule to the Code in the case of *Musst. Jeena Bahu v. Rai Parmeshwar Narayan Mahtha* (6) and we are not in the present case concerned with those considerations which may perhaps arise in the case of such combined decree. The relevant passage in the decree before us runs in these words:—“And it is further ordered and decreed with a like consent that if the money to arise by such sale shall not be sufficient for the payment in full of the amounts payable to the Plaintiff and the Defendant Harry Jones under this decree the Plaintiff or the Defendant Harry Jones as the case may be shall be at liberty to apply for a personal decree for the amount of the balance.” Now the forms prescribed in the Appendix D of the First Schedule of the Civil Procedure Code for a preliminary decree for sale and a decree for balance are respectively Forms Nos. 4 and 11.

Form No. 4 runs thus:—It is hereby declared that the amount due to the Plaintiff on account of principal, interest and costs calculated up to the day of 19 is rupees and that such amount shall carry interest at the rate of per cent. per annum—until realization, and it is decreed as follows:—

(1) That if the Defendant pays into

(6) L. R. 46 I. A. 294; s. c. I. L. R. 47 Cal. 270; 28 C. W. N. 490 (1918).

Court the amount so declared due on or before the said day of 19, the Plaintiff shall deliver up to the Defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the Defendant free from the mortgage and from all incumbrances created by the Plaintiff or any person claiming under him (where the Plaintiff claims by derived title add “or by those under whom he claims”). (Where the Plaintiff is in possession add “and shall put the Defendant in possession of the property”).

(2) That if such payment is not made on or before the said day of 19, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the Plaintiff as aforesaid together with subsequent interest and subsequent cost, and that the balance if any be paid to the Defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the Plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Form No. 11 runs thus:—Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19, and now in Court to the credit of this suit, amount to Rs. Y and there is now due to the Plaintiff the sum of Rs. X interest thereon at the rate of 6 per cent. per annum from the day of 19, to this day, and also the sum of Rs. for his costs of this suit subsequent to the decree, making a balance due to the Plaintiff of Rs. Z. And whereas it appears to

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this Court that the Defendant is personally liable for the said balance.

It is hereby declared as follows:—

(1) That the said sum of Rs. Y be paid out of Court to the Plaintiff.

(2) That the Defendant do pay to the Plaintiff the said sum of Rs. Z with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

It is clear from these forms as well as the rr. 1, 5 and 6 of Or. 34 that the decree passed under r. 4 directs that in default of the Defendant paying in accordance with the decree mentioned in cls. (a), (b) or (c) of r. 2 the Court shall pass a decree for sale and also directing that in default of the Defendant paying as mentioned therein, the mortgaged property or a sufficient part thereof be sold and the direction thus given takes effect on the happening of the contingency, and when the contingency happens it is obligatory on the Court to pass a decree under r. 5 (2). Under a decree passed under r. 4 a liberty is also reserved to the Plaintiff to apply for a decree under r. 6. When such an application is made the question whether such a decree should or should not be passed has to be decided. It is not as if the latter decree has to be passed as a matter of course: it has to be found that the nett proceeds of the sale held under the decree under r. 5 are insufficient and that the balance is legally recoverable: and this may give rise to such questions as to whether the mortgagor is under a personal liability or whether the mortgagee is not precluded by the terms of the mortgage from realizing his dues otherwise than out of the property sold or whether the right to enforce such liability has been extinguished by the statute of limitations at the time the suit was instituted. The relations therefore as between decrees

under r. 4 and under r. 5 (2) and as between decrees under the former rule and under r. 6 are fundamentally different. In one case it is an enforcement of the decree or the judgment previously passed, and in the other case though the mortgagee comes under the decree to avail of a liberty, he seeks to obtain something which the previous decree did not give him. He comes to enforce a right or seek a relief which he had independently of the previous decree. He comes under the previous decree only in the sense that the right or relief has been put off by it until the happening of certain events. Seeking to avail of a liberty for applying for a relief is different from enforcing a judgment or decree; the judgment or decree not having granted the relief but only the liberty to apply for it.

As regards the contention that the right is created by the decree because in the absence of a liberty reserved thereby the right to make an application for a decree under r. 6 is lost to the mortgagee, there is authority for the proposition that the Court cannot refuse an order under this rule simply because no provision is made for it in a decree for sale: *Sonatan v. Ali* (32) and *Mushahab v. Inayetullah* (12). Those cases were decided when Exp. III to sec. 13 of the Civil Procedure Code of 1882, corresponding to Exp. V of sec. 11 of the present Code was in force. This explanation in my opinion does not stand in the way, for the proper time for granting the relief according to the rules is only after the conditions requisite for a decree under r. 6 comes into being. The position of course would be different if the issue has been considered and granted or refused at the time of the first decree. For these reasons I am of opinion that the

(12) I. L. R. 14 All. 513 (1892).

32) I. L. R. 16 Cal. 423 (1887).

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application is not one for enforcing a decree or judgment or order and is not governed by Art. 183.

That being so, in my opinion, Art. 181 must apply to such an application; and in so far as the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1) decided that it did not, it was not rightly decided.

SANDERSON, C. J.—The result is that in pursuance of the provisions of r. 2, Chap. VII of the High Court Rules, we return the case with an expression of our opinion upon the point of law referred to the Full Bench, for final adjudication by the Division Court which referred it.

The Appellant must pay to the Respondent her costs of this Reference.

Messrs. Chatterjee & Co., Solicitors for the Appellant.

Messrs. Leslie & Hinds, Solicitors for the Respondent.

P. D.

[CRIMINAL REVISIONAL JURISDICTION.]

REFS. NOS. 190 AND 191 OF 1924

WITH

REV. NO. 865 OF 1924.

SUHWAWARDY, J.

MUKERJI, J.

1924,

Heard,

24, October.

Judgment,

3, November.

THE KING-EMPEROR

v.

ABDUR RAHIM and ors.

Commitment, quashing of, at the instance of the Crown, on the ground of non-compliance with sec. 360, Criminal Procedure Code (Act V of 1898)—Objection by accused to quashing of commitment and holding de novo trial—Proper order in the circumstances of the case to cure the defect in procedure.

Where the trial of the accused persons was commenced before the Assistant Sessions Judge and a large number of witnesses were examined but the provi-

sion of sec. 360 was not complied with in respect of the depositions of the majority of the witnesses and the Sessions Judge on the application of the Public Prosecutor transferred the case to his own file and made a reference to the High Court recommending the quashing of the commitment and the holding of a fresh enquiry and the accused persons who appeared in the High Court objected to the reference being accepted:

Held (on a consideration of the circumstances)—*That the commitment should not be quashed at the instance of the Crown and a de novo enquiry ordered, but that the case should be sent back to the file of the Assistant Sessions Judge where the witnesses whose depositions were not read over to them in the presence of the accused would be re-called and the provision of sec. 360 complied with.*

These were References from the District and Sessions Judge of Sylhet (Mr. B. N. Rau), dated the 12th September 1924, recommending that the orders of the Extra Assistant Commissioner of Sylhet (Mr. B. K. Ray Dastidar), dated the 21st January 1924 and 22nd February 1924, respectively, committing the accused in the above two cases to take their trial in the Court of Sessions, be quashed in accordance with sec. 215, Cr. P. C., for the reasons set forth in the Reference.

The Reference was as follows:—

These two cases, which are mutually connected and are being tried together, were committed to Sessions separately, one on 21st January 1924 and the other on 22nd February 1924. During the commitment inquiries, over 300 witnesses were examined. Both cases were made over to the Assistant Sessions Judge, Sylhet, for disposal on 2nd June 1924. After the examination of 102 witnesses had been concluded in the Sessions Court, there

(1) L. L. B. 42 Cal. 294 (1914).

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came out the ruling in *Hira Lal Ghose v. The King-Emperor* (1), according to which non-compliance with strict provisions of sec. 360, Cr. P. C., is an illegality entirely vitiating the proceedings. It appears now that neither during the commitment inquiries nor during the examination of the aforesaid 102 witnesses in the Court of the learned Assistant Sessions Judge were the depositions read over in the presence of the accused in the manner provided in sec. 360, Cr. P. C. I have accordingly withdrawn this case to my own file under sec. 528 (1), Cr. P. C., and am making this Reference.

It would not be impossible, although it might be inconvenient, to commence the whole trial anew: but even this would not cure the defect in the commitment proceedings. The committing Court states that "the depositions of the witnesses were read over and explained to them, but not in the presence of all the accused or their pleader." In the circumstances, it would appear that there were no materials upon which the Magistrate could legally commit the accused to Sessions and the commitments made were bad in law. I accordingly recommend that they may be quashed in accordance with sec. 215, Cr. P. C.

As the accused in these two cases have been in custody for a long time, and as there are many other commitments in this District of a similar nature, which cannot well be proceeded with until the legal point now raised is decided, I request that this Reference may be treated as urgent.

Babu Birendra Kumar De for the Accused.

Babu Manindra Kumar Bose for the Crown.

The JUDGMENT OF THE COURT was as follows:—

These are two References made by the Sessions Judge of Sylhet recommending that two commitments by which 44 and 8 accused persons respectively were committed to the Court of Sessions for trial under secs. 120B, 489A, 489B, 489C and 489D of the Indian Penal Code be quashed and a fresh enquiry preliminary to commitment ordered on the ground that the provisions of sec. 360, Cr. P. C., were not complied with in the enquiries that were held.

It appears that after the respective commitments in which altogether over 300 witnesses were examined, the two cases were made over to the Assistant Sessions Judge and on trial being commenced by him, 102 witnesses for the prosecution were examined but the provisions of sec. 360, Cr. P. C., were not complied with in respect of any of them; that thereafter the attention of the learned Assistant Sessions Judge being drawn to the decision of this Court in the case of *Hira Lal Ghose v. The King-Emperor* (1), the procedure of complying with the said provisions was adopted in respect of prosecution witnesses who were thence forward examined, and in this way about 38 more prosecution witnesses were examined and their depositions were duly recorded in accordance with the said provisions.

These References have been made by the learned Sessions Judge on the basis of a petition filed by the Public Prosecutor before him by which the Public Prosecutor prayed for an withdrawal of the case to his own file from that of the Assistant Sessions Judge on various grounds, and for obtaining an order for a *de novo* trial. The learned Judge withdrew the case to his own file, purporting to act under sec.

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528 (1), Cr. P. C., and then made these References under the provisions of sec. 438, Cr. P. C.

43 out of the accused persons have appeared before us; and they have filed a petition praying that the References be rejected and that the case be re-transferred back to the file of the Assistant Sessions Judge for the trial to be proceeded with in his Court. They have challenged the *bonâ fides* of the course adopted by the Public Prosecutor.

We have looked into all the relevant papers and have heard the learned vakil appearing on behalf of the accused persons who have entered appearance in these References and also the learned vakil on behalf of the Crown.

Now, in the case of *Hira Lal Ghose v. The King-Emperor* (1), it has been clearly pointed out by this Court that the provisions of sec. 360, Cr. P. C., were enacted for the benefit of the witnesses as also for that of the accused persons. There is no question here so far as any of the witnesses are concerned and the accused persons do not complain of any inaccuracy in the commitment record. The trial has commenced, and any application by the accused persons for setting aside the commitment on the ground of non-compliance with the provisions of sec. 360, Cr. P. C., during the enquiry preliminary to commitment, apart from the fact that it has not yet been made by them, will not be of any avail if made hereafter. In fact those of the accused who have appeared before us, do, as we have said, strongly oppose the quashing of the commitment. Questions no doubt may arise as to the admissibility of the depositions if they are sought to be put in under sec. 288, Cr. P. C., but such difficulties may perhaps be avoided. In any event we do not see any

reason why at the instance of the Crown we should quash the commitments and direct a *de novo* enquiry to be held, seeing that even in the petition which was filed by the Public Prosecutor about a month after the ruling aforesaid was published, it was not suggested that that course should be adopted, but only that a *de novo* trial should be held on the commitments already made. Then there is the fact which stares us in the face that most, if not all, of the accused persons are in *hajat*, and some of them have been in *hajat* for about a year and a half or so. Having regard to all these matters, even if the Crown anticipates any difficulty in the matter of using the depositions recorded by the committing Magistrate, of which however we can see nothing at present, we decline to subject the accused persons to the harassment of a fresh commitment enquiry.

We have considered the matter carefully in all its bearings, and we think we shall not be justified in accepting these References in their entirety. Our order is that the cases be re-transferred to the file of the Assistant Sessions Judge in whose file it was, that he do re-call the witnesses in respect of whom the provisions of sec. 360, Cr. P. C., were not complied with and take steps to comply with those provisions so far as these witnesses are concerned and then proceed with and finish the trial in accordance with law.

The References are accepted in part only.

S. C. M.

(CRIMINAL REVISIONAL JURISDICTION.)**Full Bench Reference****No. 1 of 1925**

IN

C.A. REF. No. 7 of 1925.

WALMSLEY, J.
 GREAVES, J.
 CUMING, J.
 MUKERJI, J.
 CHAKRAVARTI, J.
 1925,
 8, April.

NARENDRA CHANDRA
 RYDRA PAL,
 1st party,
 v.
 SABARALI BHUIYA,
 2nd party.

Criminal Procedure Code (Act V of 1898), sec. 360, if applicable to a proceeding under sec. 145—Party to such proceeding, if an "accused"

Held by a majority of the Full Bench—
That the provisions of sec. 360, Cr. P. C., do apply to proceedings under sec. 145, Cr. P. C., to this extent at least that as the evidence of each witness is completed it must be read over to him. The parties to a proceeding under sec. 145, Cr. P. C., are not "accused" and their attendance at the reading over is not necessary.

This was a Reference to a Full Bench by Panton and Mukerji, JJ.

The Order of Reference was as follows:—

This is a Reference made under sec. 438, Cr. P. C., by the Second Additional Sessions Judge of Dacca, recommending that an order made under sec. 145, cl. (d), Cr. P. C., in favour of the first party to proceedings under that section may be set aside on the ground that in recording the evidence of the witnesses who were examined in those proceedings the mandatory provisions of sec. 360, Cr. P. C., were not observed by the Court holding the enquiry. The second party in their application for revision alleged in ground No. 3*

* The ground was as follows:—For that the learned Magistrate not having followed the procedure laid down in sec. 360, Cr. P. C., regarding the mode of recording the depositions of witnesses, the trial is bad in law and liable to be set aside.

thereof that the said provisions were not observed, and the learned Judge was satisfied on an examination of the record that the said ground appeared *prima facie* to be well-founded and he thereupon called for a report from the Deputy Magistrate who held the enquiry. The learned Deputy Magistrate then submitted a report in which he did not state that the provisions were complied with, but stated that the procedure in a case under sec. 145, Cr. P. C., is that of a summons case and that the provisions of sec. 360, Cr. P. C., are not applicable to such a case.

The question therefore which arises is whether the provisions of sec. 360, Cr. P. C., are applicable to an enquiry held under sec. 145, Cr. P. C.

There is a clear conflict of judicial opinion, so far as this question is concerned. A Division Bench of this Court in Criminal Revision Case No. 589 of 1921 [*Aswini Kumar v. Puti* (a)] decided on the 12th September 1921, that sec. 360, Cr. P. C., is applicable to proceedings under sec. 145, Cr. P. C. This is the decision on the strength of which the learned Judge has made the Reference in the present case. Another Division Bench of this Court in Criminal Revision Case No. 960 of 1924 decided on the 26th November 1921, also held that the said provisions do apply to these proceedings. One of us was a party to both these decisions. On the other hand, in Criminal Revision Case No. 906 of 1921 [*Ishaj Chandra v. Hriday Krishna* (b)] there was a difference of opinion on this question between two learned Judges, one of whom was a party to the decision in Criminal Revision Case No. 589 of 1921 mentioned above. This matter, on such difference of opinion, was referred to another learned Judge under the provisions of sec. 429,

(a) Reported 29 C. W. N. 474 (1924).

(b) Reported 20 C. W. N. 476 (1925).

NARENDRA CHANDRA RUDRA PAL v. SABARALI BHUIYA.

Cr. P. C., who on the 11th February 1924, held that the provisions of sec. 360, Cr. P. C., are not applicable to proceedings under sec. 145, Cr. P. C. The learned Judge was of opinion that it was a point which should be laid before a Full Bench for decision, but felt that as he did not constitute a Division Bench he had no option but to decide the matter himself.

The question is of general importance and, in our opinion, calls for immediate decision.

We must necessarily differ from one or other of the views taken in the decisions we have mentioned. We accordingly refer the case to a Full Bench under r. 5 of Chap. VII of the High Court Rules, Appellate Side.

Babu Dwijendra Krishna Dutt on behalf of the 2nd party.—The provision of sec. 360, Cr. P. C., was not merely for the benefit of accused persons but for witnesses as well and as such their Lordships would have to decide the point with reference to both the accused and witnesses. Similar provisions were also found in the Code of Civil Procedure (Or. 18, rr. 5 and 6). Parties to a proceeding under sec. 145, Cr. P. C., were accused persons for the purpose of sec. 360, Cr. P. C., because that was the only section in the Criminal Procedure Code, which required the reading over of deposition to a witness in open Court, when the same was recorded *in extenso*, under secs. 356 and 357, Cr. P. C. Reference was then made to the case of *Hira Lal Ghose v. The King-Emperor* (3), where, upon a review of all the cases on the point, his Lordship Mr. Justice Manmatha Nath Mukerji held that the provision of the said sec. 360, Cr. P. C., was for the benefit of the accused persons and the witnesses and that non-

compliance with the same would vitiate the whole trial or enquiry. Cites the cases of *Jhojha Singh v. Queen-Empress* (1) and *Queen-Empress v. Mona Puna* (2), in support of his contention that the accused person is one over whom a Criminal Court assumes jurisdiction. Even if the use of the word "accused" in sec. 360 did present any difficulty for its application to a case under sec. 145, Cr. P. C., it could be easily solved if the above definition of the term "accused" was accepted and as such the parties to a proceeding under sec. 145, Cr. P. C., were treated as accused persons.

[Mr. Justice Chakravarti observed that the only question was whether the term "accused" in sec. 360 was used in a limited sense or in the wider sense, and reference to the various sections of the Code would show that wherever the word was used in its limited sense it was used as a person "accused of an offence" and hence in sec. 360, Cr. P. C., the word "accused" having been used without the aforesaid qualifying clause it might be inferred that it was used in its wider sense.]

Unless such evidence was read over to witnesses it would not be admissible in subsequent proceedings.

Emperor v. Jogendra Nath (6), *Mohendra Nath v. Emperor* (7), *Kamatchinathan v. Emperor* (8) and *Empress v. Mayadeb Gossami* (9).

Mr. L. P. E. Pugh (with *Babu Prafulla Chandra Chakravarty*) for the 1st party in reply.—The genesis of sec. 145 was to be found in Act IV of 1840 and there was no

(3) I. L. R. 52 Cal. 159: s. c. 28 C. W. N. 908 (1924).

(1) I. L. R. 23 Cal. 493 (1896).

(2) I. L. R. 16 Bom. 661 (1897).

(6) I. L. R. 42 C. L. 240 (1914).

(7) 12 C. W. N. 845 (1908).

(8) I. L. R. 28 Mad. 308 (1904).

(9) I. L. R. 6 Cal. 762 (1881).

NARENDRA CHANDRA RUDRA PAL v. SABARALI BHUIYA.

trace of such a mythical person as an "accused" in the statute. The proceeding in its nature was a preliminary enquiry and in effect decided who was to be the Plaintiff and who the Defendant in the inevitable civil suit. If the evidence was to be read over to witnesses it would involve heavy expenditure of money and waste of public time over a mythical accused. There was no person in a proceeding under sec. 145, Cr. P. C., who could be called an accused person. There was no power in the Court to compel any of the parties to be present in Court, and it could not be said that a person who need not be there and was there was an accused person.

A private person who set the law in motion—really a complainant in such a proceeding—finding that his own evidence of possession was weak and that of the other party strong, by absenting himself from the enquiry towards the close of the evidence might make the whole enquiry infructuous, as evidence could not be read over to other witnesses in his presence. The real complainant would convert himself into an accused person and reduce the Court into impotence and the proceeding to a nullity.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The question referred is whether the provisions of sec. 360, Criminal Procedure Code, are applicable to an enquiry under sec. 145, Criminal Procedure Code. The difficulty arises from the requirement that the deposition of each witness should be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and the question for our decision becomes nothing more than this, *viz.*, whether persons against whom proceedings under sec.

145, Criminal Procedure Code, have been initiated are accused within the meaning of section 360, Criminal Procedure Code.

The word "accused" is one of the words that have not been defined in any statute. Our attention has been drawn to various decisions in which a definition has been attempted. For the purpose for which those decisions were given, they may be accepted as correct; but I do not think it necessary to consider whether the definition may be regarded as satisfactory for all purposes, for to my mind they have been rendered obsolete by the changes introduced in sec. 340, Criminal Procedure Code, by Act XVIII of 1923. That section, before the amendment, ran: "Every person accused before any Criminal Court may of right be defended by a pleader." It now runs: "Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court may of right be defended by a pleader." The second clause says that "any person against whom proceedings are instituted in any such Court under sec. 107, or under Chap. X, Chap. XI, Chap. XII or Chap. XXXVI or under sec. 552 may offer himself as a witness in such proceedings." The first clause recognises two classes of persons who may be before a Court, those who are accused of an offence, and those against whom proceedings under the Code are instituted, and the second clause emphasises the distinction by enacting that many of those of the second class may offer themselves as witnesses in such proceedings. In my judgment the effect of this amendment is to narrow the meaning of the word "accused" and to limit it to those who are accused of an offence. With all deference to those who take a different view I do not think that any of the alarming results which they picture will follow from

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attributing to the word "accused" the narrow meaning. As for the suggestion that the provisions of sec. 360, Criminal Procedure Code, will cease to apply to evidence given in proceedings under sec. 145, Criminal Procedure Code, I see no difficulty in reading the first clause of sec. 360 as meaning that the evidence is to be read over to the witness in the presence of the accused if there is one, that is to say, in proceedings under sec. 145, Criminal Procedure Code, to each witness must be read over the deposition which he gives, but it will not be necessary that either the parties to the proceeding or their pleaders should be present.

This view is, I think, in accordance with the provisions of the law, and it has in its favour that it avoids the immense practical difficulties that might result from the other view, and that it does not demand in summary proceedings as to possession a more elaborate procedure than is prescribed for the civil proceedings which will finally determine questions of title.

My answer to the Reference therefore is that the provisions of sec. 360, Criminal Procedure Code, do apply to proceedings under sec. 145, Criminal Procedure Code, subject to the qualification that in proceedings under that section there is no accused whose presence at the reading of the evidence is necessary.

GREAVES, J.—I agree with the judgment just delivered by my learned brother Mr. Justice Walmsley and with the reasoning on which it is founded and I do not think it necessary to deliver a separate judgment.

CUNYFF, J.—The question that has been referred to the Full Bench is whether the provisions of sec. 360, Criminal Procedure Code, are applicable to an enquiry held under sec. 145 of the Criminal Procedure Code, or in other words, to proceedings

under Chap. XII, Criminal Procedure Code.

I would answer the question in the negative and hold that sec. 360 has no application whatever to proceedings under Chap. XII, the chapter in which the sec. 145 is found. Sec. 360 provides that (1) as the evidence of each witness taken under sec. 356 or sec. 357 is completed, it shall be read over to him in the presence of the accused or of his pleader if he appears by pleader and shall, if necessary, be corrected.

This is the material portion of the section which we now have to consider. The argument which has been put forward to us is that the expression "accused" in the section includes the "parties" referred to in Chap. XII and that it is in their presence that the evidence must be read over to the witness and further that even if they cannot be considered as accused still so much of the section as relates to the reading over to the witness must be complied with.

In my opinion the expression "accused" in sec. 360 cannot and does not include the parties referred to in Chap. XII, neither does the section contemplate that in cases coming under Chap. XII so much of the section must be complied with as relates to the reading over of the evidence to the witnesses.

I shall deal first with the contention that the expression "accused" in sec. 360 includes the parties to a proceeding under Chap. XII. The learned Vakil has contended that an accused person is a person over whom the Magistrate or other Court is exercising jurisdiction and in support of this argument he relies on the case of *Jhojha Singh v. Queen-Empress* (1) which followed the case of *Queen-Empress v.*

(1) I. L. R. 23 Cal. 493 (1898).

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Mona Puna (2). These decisions undoubtedly support the learned Vakil's contention, but with great respect to the learned Judges, to carry this definition to its logical conclusion would involve some startling results. For instance, the Court clearly exercises jurisdiction over a witness for it issues a summons on him and if he disobeys can issue a warrant and arrest him and punish him for disobeying the summons. This, I presume, is exercising jurisdiction over him. So a witness is an accused.

Sec. 342 says an accused shall not render himself liable to punishment for refusing to answer such questions or giving false answers to them and further no oath shall be administered to an accused. Therefore no oath can be administered to a witness and also being an accused he cannot be compelled to answer any question nor can he be prosecuted for giving false evidence. Yet sec. 5 of the Indian Oaths Act (X of 1873) provides that oath shall be made by the following persons: all witnesses, that is to say, all persons who may lawfully be examined or give or be required to give evidence by or before any Court.

Further, a witness who refused to take an oath or answer any questions may be punished under sec. 178 and sec. 179, Indian Penal Code, and he may be punished under sec. 193 for giving false evidence. To take yet another test, a juror is clearly a person over whom the Court exercises jurisdiction. He attends in obedience to a summons, he can be punished for neglecting to attend. He is, therefore, according to the definition, an accused person, so no oath may be administered to him.

Yet sec. 281, Criminal Procedure Code, provides that he shall be sworn under the

(2) I. L. R. 16 Bom. 661 (1892).

Indian Oaths Act. It is not necessary to further labour these points. I need only say with great respect to the learned Judges that I am not prepared to accept a definition which fails on the simplest tests being applied to it. The Code itself has not defined the expression "accused," possibly because the meaning of the term is so well known in its relation to criminal law that it requires no definition.

I would define an "accused" as a person charged with an infringement of the law for which he is liable if found guilty to be punished. Turning now to the Code itself, which perhaps is the safest guide, in Chap. XII we never find the expression "accused." The persons concerned are always referred to as parties and sec. 145 (7) provides for the substitution of a party's legal representative on his death. I am not aware that the legal representative of a person accused of any of the offences known to the Penal Code can be substituted for him on his death.

In other parts of the Code, for instance, Chaps. XVIII, XIX, XX, XXI, XXII, XXIII, which deal with trials and enquiries preliminary to commitment the expression "accused" is always used to denote the person proceeded against.

Let us, however, for the sake of argument, presume that the expression "accused" in sec. 360 includes the parties to a proceeding under sec. 145 and see what remarkable results will follow.

Presumably all the parties would be accused and therefore the evidence would have to be read over in the presence of all of them. In many cases there are a very large number of parties. Still if they were present in the Court it might be possible.

But it must be remembered that the parties to a proceeding under sec. 145 need not attend nor can they be compelled to attend nor if they choose to attend can they

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be compelled to remain. How would the evidence be read over in the presence of those who did not attend?

Moreover, those who did attend could prevent the evidence of their opponents being read over in their presence by at once leaving the Court when it was attempted to read over the evidence in their presence. The result obviously would be that no proceedings under sec. 145, could be carried out for each party could render them impossible. Sec. 145 (4) provides that the Magistrate shall receive all evidence as may be produced and take such further evidence as he thinks necessary but any party could, if sec. 360 applies to the Chap. XII, render the taking of any evidence impossible. The Legislature clearly could not contemplate such an absurdity and for this reason deliberately omitted "parties" from sec. 360. Attempts have been made to argue that the Code makes a distinction between accused persons and that the expression "accused" may be divided into two branches, persons accused of an offence and any person against whom proceedings are instituted under sec. 107 or Chap. X, Chaps. XI, XII, XXXVI or sec. 552 and reliance had been placed on sec. 340 (1) and (2) where these two classes of persons are referred to. But this argument will not stand the simplest test. In sec. 342 the expression used is "accused" which would presumably include both the branches, viz., persons accused of an offence and parties to proceedings under sec. 145. No oath shall be administered to an accused and therefore no oath can be administered to a party to a sec. 145 proceedings. Yet sec. 340 (2) provides that a party may offer himself as a witness.

Sec. 5 of the Indian Oaths Act provides that an oath shall be administered to witness. It is not necessary to elaborate this

point further. A very little consideration will show at once the absurdities into which we are led if we accept the expression "accused" in sec. 360 as including the parties to a proceeding under Chap. XII. I am, therefore, of opinion that the expression "accused" as used in sec. 360 does not include the parties to a proceeding under Chap. XII.

It has also been argued that even if the expression "accused" as used in sec. 360 does not include the parties to a proceeding under Chap. XII, still so much of the section must be observed in such proceedings as relates to the reading over to the witness. That is to say, the evidence must be read over to the witness. I do not agree with the contention for the simple reason that it does not appear to me that the section requires it.

The line of argument is that the legislature enacted the section for the protection of the witness as well as of the accused and secondly that unless the evidence is read over the witness cannot be prosecuted for perjury. The two arguments it will be seen are mutually destructive, for obviously if a witness, if the evidence were not read over to him, could not be prosecuted for perjury he would be far better protected than if the evidence was read over to him so that if necessary he could be prosecuted. It is always dangerous to attempt to speculate as to what was or was not the intention of the legislature in enacting any particular section of an Act. The Judge is liable to attribute to the legislature what he himself thinks should have been their intention and so twist the section to fit in with his own views as to what he thinks it ought to mean. Probably the safer course is to hold that the legislature intended exactly what it says. In the present sec. 360 the legislature provides that the evidence shall be read over

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in the presence of the accused. If it contemplated that if there was no accused it should still be read over to the witness it would have said so. We cannot presume that the legislature is ignorant of the provisions of the Code that it is enacting or amending. The next argument is that unless the evidence is read over to the witness he cannot be prosecuted for perjury. I admit I cannot follow this argument. A prosecution for giving false evidence is based on the statement the person made in Court. This can be proved by many ways, *e.g.*, by oral evidence or the written record of what he said. Sec. 80, Evidence Act, would still apply to such a record even though it had not been read over to the witness if the law did not provide that it should be read over to him. There is no particular virtue to be attached to the process of reading over the evidence to the witness as any one who has had any practical experience of the operation realises. In the High Court Sessions trials the evidence is never read over and up to a short time ago the only record of it was the Judge's note. Yet I never heard it suggested that a witness who gave false evidence in the High Court Sessions could not be prosecuted. Neither is the evidence read over to the witness in summons cases or in any case tried by a Presidency Magistrate.

A further argument has been put forward that sec. 360 comes after sec. 356 and sec. 357. Sec. 356 deals with the manner of recording evidence in enquiries under Chaps. XII and XVIII and also in trials before the Court of Sessions and Magistrates and it is argued that the sec. 360 refers to the evidence of each witness taken under sec. 356 or sec. 357 and as the evidence in proceedings under Chap. XII are taken under sec. 356 therefore

sec. 360 must apply to evidence taken in proceeding under Chap. XII. I do not think this is correct.

Sec. 356 is merely more general than sec. 360. Sec. 360 refers to one branch of the evidence taken under sec. 356, *viz.*, in case where there is an accused person. The reason for the distinction is clear. These proceedings under Chap. XII are *quasi* civil proceedings to determine who shall be the Plaintiff and who the Defendant in the civil suit and to prevent breaches of the peace.

No title is decided and no one's life or liberty is in question. They were intended to be summary proceedings and not elaborate civil suits into which they are sometimes allowed to be converted.

I am, therefore, of opinion that sec. 360, Criminal Procedure Code, has no application to proceedings under Chap. XII, Criminal Procedure Code. My learned brothers Walmsley and Greaves, JJ., are of opinion that there should be a partial compliance and the evidence should be read over to the witness. Although I am unable to agree, at the same time I do so far agree with them that if the deposition had to be read over the parties not being accused are not entitled to be present nor is their presence necessary when the evidence is read over.

MUKERJI, J.—The question which arises upon the case referred to us under r. 5 of Chap. VII of the High Court Appellate Side Rules is whether the provisions of sec. 360 of the Code of Criminal Procedure are applicable to an inquiry held under sec. 145, Criminal Procedure Code.

In my judgment in the case of *Hira Lal Ghose v. Emperor* (3) I have endeavoured to show that sec. 360, Cr. P. C.,

(3) I. L. R. 52 Cal. 159; s. c. 28 C. W. N. 938 (1924).

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is intended not only to protect the witness but also to safeguard the interests of the accused, and that the failure to observe its provisions may materially affect the witness and may also deprive the accused of a very valuable right which the law secures for him. The question which arises in this Reference is whether these salutary provisions were intended to apply to an inquiry held under sec. 145, Cr. P. C.

The mode of recording evidence in an inquiry under sec. 145, Cr. P. Code, is prescribed in sec. 356, Cr. P. Code. That section expressly lays down that in inquiries under Chap. XII—and sec. 145 is one of the sections in that Chapter—the evidence of each witness is to be taken down *in extenso* as contra-distinguished from merely making a substance thereof as prescribed in sec. 355, Cr. P. C. Sec. 360, Cr. P. C., provides for the procedure to be followed in regard to the evidence recorded under sec. 356 and makes no reservation or exception in respect of evidence recorded under that section in the case of inquiries under sec. 145, Cr. P. C. *Primâ facie*, therefore, sec. 360 would seem to apply to inquiries held under sec. 145, Cr. P. C. It is said, however, that there is a difficulty in applying sec. 360 to an inquiry under sec. 145 by reason of the provision therein that the reading over of the deposition to the witness should be in the presence of the accused, if in attendance, or of his pleader, if the accused appears by a pleader. The objection in substance is that the term “accused” is not applicable to a party to a proceeding under sec. 145, Cr. P. C. I propose to deal with the grounds upon which this objection is based; but before I do so, I should like to observe that even if it be assumed that the objection is well-founded, I can see no

appreciable reason why so much of the section should not be held to be applicable as can possibly be applied, that is to say, why the evidence when completed should not be read over to the witness himself on the footing that there is no accused either in attendance or appearing by pleader.

In several reported decisions to which our attention has been drawn a view has been expressed that in certain sections of the Criminal Procedure Code the word “accused” has been used in its wider significance as meaning a person over whom a Criminal Court is exercising jurisdiction. This view is considered by some to be unsound as then the word “accused” would include a witness or a juror, because a Criminal Court exercises jurisdiction over witnesses and jurors as well. According to them the word “accused” wherever it has been used in the Code, must be taken to mean a person charged with an infringement of the law for which, if convicted, he is liable to be punished. With all respect to those who are of this opinion, I do not think that this objection needs any serious consideration, as it is quite clear that the learned Judges used the word “jurisdiction” in a sense wholly different from what has been understood by the critics. “Jurisdiction” of a Court may have to be considered with reference to various matters, and its meaning and import varies according to the matter with reference to which it is considered. For instance, in the case of a Criminal Court, it exercises jurisdiction over a particular local area, in respect of certain offences, in cases or proceedings of a particular kind, as against persons parties thereto, as regards witnesses, with regard to jurors or assessors or others who may have to assist in the administration of justice, or in relation to

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other matters. The conception of jurisdiction in each of these instances is fundamentally distinct from that in the other. The definition perhaps is not scientific but its meaning is quite clear. It means that the word is used in its wider sense as meaning not merely persons who are accused of having committed offences, and who are therefore accused persons in the narrower sense of the expression, but includes also persons against whom some accusation or allegation has been made or some information has been received, by reason of which the Criminal Court is called upon to take action. In its wider sense it would include not merely persons accused of offences before a Criminal Court but also persons against whom proceedings are instituted under the Code of Criminal Procedure in any such Court.

It is said that this wider meaning cannot be attributed to the word "accused" for the following reasons: (i) the word "accused" does not find a place in Chap. XII; (ii) there is no machinery for enforcing the attendance of a person who is a party to a proceeding under sec. 145, Cr. P. Code, and so there may be cases in which he will neither attend nor appear by a pleader, and a criminal trial or inquiry in which the "accused" is absent is an anomaly which cannot be permitted; and (iii) in a case under sec. 145 the several parties will all be in the position of accused persons so that the proceeding will then be a proceeding with no complainant but only accused persons.

As regards (i), it would appear that the expression "accused person" does not find mention in Chap. VIII as well; and the logical effect of this process of reasoning will be to hold that persons who are dealt with under the preventive sections in that Chapter are also not accused persons. This is a view which was propound-

ed by this Court in the almost solitary decision in the case of *Benode Behari Nath v. Emperor* (4), the authority of which sitting as a member of this Bench I am not prepared to accept as binding. That decision, in my opinion, does not lay down the law correctly. With all respect to the learned Judges who decided that case, I must say I do not agree with the reasons given by them and the decision is against a consensus of authority the weight of which is overwhelming. It certainly seems somewhat repugnant to one's conception of an accused person to think that a person who can be arrested, detained in custody, put on bail, restrained by imposition of an order for furnishing security and sent to prison in default thereof—a person whose liberty may be curtailed or taken away in this way—is not an accused person and therefore not eligible to such rights, privileges and protection as an accused person may have under the law. The absence of the word "accused" in Chap. XII, therefore, in my opinion, affords no criterion. As regards (ii), inquiries under the Criminal Procedure Code and trials held for offences under some special laws, in the absence of accused persons, are not unknown; they are criminal inquiries and trials all the same. If there is no attendance by the accused or appearance by pleader on his behalf that part of sec. 360 cannot possibly be observed, but that is all that it comes to. This is what happens when evidence is recorded under sec. 512, Criminal Procedure Code. This again is what happens when the trial or the inquiry is held in the absence of the accused, his attendance being dispensed with under sec. 540A, Criminal Procedure Code, in a case in which he is represented by a pleader; it should be remembered that

(4) I. L. R. 50 Cal. 985; s. c. 27 C. W. N. 996 (1922).

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in such a case the pleader only represents him but he does not appear by the pleader as he does under sec. 205, Criminal Procedure Code. As for (iii), I do not see why all the disputing parties should not be considered as belonging to the category of accused persons; and after all, it is not necessary in a criminal trial or inquiry that there should always be present in the proceedings a complainant or somebody who is in the position of a complainant; for what happens when a Magistrate takes cognizance of an offence of his own knowledge or suspicion under cl. (c) of sec. 190, Cr. P. Code? These objections, in my opinion, do not militate against the view that the parties under sec. 145, Criminal Procedure Code, may be regarded as accused persons.

Another objection which is said to be more serious is based upon the provisions of sec. 340 as recently amended. It is said that a person against whom proceedings under Chap. XII are instituted may now offer himself as a witness in such a proceeding and consequently that we shall be landed in this position that an accused person will be competent to be examined as a witness and yet no oath shall be administered to him under the law. In my opinion no difficulty need be felt on the ground that the accused person will have to be examined as a witness, for it is not a compulsory examination but such examination will be held only if the person himself offers to be examined as a witness. The Legislature simply removed in the case of some particular classes of accused persons a disability, which ordinarily attaches to accused persons, and they put it in that way in their statement of Objects and Reasons for the amendment. The accused was at one time not a competent or compellable witness under the English Common Law but the position has

now greatly changed in consequence of a series of statutory provisions. The Indian Legislature is gradually making an advance in that direction. The further objection, namely, that in this view, such a person will be a competent witness, if he offers himself as one, and yet will not be able to be examined on oath, assumes that the word "accused" is used in the same sense in all parts of the Code and that it is used in the same sense in the Indian Oaths Act. For the latter assumption there is no foundation; and as regards the former I propose to examine whether it is correct to assume that the word is used in one and the same sense in all parts of the Criminal Procedure Code.

In the Codes of 1861 and 1871, the word "accused" and the expressions "accused person," "person accused of an offence," "person charged with an offence" and "offender" were used without anything to indicate that any distinction was meant. The same was the state of things, though not quite so largely, in the Code of 1882. In the Code of 1898 a person against whom an order for maintenance was applied for was designated an accused person and it was provided that he might tender himself as a witness, and that in such a case he should be examined as such [sec. 488, sub-secs. (7) and (9) of Act V of 1898]. Act V of 1898 was an Act to consolidate and amend the law relating to Criminal Procedure. The Acts of 1923 were merely amending Acts. The policy of the law has to be gathered from a study of the Act of 1898 with the aid of such light as may be afforded by the amendments subsequently made thereto. In the face of the provision contained in sub-secs. (7) and (9) of sec. 488 of Act V of 1898 to which I have just referred it cannot possibly be contended that the Legislature used the expression "accused

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person" in all parts of the Code in the narrower sense of meaning a person accused of an offence. This conclusion is further supported by a consideration of the amendments introduced in 1923 in at least two places. In sec. 340 the words in the Code of 1898 were "Every person accused before a Criminal Court." They have been substituted by the words "Every person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court." This to my mind clearly shows that an "accused person" is not identical with a "person accused of an offence;" and I can find no reason to hold that the word "accused," when it was used in the Code of 1898 and where it has retained its place after the amendment, may not include both the classes of persons mentioned above, unless there is something in the context repugnant to that meaning. The other instance is still more clear. In sec. 436 of the Code of 1898, the words "any accused person who has been discharged" have been altered to "any person accused of an offence who has been discharged." This also in my judgment shows that where the word has not been altered it is capable of the wider meaning. Reference may also be made in this connection to sec. 499 which applies not merely to persons accused of an offence but also to those dealt with by Chap. VIII of the Code, and the marginal note to that section runs as "Bond of accused and sureties." In the Chapter dealing with enquiries in trials relating to offences the word "accused" wherever it occurs necessarily means a person accused of an offence. In the case of general provisions relating to enquiries or trials, in such of them as relate to procedure applicable to all proceedings under the Code, the word "accused," in my opinion, is used in its

wider significance unless the context suggests a narrower meaning. I can see nothing in sec. 360 which suggests the narrower meaning and in my opinion it will not be right to restrict the meaning of the section in that way. The Code does not define the word and the Legislature does not say that it is to be taken in the same sense wherever it has been used in the Code. The word has no well-defined or recognised meaning in other systems of law, the word "defendant" being more often used instead of the word "accused." To build an argument on a supposed policy on the part of the Legislature when really there is none and to assume a uniformity and on such assumption to attempt to explain away diversity is, in my opinion, fallacious. With regard to other matters as well dealt with by the Code there is diversity and it is futile to attempt to evolve a consistent scheme. I have dealt with one such instance in the case of *Bahadur Molla v. Ismail* (5).

To put the narrower interpretation will lead us to absurdities and in a way revolutionise the system of Criminal Procedure. I give a few instances. A part of sec. 344 will not apply with the result that it will be permissible to remand a person in custody against whom proceedings under the preventive sections have been taken for any length of time. Sec. 361 will not apply; the interpretation of the evidence given in a language which the person proceeded against does not understand will not be necessary, and the inquiry held in that manner will be opposed to all principles of criminal jurisprudence. Sec. 362, sub-sec. (2-A) will not be applicable, and no memorandum of the statement of the person will have to be made though the case is an appealable one, and the Appellate Court will have to deal with

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the appeal not knowing what the Appellant had stated in his examination. Sec. 364 will not apply and there will be no provision for recording the examination of such a person. A part of sec. 435 will not apply, and if such person is in confinement, no order for his release could be made by the District Magistrate pending the examination of the record by him, as sec. 498 does not apply to the District Magistrate. Sec. 439, sub-sec. (2) will not apply and there will be no bar to the High Court setting aside an order of discharge without hearing the party in whose favour it has been made as under sec. 440 he will not have a right to be heard. Sec. 526, sub-secs. (5), (6) and (8) will not apply, and it will not be possible to make an order for furnishing bond, nor will any notice be necessary, and no adjournment of the inquiry will be compulsory inspite of the notification of an intention to move the High Court for transfer. Sec. 367, sub-sec. (6), provides that an order under sec. 118 or sec. 123, sub-sec. (3), shall be deemed a judgment; but sec. 371 will not apply and the party dealt with by such an order will not be entitled to a copy of it. Sec. 383 will have no application, and there will be no provision for issuing a warrant for committing to jail a person who has failed to furnish the bond called for from him under the preventive sections.

I do not see any reason why the limited meaning should be attached to the word so as to give rise to inconsistencies and difficulties, some of which will have the effect of denying justice and others paralysing the administration of it.

I am clearly of opinion, that the word "accused" has not been used in the same sense in all parts of the Code. The Code deals with procedural law and a Court has always inherent power to shape and mould

its procedure in such a way as may be necessary to meet the requirements of each particular case or class of cases. In my opinion the word "accused" has been used in sec. 360, Criminal Procedure Code, in its wider significance and the provisions of the section are applicable to a proceeding held under sec. 145, Criminal Procedure Code, and the said provisions should, if practicable, be applied in their entirety to such proceedings. If, however, a party or the parties to the proceedings do not care to attend or appear by pleader at the reading over of the deposition, there is no conceivable reason why so much of the provisions as it is possible to apply should not be complied with.

In the present case it is not disputed that the provisions of sec. 360, Criminal Procedure Code, were not complied with, and the said provisions being mandatory the trial must be held to have been vitiated. Accordingly, in my opinion, the order passed by the learned Magistrate should be set aside.

CHAKRAVARTI, J.—The question referred to the Full Bench for decision is stated in the Order of Reference in these words:—"Whether the provisions of sec. 360, Criminal Procedure Code, are applicable to an enquiry held under sec. 145, Criminal Procedure Code." At the very outset I must point out that the question before us is not what is the precise meaning of the word "accused" as used in sec. 360, cl. (1) of Criminal Procedure Code. This is necessary because it seems to me that any answer to the latter question may not furnish any definite answer to the question we are to decide although it is the use of this word in the section which has led to the divergence of views on this question.

Now the Chapter in which sec. 360 finds its place is Chap. XXV which purports to lay down "The mode of taking or record-

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ing Evidence in Inquiries and Trials." The sections which follow are therefore of general application but, an examination of these sections will make it clear that some of the provisions are of a limited application and that is owing to the use of the word "accused" which has not been defined in the Code.

I confess I do not see that the Legislature by the recent amendment of sec. 340 of the Code have in any way made the position clearer.

The word "accused" used in sec. 340 before amendment was interpreted by this High Court and other High Courts to have a wider significance than the word has in common parlance in which an accused person is understood to be a person accused of an offence punishable under the law. To make the provisions of sec. 340 of the Code applicable to the proceedings under Chaps. X, XI, XII, etc., the word "accused" was read in a wider sense. By the amendment the Legislature have adopted the view expressed by the High Courts and with a view to make their meaning clear sec. 340 was amended as follows:—

Sec. 340.—(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court may of right be defended by a pleader.

(2) Any person against whom proceedings are instituted in any such Court under sec. 107, or under Chap. X, Chap. XI, Chap. XII or Chap. XXXVI or under sec. 552 may offer himself as a witness in such proceedings.

Therefore "an accused" before amendment was understood to mean "any person accused of an offence" and also a person as party to a proceeding under Chaps. X, XI, etc. The Legislature have used the word "accused" in a number of sections in Chap. XXV after the amend-

ments but without the qualification by adding the words "of an offence." Can it not, therefore, be understood that the Legislature left the word to be interpreted according to the context so as to mean one or the other thing.

An examination of the sections of this Chapter shows that the word as used in some of the sections means "a person accused of an offence" and cannot mean anything else.

The word "accused" in sec. 342, cl. (1), is undoubtedly used in its narrower sense. I may cite other sections, namely, secs. 344, 347, 348, 353, etc., in which the same limited sense is intended. But there are sections in which the word is used as it appears to me, in its wider sense. Sec. 340, Criminal Procedure Code, as amended, provides that parties to proceedings under the Code, other than those accused of an offence, may give evidence in their own behalf but not parties under proceedings held under sec. 110 of the Criminal Procedure Code. Sec. 342 (4), Criminal Procedure Code, provides, as it did before amendment, that "no oath shall be administered to the accused." In my opinion if the word "accused" in this section is limited to a person accused of an offence, a party to a proceeding who has not the benefit of sec. 340 (2) will also lose the protection of this section. This could hardly be intended. To take other examples sec. 356, cl. (2) runs as follows:—

"When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record."

There is no reason to hold why a party

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in a proceeding under Chap. XII shall be deprived of the benefit of the provision of this section.

Then sec. 361 runs as follows :—

“(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

“(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.”

If the word “accused” is understood here in its limited sense then a person who is a party to a proceeding under sec. 107 or 110, Criminal Procedure Code, may be proceeded with without his understanding a word of the evidence. This could not have been intended when it is borne in mind that these are general provisions for recording evidence.

It appears to me therefore that there is no difficulty in reading the word “accused” in both its wider and narrower sense according to the context of the various sections in this Chapter.

Coming now to sec. 360 I do not see any reason why it should not apply to proceedings under sec. 145 in so far as the mode of recording of the evidence goes. The evidence has to be read over as the section requires and I do not see what practicable difficulty can arise if the party, whether he is a person accused of an offence or not, takes part at the time of reading that evidence over to the witness. If such a party does not appear that can create no practical difficulty. If any party to a proceeding deliberately abstains from taking advantage of the safeguard provided by this section, he cannot be heard to say that the recording of the evidence was irregular, because it was not read over

to the witness in the presence of the accused. On the other hand, the word “accused,” if limited to a person accused of an offence, will preclude amongst others parties to proceedings under secs. 107 and 110 of the Criminal Procedure Code from watching the reading over of the evidence in which they are as vitally interested as a person accused of an offence. I do not see any cogent reason why this section which provides “the mode of taking or recording” evidence should be limited only to cases in which the party is a person accused of an offence.

On the whole, therefore, my answer to the question put in the Reference is in the affirmative and I think the word “accused” in sec. 360 is not used in a limited sense but is used in the wider sense of the word.

The decision of the FULL BENCH was as follows :—

The result of these judgments is that a majority of the Court is of the opinion that the provisions of sec. 360, Criminal Procedure Code, do apply to proceedings under sec. 145, Criminal Procedure Code, to this extent at least that as the evidence of each witness is completed it must be read over to him.

The majority of the Court is of opinion that the parties to the proceedings are not “accused,” and that their attendance at the reading over is not necessary.

Regarding the particular case before us, our decision is that the reference made by the learned Sessions Judge must be accepted and the order made by the Magistrate in favour of the first party set aside because the learned Magistrate does not pretend to have complied with the provisions of sec. 360, Criminal Procedure Code, even to the limited extent indicated.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

APPS. NOS. 88 AND 89 OF 1924.

<p>SANDERSON, C. J. BUCKLAND, J. 1924, 11, November.</p>	}	<p>SIR HUKUMCHAND KASLIWAL and anr., Appellants, v. RADHAKISSEN CHAMARIA and ors., Respondents.</p>
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Companies Act (VII of 1913), sec 171—Original Side Rules under Companies Act, Rule 95—Winding up of Company by Court—Pending suits in other Courts to enforce mortgage claims—Sale of properties by winding up Court with consent of mortgagee, if a ground for re-calling leave to continue his suit—Stay of suits in other Courts and inquiry of all claims by winding up Court, if may be ordered by latter Court.

An order to wind up a Company having been made by the High Court on its Original Side on the 4th June 1923, orders were made by the said Court on the applications of the Plaintiffs in two suits brought by them in the Court of Unao to enforce their several claims as mortgagees to continue those suits on the 13th August 1923 and 21st November 1923, respectively. Meanwhile on, the 6th August 1923 the properties of the Company (over which mortgagee rights were being claimed in the suits) were at the instance of the Plaintiffs of one of the suits ordered to be sold by the winding up Court and were sold in September 1923, the sale-proceeds being kept in the custody of the Imperial Bank. On the 5th February 1924, a Defendant in both the said suits moved the High Court for an order for staying the suits in the Unao Court and for an enquiry into the question of the priorities of the several claims against the Company by the High Court in the matter of the liquidation of the Company, and the Court having ordered accordingly:

Held (on appeals by the Plaintiffs in the

Unao Court suits)—That the order for sale was without prejudice to the rights of those who claimed to be secured creditors and without prejudice to such proceedings as the secured creditors might ordinarily be entitled to take, irrespective of the winding up Court, for the purpose of enforcing their securities.

That the leave previously given to the Appellants to enforce their rights by means of suits should not have been recalled, the position having remained the same, the sale by the winding up Court notwithstanding.

That IN RE PACAYA RUBBER AND PRODUCE COMPANY, LIMITED (1) was no authority for the order of the trial Court staying the suits in the Unao Court and directing inquiry into the question of priorities by the winding up Court.

These were two appeals from an order, dated the 3rd April 1924 passed by C. C. Ghose, J., upon an application made by the Respondents in the matter of the Pioneer Mills, Ltd. (in Liquidation) on the 5th February 1924. The circumstances in which the application was made will appear from the order of the learned Judge which was as follows:—

C. C. GHOSE, J.—This is an application for an enquiry into the question of the priorities of the claims of certain persons named in the summons as between themselves and for an order that pending such investigation all proceedings in a certain suit now pending in the Court of the Subordinate Judge of Unao in the United Provinces of Agra and Oudh may be stayed. There are a few other prayers in the summons but they have not been pressed before me.

The facts are as follows:—The Pioneer Mills, Ltd., carried on business amongst

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other places at Unao where it had a sugar refinery and distillery. By an order made by this Court on the 4th June 1923, the Company was wound up and Mr. M. L. Tarmaster and Mr. H. N. Ghose were appointed Official Liquidators. By a subsequent order, dated the 6th August 1923, the Liquidators were given liberty to put up for sale by public auction the moveable and immoveable properties of the said Mills including factories and distilleries, etc., but the bids were not to be accepted without the order of this Court. These bids were brought to my notice during the last long vacation and for the reasons given in my judgment of the 25th September 1923, I rejected the bids but I was able to secure a purchaser for the Mills for Rs. 9,05,000 in the person of Lala Joyram Das. The entire amount of the purchase money has been paid in by the purchaser and the same has been invested in war bonds, which have been kept for safe custody in the Imperial Bank of India.

On the 10th August 1922, the Pioneer Mills, Ltd., executed a mortgage of the moveable and immoveable properties belonging to the Company in favour of the Tata Industrial Bank, Ltd. On the same date there was a second mortgage in favour of Bilasroy Hurdut Roy, for whom Mr. Langford James appeared before me. On the 31st August 1922, a mortgage was executed by the Pioneer Mills, Ltd., for Rs. 5,00,000 in favour of Radhakissen Chamaria and Motilal Chamaria. The first mortgage was paid off and the last named persons claimed to stand as first mortgagees in the shoes of the Tata Industrial Bank. On the 1st September 1922 the last mentioned mortgage was registered with the Registrar of Joint Stock Companies. The Chamarias allege that while negotiations to pay off the Tata In-

dustrial Bank were proceeding the Company in fraud of the rights of the Chamarias executed a mortgage in favour of Bilasroy Hurdut Roy, which mortgage, however, was not registered till the 21st November 1923. On the 2nd January 1923, the Chamarias obtained a formal assignment of mortgage from the Tata Industrial Bank. Sir Hukumchand Kasliwal and Harkissen Das Bhattar, who also claim to be mortgagees, filed a suit in the Unao Court to recover their dues. This was in February 1923. The order for sale of the properties was made as stated above on the 6th August 1923, at the instance of Bilasroy Hurdut Roy but before the sale was effected Bilasroy Hurdut Roy obtained leave on the 13th August 1923, to proceed with the suit on their mortgage in the Unao Court. On the 20th November 1923, Sir Hukumchand Kasliwal obtained leave to proceed with his suit. The present application is made under the provisions of secs. 171, 172 and 173 of the Indian Companies Act. Reference is also made to r. 95 of the Rules of the Court under the Companies Act and it is claimed that in accordance with the practice which obtains in England [see in this connection, *In re Pacaya Rubber and Produce Company, Limited* (1)] the actions now pending in Unao should be stayed and the question of the priority of the claims should be gone into in this Court where the winding up proceedings are pending. Having regard to the events which have happened and to the facts that with the consent of all the mortgagees the properties have been sold free from all incumbrances and to the fact that the proceeds of the sale are now in the custody of this Court, reason and convenience alike indicate that the question of the priorities

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should be gone into in this Court. No doubt, a mortgagee has a right to realize his security and of course as incidental to that a right to bring an action. But the mortgagees in this particular case are really able to get everything they want by an enquiry in this Court without proceeding with the actions at Unao. I am at present unable to see what good can possibly result by these actions at Unao being allowed to continue. The order therefore, which I make is that the various Plaintiffs in the Unao Court in respect of this matter do not continue further their suits in the said Court and that the matter must be set down to be heard in this Court for the purpose of determining the question of the said priorities and such other questions as may arise on the contentions of the parties. The costs of the application will be determined after the disposal of the question of the priorities and of the other questions.

Two appeals were preferred against the order, Appeal No. 88 by Sir Hukumchand Kasliwal and another and Appeal No. 89 by Bilasroy Hurdut Roy.

The Advocate-General (with *Mr. S. C. Roy*) for Sir Hukumchand Kasliwal and another.

Mr. Langford James (with *Mr. S. M. Bose*) for Bilasroy Hurdut Roy.

Sir B. C. Mitter (with *Mr. N. N. Sircar*) for the Respondents Radhakissen Chamaria and another.

THE JUDGMENT OF THEIR LORDSHIPS was as follows :—

SANDERSON, C. J.—These two appeals, which are No. 88 of 1924 and No. 89 of 1924, have been argued one after the other. They arise out of an application made by the Respondents Radhakissen Chamaria and Motilal Chamaria, which was disposed of by my learned brother Mr.

Justice C. C. Ghose on the 1st of April 1924.

In Appeal No. 88 the Appellants are Sir Hukumchand Kasliwal and another; and, in Appeal No. 89 the Appellants are Bilasroy Hurdut Roy.

The facts, which have been stated both by the learned Advocate-General who appeared for the Appellants in Appeal No. 88 and by the learned Counsel who appeared for the Appellants in Appeal No. 89, are as follows :—

It is alleged that on the 14th of February 1920 Sir Hukumchand Kasliwal and Harkissen Das Bhattar entered into an agreement with the Pioneer Mills Limited (which was a joint stock Company having its registered office in Calcutta and carrying on business as refiners, manufacturers and dealers in sugar at Unao in the United Provinces of Agra and Oudh) by which Messrs. Hukumchand Harkissen Das were to be the banians of the Company; and, it was alleged that the Appellants advanced Rs. 1,50,000 to the Company upon condition that this sum should be secured upon the factory, plant and machinery of the Company and its stock-in-trade at Unao. It was further alleged that after the sum of Rs. 1,50,000 had been advanced the Company wrongfully put an end to the agreement and a suit was eventually instituted by Messrs. Hukumchand Kasliwal and Harkissen Das Bhattar against the Pioneer Mills Ltd., the Tata Industrial Bank Limited, Bilasroy Hurdut Roy, Radhakissen Chamaria and Motilal Chamaria, the second, third and fourth Defendants being joined on the ground that they alleged that they were also mortgagees of the properties of the Company. The relief which was asked for in that suit was, amongst other things, declaration that the Defendant Company's factory at Unao together with the lands,

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machineries, implements, building and structures and its stock-in-trade should stand charged with the payment of the amount which might be found due to the Plaintiffs for the advances made by them to the Company.

The next date which is material is that on the 16th of April 1920 the Company entered into a banianship agreement with Messrs. Bilasroy Hurdut Roy; and, it was alleged by Bilasroy Hurdut Roy that on the 10th of August 1922 the Company executed a mortgage in their favour for the sum of rupees 4 lacs and on the same date executed a mortgage in favour of the Tata Industrial Bank Limited.

It was further alleged that on the 31st of August 1922 the Company executed a mortgage in favour of Messrs. Chamarias.

On the 21st of September the Chamarias' mortgage was registered but Bilasroy Hurdut Roy's mortgage was not registered until the 21st of November 1922, leave having been obtained to extend the time. It was further alleged that on the 1st of January 1923 the Tata Industrial Bank Limited assigned their mortgage to Messrs. Chamarias. The date on which Hukumchand Kasliwal's suit, to which I have already referred, was instituted, was the 10th of February 1923.

Bilasroy Hurdut Roy also instituted a suit; and, the Defendants in that suit were the Company and Messrs. Chamarias. Messrs. Hukumchand Harkissen Das were not joined as a party in that suit. The relief claimed was a decree in favour of the Plaintiffs for Rs. 4,00,000 as principal and Rs. 18,666-10-0 as interest together with costs and that the Plaintiffs should be declared entitled to withdraw the decretal amount from the sale-proceeds of the Pioneer Mills Sugar Refinery and Distillery which was in deposit with the Imperial Bank of Calcutta under the orders

of the Calcutta High Court. That last prayer, as I understand, was added by way of amendment. The exact date on which that suit was instituted has not been stated to this Court but it has been taken that it was instituted before the date on which the High Court at Calcutta made an order for the winding up of the Company, which was on the 4th of June 1923.

On the 6th of August 1923, an order was made on Bilasroy Hurdut Roy's petition and with the consent of Messrs. Chamarias that the property of the Company which was subject to the alleged mortgages and charges, to which I have already referred, should be sold by the winding up Court. The bids were not to be accepted without the order of this Court and it was ordered that bids should be invited for the sale of the property subject to the incumbrances and that bids should be further invited for the sale of the property free of all incumbrances.

On the 13th of August 1923, my learned brother Mr. Justice Greaves made an order giving leave to Messrs. Bilasroy Hurdut Roy to continue their suit in the Unao Court. That order was necessary because of sec. 171 of the Indian Companies Act, VII of 1913, which provides as follows:—"When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commence against the Company except by leave of the Court, and subject to such terms as the Court may impose." That order was made by my learned brother in the presence of Messrs. Chamarias.

In September 1923, my learned brother Mr. Justice C. C. Ghose sanctioned the sale of the property free from incumbrances to a purchaser, whose name is not material for my present purpose. The

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property was sold free of incumbrances and the proceeds, as I have already mentioned, were deposited in the Imperial Bank Limited by the order of the learned Judge.

On the 21st of November 1923, my learned brother Mr. Justice Ghose made an order that Messrs. Hukumchand Harkissen Das's suit should proceed. That order was made *ex parte* on the application of the Plaintiffs in the suit. On the 18th of December 1923 Messrs. Chamarias filed their written statement in the suit which was brought by Messrs. Hukumchand Harkissen Das in the Unao Court: and, in that written statement, amongst other defences, they set up the case that the Plaintiffs had no charge or mortgage over the properties of the Defendant Company described in the plaint. They also alleged that the mortgage which was relied upon by Bilasroy Hurdut Roy and which purported to have been executed by the Defendant Company, was a collusive transaction and was invalid and inoperative in law. An order was made in Messrs. Hukumchand's suit in the Unao Court that on the 26th March 1924 the parties should appear and that issues should be settled. Before that date arrived, *viz.*, on the 5th of February 1924, the application which gave rise to these proceedings was made before my learned brother Mr. Justice Ghose.

In the application which related to Hukumchand Harkissen Das's matter the prayers in the petition were that the Liquidators should be directed to pay a certain sum to the Petitioner, that the claims of Bilasroy Hurdut Roy and Sir Hukumchand Kasliwal and H. Bhattar to rank in priority to the Petitioner's claim might be adjudicated and that pending such adjudication the suits Nos. 28 and 37 of 1923 (which were the suits brought by

Hukumchand Harkissen Das and Bilasroy Hurdut Roy respectively in the Subordinate Judge's Court at Unao) might be stayed, and if necessary the leave granted to Bilasroy Hurdut Roy to proceed with their suits in the Unao Court might be revoked.

Upon this application coming before my learned brother Mr. Justice Ghose the following order was made:—"It is ordered that the said Hukumchand Kasliwal and Harkissen Das Bhattar and Bilasroy Hurdut Roy, the Plaintiffs in suits Nos. 28 of 1923 and 37 of 1923 respectively filed in the Court of the Subordinate Judge at Unao, do not continue with these suits in the said Court: and I am further ordered that this application be set down for hearing in this Court for the purpose of determining the question of priority of the respective claims of the mortgagees and such other incidental questions as may arise on the contentions of the parties."

It is from the learned Judge's judgment and his order that these two appeals have been preferred by Hukumchand Kasliwal and Harkissen Das, and Bilasroy Hurdut Roy.

I propose to deal in the first instance with the appeal by Hukumchand Kasliwal and Harkissen Das.

In this case, as in the other, it has not been disputed that the mortgagee or the person who claims to be the mortgagee, in the ordinary course would be entitled to enforce his rights by means of a suit, irrespective of the winding up Court, and, it was upon that basis, I assume, that the learned Judge on the 21st of November 1923 made his order that Messrs. Hukumchand Harkissen Das should be at liberty to proceed with the suit which they had instituted.

It has been argued however on behalf of

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the Respondents that that principle does not apply to these cases because the property in question has been sold by the order of the learned Judge presiding over the winding up Court and that the two suits in question are no longer mortgagees' suits in the ordinary acceptance of the term.

It was further argued that the Appellants should not be allowed to approbate and reprobate in the sense that the Appellants having taken advantage of the winding up proceedings to have the properties sold, cannot object to the order which has been made by my learned brother Mr. Justice Ghose.

I am not prepared to accept that argument. It seems to me on the facts of the case with which I am now dealing (No. 88) that it must have been the intention of the parties that the property should be sold by the winding up Court without prejudice to the rights of those who claimed to be secured creditors, and without prejudice to such proceedings as the secured creditors might ordinarily be entitled to take for the purpose of enforcing their securities. It is not necessary for me to deal in detail with the facts which induce me to come to that conclusion. It is desirable, however, to draw attention to the fact that in Hukumchand Harkissen Das's case, the sale had actually taken place before the learned Judge gave leave to proceed with the suit, that Messrs. Chamarias subsequently filed their written statement in that suit and that an order was made that the parties should appear to settle the issues in that suit.

Having regard to those facts I have no doubt that the sale of the property by the winding up Court was a proceeding, which was carried out for the sake of convenience and with the object of getting the

property sold at a time and in a place where a good price might be obtained for it. There is no doubt in my mind that it was not intended that the Plaintiffs should thereby be debarred from enforcing their rights in the usual way if they were so advised.

It is also desirable to point out that the Defendants-Respondents have not in any way, as far as I know, changed their position for the worse by reason of the property having been sold which was done with their consent under the order of the winding up Court.

The position in this case, therefore, is that the Plaintiffs are alleging that they are entitled to a charge. The Defendants are denying that the Plaintiffs are entitled to the charge. That issue ought in the ordinary course to be decided in a suit. The learned Judge in fact made an order that the suit, which had been instituted, should be continued; and certain proceedings were taken by the Defendants in the suit.

The question then arises, in my opinion, whether the order, which the learned Judge made on the 21st of November 1923 was a correct one. In my judgment it was.

That being so, I cannot find that anything has occurred since the 21st of November 1923 which would justify that order being set aside by the learned Judge.

It seems to me that the position was practically the same when the matter came before my learned brother in April 1924 as it was when the matter was before him on the 21st of November 1923. There does not appear to have been with respect to the learned Judge any real ground for departing from the order which he made in November 1923.

It has been argued by the learned Advocate-General and by Mr. Langford

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James that the learned Judge had no jurisdiction to set aside his previous order or to make an order which would in effect revoke the previous order which had been made giving the Plaintiff leave to continue the suit.

In my judgment, it is not necessary for this Court to express any opinion upon that point, because the matters to which I have already referred, are, in my opinion, sufficient to dispose of this appeal.

The result is that in my judgment the appeal of Hukumchand Kasliwal and Harkissen Das Bhattar must succeed.

Then the question arises whether there is anything in the appeal of Bilasroy Hurdut Roy which would induce me to come to a different decision from that at which I have already arrived in the appeal of Hukumchand.

The facts, as I have already stated, are not quite the same but upon the question as to what was the intention of the parties when the property was sold by the winding up Court it seems to me that it is even more clear in this case that the parties had only the intention which I have already stated.

As I have already mentioned, on the 6th of August an application was made by the Appellants with the consent of Messrs. Chamarias that the properties should be put up for sale and on the 13th they applied that the suit which they had instituted in the Unao Court should be continued and they obtained an order from the learned Judge in the presence of Messrs. Chamarias to that effect.

With the exception that the properties were sold under the circumstances to which I have already referred, there does not seem to me to have been any real difference between the position of affairs when the matter was before my learned brother Mr. Justice Greaves on the 13th

of August 1923 and when the matter was before my learned brother Mr. Justice Ghose in April 1924; and, inasmuch as the order made by my learned brother Mr. Justice Greaves was made in the presence of the Respondents, the Chamarias, the facts in this respect present a strong case in support of the Appellants' contention.

The question which is in dispute between the parties in Bilasroy's appeal is not the same as the question between the parties in Hukumchand Harkissen Das's appeal. In this case the defence set up by the Respondents was that Bilasroy's mortgage was invalid and was obtained by certain fraudulent representation. Sir Binode Mitter who argued the case for Messrs. Chamarias stated that his clients would not rely upon the alleged fraud but that they intended to call upon the Appellants to prove the consideration for their mortgage and they would rely upon the point raised in connection with the delay in registering the mortgage.

The learned Counsel for the Appellants however urged that whether the dispute is a large one or a small one, there is a material dispute between the parties in respect of this mortgage, and that being the case, it seems to me that the principle, to which I have already referred, applies to this case as well as to Hukumchand's case and that the order which my learned brother Mr. Justice Greaves made on the 13th of August 1923 giving the Plaintiffs leave to continue the suit was a proper one and I see no reason why it should be departed from or set aside.

There is one other matter to which I must refer and that is the case which was mentioned by my learned brother in his judgment, the case of *In re Pacaya Rubber and Produce Company, Limited* (1). It is not clear as I read the learned Judge's

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judgment, whether the learned Judge placed any real reliance upon the decision in that case and whether it affected his mind in coming to his judgment, because all that the learned Judge said was :— "Reference is also made to r. 95 of the Rules of the Court under the Companies Act and it is claimed that in accordance with the practice which obtains in England [see in this connection, *In re Pacaya Rubber and Produce Company, Limited* (1)] the actions pending in Unao should be stayed and the question of the priority of the claims should be gone into in this Court where the winding up proceedings are pending."

But inasmuch as the case was mentioned by the learned Judge, I think, it is right to say that in my judgment, that decision does not seem to affect the question which is now before us. In the cited case the question was whether the learned Judge of the winding up Court had power to transfer to that Court an action by or against the Company which at the date of the winding up was pending in another Court when it appeared that the action which was sought to be transferred extended to other parties as well as the Company as Defendants; it was held by the Appeal Court that the learned Judge of the winding up Court had power to transfer such an action under r. 42 of the Companies (winding up) Rules, 1909. It was merely a question of transferring a suit from one Court to another and no question of staying a suit arose in that case : I do not see how it has any bearing upon the question which is now before us.

For these reasons, in my judgment, both the appeals must be allowed and the order of the learned Judge of the 1st of April 1924 should be set aside and the application of Messrs. Chamarias, in res-

pect of which this appeal arises, must be dismissed.

Having heard learned Counsel on the question of costs the order which we make is that Messrs. Chamarias do pay the costs of Bilasroy Hurdut Roy and of Hukumchand and his partner in respect of the proceedings before Mr. Justice Ghose and that the Respondents Messrs. Chamarias do pay the costs of the Appellants in each appeal in this Court.

BUCKLAND, J.—It is well established that a secured creditor has *prima facie* a clear right to apply for and obtain leave to enforce his security.

The Appellants have filed suits to enforce their securities and the question is whether or not the order re-calling leave should be allowed to stand.

The appeals have been argued on several grounds and I will say at once that I am not impressed by the argument that the Court has no power to re-call leave once granted, nor by that which suggests that the machinery at the disposal of the Judge in the winding up would be inadequate to enable him to decide the questions which may arise in the suits should they come before him. Possibly the want of authority on these points is due to the fact that the circumstances are unusual. There is, however, no need to decide them, for, the appeals can be disposed of upon other grounds.

On behalf of the Chamarias the argument substantially is based—and, I think, exclusively—upon sale of the properties. This has been put in many ways, but it comes to this, that by reason of the sale of the properties there has been a change in the position of the parties of which they are entitled to take advantage.

Now, first one must consider what was the order under which the securities were sold. It is well-known that on the Orig-

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nal Side of this Court when a property eventually will have to be sold such property frequently is sold under conditions which may promptly secure the best possible price, entirely without prejudice to all rights and contentions of the parties of any kind whatsoever, the object being to obtain the best value for the property when conditions are most favourable and to allow such contentions as may arise to be argued at leisure thereafter. It has been argued that though the sale may have been without prejudice to the contentions of the parties, it was not without prejudice to the rights of the secured creditors as regards procedure. I can only say that if there was any reservation made at the time I should have expected that to have appeared either in the order or in the minutes or somewhere where my attention could be drawn to it. I think that the order must be taken—and it is the only way in which one can take it—as without prejudice to any of the parties whether as to their rights to any property or whether as to their rights to enforce such rights. However, be that as it may, what do we find? The Chamarias made no reference to such change of position, if any, as was induced by that sale until this application was made. Sir Hukumchand Kasliwal and his partner moved *ex parte* and leave was granted *ex parte*. Beyond all question leave so granted could have been revoked. But so far from making any application to revoke it I find that the Chamarias filed their written statement in the Court at Unao. It may be—as to this we have no information—that at that time they were not aware of the leave granted; but that seems improbable; at all events, it is not so asserted. Thirdly, as has been pointed out by my Lord, even if it is to be taken that the position was changed it certainly has not been sug-

gested that the change was in any degree to the prejudice of the Chamarias. On the contrary I think one may take it that so far as any benefit has been derived from sale of the properties such benefit will enure to the Chamarias if they have any rights against the funds in Court. The Appellants are entitled to insist upon their rights, and upon this ground, in my judgment, the appeals will have to succeed and upon the ground that the Appellants are entitled to rely upon their right to enforce their securities by suits.

It is unnecessary to make any differentiation between the two Appellants; but I must say that I have come to my conclusion with considerable reluctance because I cannot but feel that the balance of convenience and expedition is entirely in favour of dismissal of these appeals. These are not, however, sufficient grounds for disposing of a case when the Appellants have rights which they seek to enforce and I agree with the order which my Lord has proposed to make.

Messrs. K. K. Dutt & Co., Solicitors for Sir Hukumchand Kasliwal and another.

Messrs. Sanderson & Co., Solicitors for Bilasroy Hurdut Roy.

Messrs. Dutt & Sen, Solicitors for Radhakissen Chamaria and others.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1989 OF 1922.

GREAVES, J.

CUMING, J.

1925,

2, April.

GOPI MOHAN MAZUMDAR
and anr., Defendants,
Appellants,

v.

NAWAB BAHADUR OF
MURSHIDABAD, Plaintiff,
Respondent.

Suit for enhancement of rent—Plea of mourashi mokarari tenancy in defence—Finding that holding

GOPI MOHAN MAZUMDAR v. NAWAB BAHADUR OF MURSHIDABAD.

was created after the Permanent Settlement and therefore the presumption under sec. 50, Bengal Tenancy Act (VIII of 1885), did not arise, if sufficient to dispose of the case—Court bound to consider if there was a contract as to fixity of rent.

The landlord having sued for enhancement of rent, the tenant pleaded that the jama was mourashi mokarari and therefore there could be no enhancement. It was found that the jama was created after the Permanent Settlement:

Held—That the fact that the jama was created after the Permanent Settlement and therefore no presumption arose under sec. 50 of the Bengal Tenancy Act did not dispose of the case for it was open to the tenant to establish by evidence that there was a contract that the rent of the tenure should not be enhanced and there must be a finding by the lower Appellate Court on this point on the evidence.

This was an appeal preferred on the 2nd of August 1922 against the decree of J. W. Nelson, Esq., Special Judge of Zillah Murshidabad, dated the 11th of April 1922, affirming the decree of Moulvi Mahammad Ishaque, the Assistant Settlement Officer of Rajshahi (Dhulian Camp), dated the 20th of September 1920.

The Plaintiff (the landlord) claimed enhancement under sec. 7 of the Bengal Tenancy Act. The Defendant (the tenant) alleged that the jama was *mourashi mokarari* and so enhancement should not be allowed. The Court of first instance decreed the Plaintiff's suit by the following judgment:—

"This is a case brought by the landlord for settlement of fair and equitable rent of the tenure of the Defendant. The Plaintiff claims enhancement under sec. 7 of the Bengal Tenancy Act. The Defendant alleges that the jama was *mourashi mokarari* and so enhancement should not be allowed.

One witness for the Plaintiff and one for the Defendant have been examined in this case and the following issues have been framed for decision in this case—
(1) Whether the jama of the Defendant is *mokarari*. (2) To what relief, if any, is the Plaintiff entitled?

From the deposition of the Defendant it appears that the jama was created after the Permanent Settlement and further he does not produce his *dakhilas* to raise the presumption under sec. 50 of the Bengal Tenancy Act. So I hold that the jama is not *mokarari* but liable to enhancement. From the papers filed by the Defendant, and from the evidence of the parties it is quite clear that the jama was not enhanced within the last fifteen years. The gross asset of the tenure is calculated at Rs. 4-11 per acre of *barga* land and at Rs. 3-2 per acre of *hasdakhal* land. I allow 30 per cent. of the gross asset as collection charges and 30 per cent. of the balance as net profits to the Defendant and I order that the rest be settled fair and equitable rent of the tenure."

There was an appeal to the Special Judge of Murshidabad who dismissed the appeal by the following judgment:—

"The Appellant was recorded as a holder of a tenure liable to enhancement of rent and in proceedings under sec. 105, Bengal Tenancy Act, his rent was enhanced. The only question raised in this appeal is whether the tenure is liable to enhancement. It is not alleged that the rent was fixed permanently by contract. The tenure was admittedly created after the Permanent Settlement, so sec. 50 cannot apply. The rent is therefore liable to enhancement."

Against this decision the Plaintiff preferred a second appeal to the High Court.

Mr. Bepin Chandra Mullick and Babu

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Rabindra Nath Banerji for the Appellants.

Messrs. Hemendra Nath Sen and Amarendra Nath Bose and Babu Suresh Chandra Mukerji for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by the Defendants against a decision of the District Judge of Murshidabad, affirming a decision of the Assistant Settlement Officer of Rajshahi. The Plaintiff, the landlord, claimed enhancement of rent, Defendants pleaded that the *jama* was *mourashi mokarari* and that therefore there could be no enhancement. Both the Courts below have found that the *jama* was created after the Permanent Settlement. The lower Appellate Court seems to have thought that once this was established, the fact that no presumption therefore arose under sec. 50 of the Tenancy Act disposed of the case. In our opinion, this is not so. It is true that even if the tenure had been held for a long period at the same rate of rent, no presumption as to its permanency could arise, if, as has been found, the tenure was created after the Permanent Settlement. But even so, it is open to the Defendants who are sued for enhancement of rent to establish on the evidence that there was a contract that the rent of the tenure should not be enhanced. Unfortunately, the lower Appellate Court has not found whether or not any such contract existed; and the matter will accordingly go back to the Judge in the Court below in order that he may arrive at a finding on the evidence, both documentary and oral, in the suit as to whether there was any arrangement or contract between the parties that the rent of this holding should not be enhanced. The same point arose

in the case of *Nityanand Pal v. Nand Kumar Chowdhury* (1). The decree of the lower Appellate Court is accordingly reversed and the matter must go back in order that the case may be considered from the point of view indicated in this judgment. Costs of this appeal and of the remand will abide the decision by the lower Appellate Court who will finally dispose of the case.

CUMING, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD DUNEDIN.

LORD ATKINSON.

MR. AMEER ALI.

LORD SALVESEN.

1924,

Heard, 23, 24 and

27, October.

Judgment,

25, November.

SATYA NIRANJAN
CHAKRAVARTI and
ors., Appellants,

v.

RAM LAL KAVIRAJ
and ors., Respondents.

Minerals, right to—Putni lease—"Adha" and "urdha," if include minerals—Words, if of common style and surplusage—Putni lease, as such, if conveys minerals to putnidar—Question, if decided by the Privy Council—Transfer of Property Act (IV of 1882), sec. 108 (o).

Held, upon the construction of a *putni* lease—That looking to the anxious expression of the generality of the grant as evidenced by the long category of things conveyed, the words "*adha*" and "*urdha*" (above and below the surface) used in the lease made it plain that there was every intention to convey all below the surface as well as all on it or above it.

Common words of style used in conveyances of any sort may be, and often are, words of surplusage. But when they are not words of surplusage, they must be given the proper effect of their own meaning.

(1) 13 C. L. J. 415 (1914).

SATYA NIRANJAN CHAKRAVARTI v. RAM LAL KAVIRAJ.

Where the grantee of minerals is also the grantee of the surface, the grant, in a question with the grantor, includes the right to work the minerals.

Sec. 108 (c) of the Transfer of Property Act deals with the ordinary rights of a lessee in an ordinary lease. Its terms do not cut down the right to work minerals expressly conveyed.

The question whether or not a putni lease as such conveys the minerals to the putnidar is, so far as the Judicial Committee is concerned, still open. The judgment of Prinsep and Hill, JJ., in NAWAB SIR ALI QUADER SYED HOSSEIN ALLY MIRZA BAHADUR v. RAI JOGENDRA NARAIN ROY (7) has not been overruled by the decision of the Board in GIRIDHARI SINGH v. MEGH LAL PANDEY (5) which was a case of a mokurari and not a putni lease.

This was an appeal from a decree, dated the 16th June 1920, of the High Court at Patna which reversed a decree, dated the 23rd August 1917, of the Subordinate Judge of Jamtara.

The suit out of which this appeal arose was instituted by the Plaintiffs-Appellants for a declaration of their right to the sub-soil in Mauza Sultanpur, for damages for coal removed by the Defendants and for an injunction. The plaint also contained a prayer for general relief.

The Defendants-Respondents resisted the claim on the ground that they were putnidars and dar-putnidars of the said Mauza under grants from the predecessor-in-title of the Appellants. They alleged that the language of the putni deeds was such as to give the putnidars the mineral rights, and set up a prescriptive title and

pleaded that the suit was barred by limitation.

The terms of the grant which are set out in the judgment of the Judicial Committee contained the vernacular words "adha" and "urdha" and the Defendants contended that these words meant to convey in express terms the underground rights to the grantees.

The Subordinate Judge held that the existence of minerals was not known to the parties at the date of the grant and that the Settlement Officer only recognized the lease of the surface of the land in proceedings under Reg. III of 1872.

On the construction of the grant he held as follows:—

"The Defendants rely upon the words 'adha,' 'urdha' used in the said Patta, and ask the Court to infer that word 'adha' means minerals. I am not aware of any authority which lays down that the word 'adha' means minerals; the words 'adha,' 'urdha,' 'hak hakuk hadud madud,' so far as I can gather, are generally used by writers of deeds without knowing their meanings. These words generally go to indicate that the lease is a permanent one. The English translation of the words 'adha' and 'urdha' is 'up' and 'down,' and are general and vague words . . . Considering the above circumstances, I hold that the Defendants have totally failed to adduce any evidence to show that the Zamindars have parted with mineral rights of village Sultanpur to the Defendants, and accordingly decide this issue (i.e., the 5th issue) against the Defendants."

The Subordinate Judge likewise found against the Defendants on the questions of limitation and prescription and he accordingly decreed the suit.

The High Court (Jwala Prasad and

(5) L. R. 44 I. A. 246, 249: s. c. I. L. R. 45 Cal 87; 22 C. W. N. 201 (1917).

(7) 16 C. L. J. 7 (1889).

SATYA NIRANJAN CHAKRAVARTI v. RAM LAL KAVIRAJ.

Adami, JJ.) were of opinion that the words of the grant were sufficient to include a transfer of the mineral rights. They found that the Defendants had been working the mines on a large scale from the year 1894 and had thus acquired a right to the minerals underlying the whole village "by possession."

Messrs. Upjohn, K. C., Dunne, K. C. and Dube for the Appellants.—A grant such as the *putni* grant in 1852 does not *prima facie* include the right to minerals. Any intention to convey such right must be clearly proved. A lease of property which contains the words "*adha*" and "*urdha*" is not sufficient to transfer mineral rights. To secure that result there must be a lease expressly granting the underlying minerals for the purpose of being won.

Hari Narayan Singh v. Sviram Chakravarti (2), *Durga Prasad Singh v. Braja Nath Bose* (3), *Sashi Bhusan Misra v. Jyoti Prasad Singh Dco* (4), *Giridhari Singh v. Megh Lal Pandey* (5) and *Raghunath Roy Marwari v. Raja of Jheria* (6).

The Respondents' claim to work minerals is negatived by sec. 108, sub-sec. (c) of the Transfer of Property Act, IV of 1882, which forbids a lessee to work mines not open when the lease was granted.

A reference to sec. 105 of the Act shows that this prohibition attaches even to a lessee in perpetuity.

(2) L. R. 37 I. A. 136; s. c. I. L. R. 37 Cal. 723; 14 C. W. N. 740 (1910).

(3) L. R. 39 I. A. 133; s. c. I. L. R. 39 Cal. 690; 16 C. W. N. 482 (1912).

(4) L. R. 44 I. A. 46, 53; s. c. I. L. R. 44 Cal. 585; 21 C. W. N. 377 (1916).

(5) L. R. 44 I. A. 246; s. c. I. L. R. 45 Cal. 87; 23 C. W. N. 201 (1917).

(6) L. R. 46 I. A. 158; s. c. 23 C. W. N. 914 (1919).

Secretary of State v. Srinivasa Chariar (8). *

The *putni* grant was made in 1852 and the above section of the Transfer of Property Act, 1882, is declaratory of the law as it existed prior to the passing of the Act. Even if mines are included in the lease that does not entitle the lessee to commit any act injurious to the property, such as opening up new mines and removing the produce.

The right to minerals does not *ipso facto* include the right to work them.

The Respondents cannot by working certain minerals obtain a prescriptive right to all the minerals in the sub-soil of the village.

Lord Advocate v. Wemyss (9) and *Glyn v. Howell* (10).

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondents.—The authorities cited for the Appellants in regard to a grant of the minerals are not applicable to *putni* tenures.

They are concerned mostly with *brahmottar* or *debottar* tenures.

A *putni* taluq comes under a different heading and passes all the rights held by the Zamindar.

The grant of a *putni* taluq was a species of sub-settlement by the Zamindar.

The latter pays his rent direct to Government and the *putnidar* pays it to the Zamindar. Apart from that obligation each is a full owner.

They referred to Reg. VIII of 1819.

Tarini Charan Ganguly v. Watson & Co. (11) and *Joykishen Mookerjee v. Collector of East Burdwan* (12).

(8) L. R. 48 I. A. 50; s. c. I. L. R. 44 Mad. 421; 25 C. W. N. 818 (1920).

(9) L. R. [1900] A. C. 48, 68.

(10) L. R. [1909] 1 Ch. 668, 671, 678.

(11) 12 W. R. 413; 3 B. L. R. 437 (1867).

(12) 10 M. I. A. 16 (1864).

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It is the basis of the latter case that if the Zamindar had a right to do something the *putnidar* would get the same right.

In *Syed Hossein Ally, Mirza Bahadur v. Rai Jogendra Narain Roy* (7), it was expressly held that the whole interest of the Zamindar is conferred under a *putni* grant and that only such rights as are expressly reserved can be held back.

Apart from the law the words of the grant here do expressly transfer the whole of the Zamindar's rights including any rights in the sub-soil. The official translation, which is conclusive, construes the words "*adha*" and "*urdha*" as "above and below the surface."

The suit is barred by limitation.

Whether it is a suit for a declaration or for an injunction it is equally barred by Art. 120 of the 1st Schedule of the Limitation Act, IX of 1908.

Kodolh Ambu Nair v. Secretary of State (13) and *Waziran v. Babulal* (11).

Furthermore there are findings of fact, which have not been challenged by the Appellants in opening their appeal, that the Respondents have been in possession for more than 12 years; any claim for possession is therefore barred by Art. 111.

Mr. Upjohn, K. C., in reply.—The Bengal Regulations show that there are different kinds of taluqdars and indicate that *putnidars* are not in the position of proprietors.

There is no bar by limitation. The suit was in substance for possession of the property and the defence has all along been a reply to an action for possession.

The wrong done by the Respondents was a continuing wrong and a fresh period of limitation continually recommences.

Sec. 23, Limitation Act, 1908.

Reference was also made to Field's Regulations, p. 37.

Harrington's Analysis, Vol. III, p. 247.

Field's Land-holders and Relation of Landlord and Tenant, pp. 512, 708.

Marshall's Reports (Bengal), p. 28.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The present action is as to the right to the minerals in a Mauza at Sultanpur. The Plaintiffs are the Zamindars of a Zamindari within the bounds of which the said Mauza lies. The Defendants are the *putnidars* and *dar-putnidars* of the said Mauza. The Defendants are working, and, as the High Court have found—as to which finding no dispute has been raised before this Board—have worked the mines on a large scale since 1894 and to the knowledge of the Plaintiffs since 1898.

The present suit was raised in 1915. The Defendants rely upon three separate defences. First, they say that being *putnidars* they are in right of all the Zamindari rights appertaining to the territory embraced in the *putni* lease unless exception has been expressed, and that no exception of minerals was expressed. Secondly, they say that the *putni* lease gives them the right to the minerals in express terms. Thirdly, they say that the suit is barred either under Art. 120 or Art. 144 of the schedule to the Limitation Act. The learned Subordinate Judge decided all three questions against the Defendants and gave decree. On appeal the High Court of Patna affirmed the view of the Subordinate Judge on the first question, but reversed him on the second. It is somewhat difficult to say whether they affirmed or reversed on the third, but, as they were in favour of the

(7) 16 C. L. J. 7 (1889).

(13) L. R. 51 I. A. 257, 268; s. c. 29 C. W. N. 365 (1924).

(14) I. L. R. 26 All. 391 (1904).

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Defendants on the second, they dismissed the suit.

On appeal to this Board all these questions have been argued at great length, and it has been urged that the first question is one of very general importance. Their Lordships, however, think that the case may be disposed of on the second and third questions. To take the third question first, the relief asked by the Plaintiffs was at once possessory and declaratory, for they ask "that it should be declared that the Plaintiffs are entitled to and are in possession of the underground rights of the said Mauza." Their Lordships think that they are placed in this dilemma. The suit is admittedly raised more than 12 years after the working of the minerals on a large scale, that is to say, a proper working of the field. It must be assumed for the purposes of this plea that the Plaintiffs are right on the first and second points. The working by the Defendants was, therefore, working not under a lease but by a mere trespasser. If, therefore, the suit is possessory, then it is barred under Art. 141 of Sch. I, for more than 12 years have elapsed since the possession became adverse. If, on the other hand, the suit is declaratory, it is barred under Art. 120, for more than 6 years have elapsed since the right to sue the declaration emerged. Further, their Lordships agree with the High Court on the second question. This depends on the document of title. It runs as follows :—

DEED OF PATNI SETTLEMENT.

"We let out to you in Mofussali Patni settlement the Mauza Sultanpur, as per boundaries given in the Thakbasta papers, appertaining to Taraf Afzalpur and comprised in our Zamindari share, amounting to 4 annas in Tappa Kuntahit Karaya, excluding the Chakran Jaigir, Debotar, Brahmotar and other extra lands, etc., and the Katar Jungles included in Tikish (?) at

an annual rental of Rs. 25 in Company's coin and a premium of Rs. 45 in Company's coin. You will hold possession of all the lands appertaining thereto from a very long time, such as Mal, Khamar, Hasil, Patit, Bil, Jhil, Khal, Kandar, Pahar and Parbat, Jalkar, Falkar, the fruit-bearing and non-fruit-bearing trees and the Jungles and all rights and interests appertaining to all such things lying within the four boundaries and above and below (the surfaces). You will not be ousted from the Zamindari."

There have been a series of cases before this Board in which their Lordships have held, in the case of leases of *mokurari* and other tenures, that, in order to pass minerals to the lessee, express words must be used. They are *Tituram Mukerji v. Cohen* (1), *Kumar Hari Narayan Singh Deo Bahadur v. Sriam Chakravarti* (2), *Raja Sri Sri Durga Prasad Singh v. Braja Nath Bose* (3), *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo* (4), *Giridhari Singh v. Megh Lal Pandey* (5) and *Raghunath Roy Marwari v. Raja of Jheria* (6). Both the Subordinate Judge and the Judges of the High Court have decided that these cases equally apply to *patni* tenures. Without so deciding, this must be assumed for the purpose of deciding the second question. The Subordinate Judge thought that such words as "*adha*," "*urdha*," *hadud mahdud*" were mere words of style commonly used by writers of deeds without a proper understanding of their meaning, and, therefore, refused

(1) L. R. 32 I. A. 185 : s. c. 9 C. W. N. 1073 (1905).

(2) L. R. 37 I. A. 136 : s. c. I. L. R. 37 Cal. 723 ; 14 C. W. N. 740 (1910).

(3) L. R. 39 I. A. 133 : s. c. I. L. R. 39 Cal. 686 ; 16 C. W. N. 482 (1912).

(4) L. R. 44 I. A. 46 ; s. c. J. L. R. 44 Cal. 585 ; 21 C. W. N. 377 (1910).

(5) L. R. 44 I. A. 246 : s. c. I. L. R. 45 Cal. 87 ; 22 C. W. N. 201 (1917).

(6) L. R. 46 I. A. 158 : s. c. 23 C. W. N. 914 (1919).

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to give any effect to them. This seems a mistaken view. Common words of style used in conveyances of any sort may be, and often are, words of surplusage, but when they are not words of surplusage, they must be given the proper effect of their own meaning. This view was taken by the High Court. They thought that, looking to the anxious expression of the generality of the grant as evidenced by the long category of things conveyed, the words "adha" and "urdha" made it plain that there was every intention to convey all below the surface as well as all on it or above it. With this view their Lordships agree.

Two more contentions of the Appellants must, however, be stated in order to be set aside. Their Counsel argued that sec. 108 (c) of the Transfer of Property Act settled the question. Their Lordships consider this an impossible contention. The meaning of the section is clear enough. It is obviously dealing with the ordinary rights of a lessee in an ordinary lease, but it would be nothing less than an absurdity to hold that its terms cut down the right to work a mineral field expressly conveyed. They further argued that a right to the minerals does not infer a right to work. It is a general principle of all grants *quando aliquid conceditur id etiam conceditur sine quo res ipsa non esse potest*. This is always true as between grantor and grantee, but it does not necessarily apply as against third parties. If the grantor has granted the surface to A and the minerals to B, it may well be that the mere grant of the minerals will not include a right to bring down or otherwise injure the surface in the process of winning the minerals. But here there is no question of that sort. The grantee of the minerals is also the grantee of the surface. Their Lordships have,

therefore, no hesitation in saying that this grant of the minerals, in a question with the grantor, which is the only question here, includes the right to work. Such being their Lordships' views, which directly lead to an affirmance of the judgment of the High Court, they would, in ordinary circumstances, have said no more as to the first and general question of whether a *putni* tenure, without more said, transfers as has been contended by the Respondents all the rights of the Zamindari, including the right to the minerals.

There is admittedly conflicting authority on the point, but the learned Subordinate Judge, and also the Judges of the High Court, considered that the authorities in favour of the *putnidar* were overruled by the decisions of the Board in the series of cases mentioned above. Their Lordships cannot agree with that view. *Tituram Mukerji v. Cohen* (1) was the case of a maintenance grant. This was held not to include minerals. *Kumar Hari Narayan Singh Deo Bahadur v. Sriyam Chakravarti* (2) was *debottar* tenure. *Raja Sri Sri Durga Prasad Singh v. Braja Nath Bose* (3) was the case of lease held as the appanage to the office of Digwar. *Sashi Bhushan Misra v. Jyoti Prashad Singh Deo* (4) was the case of a *brahmottar* tenure, which means that that was a grant to Brahmins for their support. *Giridhari Singh v. Megh Lal Pandey* (5) was an ordinary *mokurari* lease. *Raghunath*

(1) L. R. 32 I. A. 185; s. c. 9 C. W. N. 1073 (1905).

(2) L. R. 37 I. A. 136; s. c. I. L. R. 37 Cal. 723; 14 C. W. N. 746 (1910).

(3) L. R. 39 I. A. 133; s. c. I. L. R. 39 Cal. 696; 16 C. W. N. 482 (1912).

(4) L. R. 44 I. A. 46; s. c. I. L. R. 44 Cal. 585; 21 C. W. N. 377 (1916).

(5) L. R. 44 I. A. 246; s. c. I. L. R. 45 Cal. 67; 22 C. W. N. 201 (1917).

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Roy Marwari v. Raja of Jheria (6) was again a case of *brahmottar* tenure. Not one of these was the tenure of a *putni* taluq in the hands of a *putnidar*. In their opinion the question, so far as direct decision of this Board is concerned, is still open. It really turns on what is the true nature of a *putni* tenure. Their Lordships think that the learned Judges have been misled by a wrong view of expressions used by Lord Shaw in *Giridhari Singh v. Megh Lal Pandey* (5), when quoting the judgment of Lord Buckmaster. His Lordship says :—

“The decisions establish that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.”

But that only means that the mere fact of a lease being permanent, transferable and heritable does not necessarily carry with it the result that the lessee has all Zamindari rights. His Lordship was dealing with a contention founded on *mokurari* leases. The passing of a *mokurari* lease does not, says he, have the effect that all the rights of a Zamindar go with it, but his Lordship did not mean to say and did not say “because a permanent lease does not entail that effect, therefore, inasmuch as a *putni* lease is a permanent lease, it does not entail that effect.” That question was not before him and was not decided. Their Lordships do not decide it now as it is not necessary for the judgment, nor do they wish to express any opinion on the matter save one, *viz.*, that they do not agree with the dictum of the High Court which says

that the judgment of Priusep and Hill, JJ., in the case of *Nawab Sir Ali Quader Syed Hossein Ally Mirza Bahadur v. Rai Jogendra Narain Roy* (7) has been overruled by the decisions of this Board above cited. That decision is in conflict with the decisions of other Courts in India, and whether it or those other decisions are right must remain for settlement on another occasion.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor : Mr. H. S. L. Polak for the Appellants.

Solicitors : Messrs. Pugh & Co. for the Respondents.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 85 OF 1924.

C. C. GHOSE, J.	JOTINDRA NATH DUTT, Plaintiff, v. DEBENDRA NATH DUTT, Defendant.
1925,	
Heard, 16, March.	
Order, 23, March.	

Suit to declare G. P. Notes charged with debt—Attachment of Notes in execution of money decree pending suit—Consent decree declaring charge—Priority of claims.

A mortgagee A filed a suit on 8th January 1924 against the mortgagor B for a declaration that certain G. P. Notes do stand charged for the repayment of his claim and on 20th March 1924 a consent decree was passed declaring such charge. Prior to this suit C, another creditor of B, had filed a suit on 21st November 1923 for the recovery of certain sum and obtained a decree against B on 7th January 1924 for the sum advanced. In execution of this decree C attached the said G. P. Notes and in pursuance of the order, dated 3rd March 1924, the same were made over to

(7) 16 C. L. J. 7 (1869).

(5) L. R. 44 I. A. 246 at p. 249; s. c. I. L. R. 45 Cal. 87; 22 C. W. N. 201 (1917).

(6) L. R. 46 I. A. 158; s. c. 23 C. W. N. 914 (1919).

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the Sheriff of Calcutta to the credit of this suit. A applied in execution for the sale of the said G. P. Notes by the Registrar and prayed that the sale proceeds be paid first to him in satisfaction of his decree and the balance, if any, be paid to C.

Order of the Court was that the application be granted.

JOGENDRA v. DEBENDRA (1), SUDINDRA v. BUDAN (2), DEEFHOLTS v. PETERS (3) and THAKUR PROSAD v. FAKIRULLAH (4) followed.

This was an application by the judgment-creditor for the sale of certain G. P. Notes in the hand of the Sheriff of Calcutta and the sale proceeds be paid to him in satisfaction of his claim.

One Jotindra Nath Dutt on 8th January 1924 filed a suit against his brother Debendra for a declaration that certain G. P. Notes belonging to Debendra do stand charged with the repayment of his claim and on 20th March 1924 a consent decree was passed declaring such charge. Prior to the said decree on 21st November 1923 another suit, being Suit No. 2985 of 1923, had been filed by another creditor Surendra Nath Ganguly against Debendra for the recovery of Rs. 7,321 and on 7th January 1924 a decree was passed for the said sum. In execution of this decree the G. P. Notes were attached in the hands of the Corporation of Calcutta and in pursuance of the order, dated 3rd March 1924, the same were made over to the Sheriff of Calcutta by the said Corporation to the credit of the Suit No. 2985 of 1923. This application was once made on 8th May 1924 and the same was abandoned.

Mr. P. N. Chatterjee for the applicant

Jotindra argued that a judgment-creditor can sell properties in the hands of a Receiver in execution of a mortgage decree, although he cannot execute a decree against such properties by way of attachment or sale, *Jogendra v. Debendra* (1). Here the property instead of being in the hands of a Receiver is in the hands of the Sheriff and the same principles will apply. The property is in the hands of the Sheriff of Calcutta, therefore he may be directed to make over the G. P. Notes to the Registrar to be sold by him and out of the sale proceeds his client's claim may be satisfied first and the surplus, if any, after such payment may be paid to Surendra.

Mr. S. N. Banerjee for the attaching creditor Surendra submitted that the consent decree was collusive and the properties had been attached by Surendra in Suit No. 2985 of 1923 and he must get his claim satisfied prior to the applicant. This application was barred by the principles of *res judicata*, as an application for sale in this suit was once made and dismissed. He ought to file a claim but then he is hopelessly out of time.

Mr. P. N. Chatterjee in reply argued that the execution Court cannot go into the question of the validity or otherwise of the decree, *Sudindra v. Budan* (2) and in case of a decree-holder in a mortgage suit he need not attach the property, *Deefholls v. Peters* (3). He can get the order for sale always. A decree-holder can make any number of applications in execution and cannot be barred by *res judicata* as the former application was not dismissed on its merits, *Thakur Prosad v. Fakirullah* (4).

(1) I. L. R. 26 Cal. 127 (1898).

(2) I. L. R. 9 Mad. 80 (1885).

(3) I. L. R. 14 Cal. 631 (1887).

(4) L. R. 22 I. A. 11; s. c. I. L. R. 17 All. 106 (1894).

(1) I. L. R. 26 Cal. 127 (1898).

(2) I. L. R. 9 Mad. 80 (1885).

(3) I. L. R. 14 Cal. 631 (1887).

(4) L. R. 22 I. A. 44; s. c. I. L. R. 17 All. 106 (1894).

JOTINDRA NATH DUTT v. DEBENDRA NATH DUTT.

The ORDER MADE BY THE COURT was as follows :—

The Sheriff of Calcutta to make over to the Registrar the said G. P. Notes and the Registrar to sell the same and the sale proceeds to be placed to the credit of this suit and out of the sale proceeds, the applicant's claim in this suit be paid first, and if any balance is left the same to be placed to the credit of the Suit No. 2985 of 1923 and paid to Surendra.

Mr. S. C. Dhar, Solicitor for the Applicant.

Mr. P. L. Mallik, Solicitor for the Opposite Party.

P. D.

(CIVIL APPELLATE JURISDICTION.)

LETTERS PATENT APPEAL

No. 37 OF 1923.

GREAVES, J.

CUMING, J.

1925,

Heard, 9, 11 and

12, March.

Judgment,

26, March.

SUDHANYA KUMAR DAS

v.

SAIK ISMAIL.

Under-raiyat—Customary right of occupancy, if heritable—Personal right—Bengal Tenancy Act (VIII of 1885), secs 26, 113 (1) and 183.

Per GREAVES, J.—The right of occupancy of an under-raiyat is a right acquired by custom or usage, and before such right can be said to be heritable, it must be proved by evidence in the usual way that by custom or usage heritability is an incident of such right.

Per CUMING, J.—An occupancy right is a personal right created by statute. Apart from sec. 26 of the Bengal Tenancy Act which makes the occupancy right of a raiyat heritable, there is no right of heritability in regard to such a right. The

occupancy right of an under-raiyat is thus not heritable by law, but it is open to the under-raiyat to prove that by custom or usage the occupancy right is heritable.

This is an appeal under cl. 15 of the Letters Patent against the decree of Mr. Justice B. B. Ghose in S. A. No. 2866 of 1920, dated the 11th April 1923, reversing a judgment and decree, dated the 17th September 1920, of 1st Subordinate Judge of Faridpur (Babu Haripada Banerjee), and confirming those of the Munsif, 1st Court of Bhanga (Babu Surendra Nath Sen), dated the 6th April 1920.

The material facts sufficiently appear from the judgment of B. B. Ghose, J., which was as follows :—

B. B. GHOSE, J.—This appeal is by the Defendants and it arises out of a suit for ejectment by the Plaintiffs. The allegations of the Plaintiffs in their plaint are that the Plaintiffs were raiyats and one Sheikh Gedu was an under-raiyat under them and that they had served notice under sec. 49 of the Bengal Tenancy Act determining the under-raiyati interest of Gedu in Chaitra 1323 and thereby the interest of Gedu had been extinguished. The plaint further states that Gedu died in Aghran 1325 and his *korfa jamai* interest was determined on his death, and it is further stated that according to law and local custom a *korfa* tenant does not and cannot acquire an occupancy right and therefore Gedu had no occupancy right in the land. It is also alleged that if the record-of-rights shows that Gedu had an occupancy right it was erroneously recorded without the Plaintiffs' knowledge. That being so, the Defendants had not acquired any right to the disputed land and are therefore liable to be ejected. The Defendants' plea shortly stated was that their father had occupancy right in the land of the Plaintiffs who were tenure-

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holders. It has been found by both the Courts below that Gedu, the father of the Defendants, was an under-raiyat under the Plaintiffs who are raiyats, but that he had acquired a right of occupancy under local custom. Upon that finding the trial Court dismissed the Plaintiffs' suit holding that the Plaintiffs were not entitled to *khas* possession under the circumstances. On appeal by the Plaintiffs the Subordinate Judge has held that although the Defendants' father had acquired a right of occupancy as under-raiyat by local custom his right was not heritable and as the Defendants had acquired no right they are liable to be ejected.

The question does not seem to have come up for decision before this Court in any previous case. The learned vakils who argued this case before me were unable to find any authority on the point in controversy. The learned Subordinate Judge has decided the case apparently following the Full Bench case of *Arif Mondal v. Ram Ratan Mondal* (1) and the case of *Jamini Sundari Dasi v. Rajendra Nath Chakraverty* (2). Those cases, however, do not cover the present question. There the under-raiyats were not found to have acquired any right of occupancy but held under an annual holding. It has been held that the interest of an under-raiyat holding for a term is heritable, *Alejan v. Raham* (3). The question here is what is the position of an under-raiyat who has acquired a right of occupancy by custom as he is entitled to do under the provisions of sec. 183 of the Bengal Tenancy Act. It is contended on behalf of the Appellants that he will

have all the rights conferred upon raiyats having occupancy rights. It is contended on the other hand that it cannot be so, as Chap. V of the Bengal Tenancy Act deals specially with the case of raiyats having occupancy rights; and therefore any under-raiyat having a right of occupancy cannot claim the rights which are incidental to the occupancy right of a raiyat; and it is further contended by him that it is incumbent on the under-raiyat to prove not only that he had acquired a right of occupancy by custom but also to prove custom which regulates the incidents of such occupancy rights, and if such an under-raiyat cannot establish the custom of heritability it should be held that it is not heritable. In my opinion the contention of the Respondents does not appear to be sound. It seems to me that when once an under-raiyat proves that he has acquired a right of occupancy by custom he should be clothed with all the rights which have been described as the incidents of occupancy right under Chap. V of the Bengal Tenancy Act, in the absence of any custom to the contrary. To hold otherwise would be to give an under-raiyat an occupancy right which would be barren of any results. For instance it seems to me that it cannot be said that an under-raiyat who has acquired a right of occupancy can be ejected under sec. 49 of the Bengal Tenancy Act, and it has been so held in the case of *Gopal Mandal v. Tapai Sankhari* (4). In my judgment therefore the right of an under-raiyat who has acquired a right of occupancy is heritable. It would further appear from the statement of facts in the plaint that the Plaintiffs also understood that if the Defendants could establish a right of occupancy as an under-raiyat the

(1) I. L. R. 31 Cal. 757 : s. c. 8 C. W. N. 479 (F. B.) (1904).

(2) 11 C. W. N. 519 (1906).

(3) 20 C. W. N. 766 : s. c. 22 C. L. J. 232 (1915).

(4) I. L. R. 46 Cal. 43 : s. c. 22 C. W. N. 618 (1918).

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Plaintiffs would not be entitled to eject them on the ground that such an interest is not heritable. Therefore the sole question that was discussed in the trial Court was whether the Defendants had acquired right of occupancy or not, and that having been found in favour of the Defendants the suit was dismissed by the trial Court.

It seems to me therefore that the Plaintiffs are not entitled to eject the Defendants on the ground stated by the learned Subordinate Judge and this appeal must be allowed with costs in all Courts.

[The Defendants preferred this appeal under the Letters Patent.]

Babu Satindra Nath Roy Chaudhuri for the Appellant.

Babu Surendra Nath Das Gupta II for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal under sec. 15 of the Letters Patent from a decision of Mr. Justice Bepin Behary Ghose, dated the 11th April 1923.

The question which arises for our decision is whether the learned Judge was right in holding that a right of occupancy acquired by an under-raiyat by custom descends to his heirs.

The point so far as I can ascertain has never been decided.

By sec. 26 of the Bengal Tenancy Act if a raiyat dies intestate in respect of a right of occupancy the right descends like other immoveable property subject to any custom to the contrary and the learned Judge considers that once an under-raiyat proves that he has acquired a right of occupancy he is clothed with all the rights which have been described as the incidents of occupancy right under Chap. V. of the Bengal Tenancy Act in the ab-

sence of any custom to the contrary and he thinks that to hold otherwise would be to give an under-raiyat an occupancy right which would be barren of any results. Chap. V deals with occupancy raiyats and nowhere in the chapter is an under-raiyat mentioned or referred to except in sec. 113 (1) where reference is made to an under-raiyat with rights of occupancy and it is not until sec. 183 of the Act is reached that there is any reference to the occupancy rights of an under-raiyat acquired by custom or usage which are expressly saved by that section and I find it difficult to see on what ground the provisions of Chap. V should regulate or govern these rights. Such rights are acquired by custom or usage and, in my opinion, before such right can be said to be heritable it must be proved by evidence in the usual way that by custom or usage heritability is an incident of such right, and I think the case must go back to the Munsif for a decision upon evidence of the question whether by the custom or usage prevailing in that part of the country where the land is situated upon the death of an under-raiyat who has by custom or usage acquired occupancy rights in his holding such right upon his death descends to his heirs. The Munsif will record his finding and return it to this Court as soon as possible. The parties will be at liberty to adduce fresh evidence if they so desire. Before I leave this appeal I should say that in my opinion the question is one of fact and not of law and I think that no useful purpose will be served by referring to the numerous cases which were cited before us.

The right of occupancy acquired by an under-raiyat is a right acquired by custom or usage and not by statute and in order to determine whether heritability is an incident of the custom or usage you

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have to ascertain by evidence the nature and extent of the custom or usage.

I have not been able to satisfy myself that apart from statute heritability is an invariable incident of occupancy right as was urged before us; it may have been so in the case of *khooḍ khast* raiyat who seems by custom to have acquired by long tenancy an hereditary right of occupancy. See Philip's Law of Land Tenures, Bengal, p. 14, and I think from the terms of sec. 6 of Act X of 1859, re-enacted by Act VIII of 1869, sec. 6, that the right of occupancy thereby conferred on raiyats who had cultivated far more than 12 years was a heritable right, at least it would seem so from the wording of the section which refers to the holding of the father or other persons from whom a raiyat inherits, although Sir Barnes Peacock in *Ajoodia Persad v. Mussammat Emambandee Begum* (5) doubts whether a right of occupancy was heritable and in other cases it has been held to be merely a personal right. See *Narendra Narain Roy Choudhury v. Ishan Chandra Sen* (6) and *Bibi Suhodra v. Smith* (7).

CUMING, J.—This is an appeal against the order of Mr. Justice B. B. Ghose reversing the order of the learned 1st Subordinate Judge of Faridpur who had reversed the order of the 1st Munsif of Bhanga. The learned Judge by his order dismissed the Plaintiff's suit.

The Plaintiff has appealed under cl. 15 of Letters Patent.

The facts found are briefly these. The Plaintiffs are raiyats and one Gedu was their under-raiyat with a right of occupancy. He died.

The Plaintiff now seeks to eject his heirs on the ground that the occupancy right

of an under-raiyat is not heritable and does not descend to his heirs. The learned Judge has held that such a right is heritable and, hence this appeal. The sole point to be determined in this appeal is—

Is the occupancy right of an under-raiyat heritable?

The argument of the Plaintiff-Appellant is this. Occupancy rights are made heritable by statute by sec. 26 of the Bengal Tenancy Act. This section applies only to raiyats and not to under-raiyats and therefore the occupancy right of an under-raiyat is not heritable. The Respondent argues that an occupancy right is immoveable property and so descends like any other immoveable property. That before 1859 the right of all cultivators whether raiyats or under-raiyats were recognized as heritable and the present Act has made no difference. That the heritability of an under-raiyat is part of the customary law of this country and not a creature of statutes.

Now ordinarily the interest of an under-raiyat holding on an annual holding is not heritable, [see the cases of *Mehar Ali v. Kalai Khalasi* (8), *Arif Mondal v. Ram Ratan Mondal* (1) and *Jamini Sundari Dasi v. Rajendra Nath Chakraverty* (2)].

All that the heirs get is the right to remain on the holding until the end of the agricultural year.

If he holds under a lease his heirs are entitled to succeed him in the Tenancy and can be ejected without notice at the expiry of the lease [*Alejan Bibi v. Raham Ali* (3)]. Are his heirs in any different position if he held a right of occupancy in

(1) I. L. R. 31 Cal. 757; s. c. 8 C. W. N. 479 (F. B.) (1904).

(2) 11 C. W. N. 519 (1906).

(3) 20 C. W. N. 756; s. c. 22 C. L. J. 232 (1915).

(8) 27 C. L. J. 579 (1915).

(5) B. L. R. Full Bench Rulings 725 (1867).

(6) 13 B. L. R. 274 (1874).

(7) 20 W. R. 139 at p. 140 (1873).

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the land or in other words, is the occupancy right of the under-raiyat heritable?

The Respondent has contended strenuously that a right of occupancy is not a personal right but is immoveable property and he relies on certain observations in the case of *Chandra Benode Kundu v. Alu Bux* (9) where Mookerjee, J., remarks: "The right of occupancy it will be observed is, for the purpose of descent, thus placed on the same footing as other immoveable properties. This is hardly consistent with the theory that the right of occupancy is a merely personal right." And further on (p. 250) the same learned Judge remarks: "The occupancy raiyat enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely personal right or personal privilege."

Unfortunately the learned Judge does not go on to state how such a right of occupancy can be appropriately described. I think myself that considerable confusion has arisen from the use of the expression "occupancy holding," an expression which is constantly found in the Law Report and is used in the decision which I have just referred to. As far as I can see with great respect to the learned Judges who have used the expression it is inaccurate. In the Bengal Tenancy Act a holding means a parcel of land held by a raiyat and forming the subject of a separate tenancy; so an occupancy holding is an occupancy parcel of land held by a raiyat. I confess, I can attach no meaning to this expression. The expression occupancy holding is found occasionally in the Act itself, e.g., in sec. 113. Possibly it is used as a short way of referring to a holding when held by a raiyat with a right

of occupancy. But as a general rule the Act speaks of a raiyat with a right of occupancy. The view which I have always taken is that it is inaccurate to speak of an occupancy holding. To illustrate my meaning take a certain parcel of land in a village. It is let out to A who is a settled raiyat of the village. He has a right of occupancy in the land.

But suppose it is let out to B, a person who is a complete stranger and without any right of occupancy. His interest in the land is entirely different from A and he has no right of occupancy. So the incident of the tenancy depends not on the particular piece but the person who holds it and it is difficult to see how a right of occupation is anything but a personal right peculiar to the person who holds the land and not to the land itself. As was pointed out in the case of the *Midnapur Zemindary Co. v. Hrishikesh Ghose* (10), sec. 26 deals with the devolution of the right of occupancy and not of a holding pure and simple and as the right of occupancy is a creature of the statute and a doubt had been expressed as to the heritability of a right of occupancy under Act X of 1859, there was a good reason for making other provision in relation to a right of occupancy which would not apply to the ordinary holding of a raiyat. A consideration of secs. 19, 20, 21, 22, 23 and 26 make it clear that the right of occupancy is a right peculiar to a particular person and not to a particular parcel of land, or holding. The conclusion to which I come is that an occupancy right is a personal right. The use of the expression "as other immoveable property" in sec. 26 has helped to add to the confusion, it being argued that as the word other is used it must mean that an occupancy right is immoveable property. If however this was

(9) I. L. R. 48 Cal. 184 at p. 249: s. c. 24 C. W. N. 818 (Spl. B.) (1920).

(10) 18 C. W. N. 828 (1914).

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the meaning the section would be clearly superfluous. I may now deal with an argument which was put forward that before the passing of the Tenancy Act of 1885 an under-raiyat or sub-tenant was a raiyat. Mookerjee, J., dealt with the question in the case of *Kamini Sundari Dasi v. Prasanna Kumar Sil* (11) and it is unnecessary for me to discuss it for I entirely agree with the conclusion to which the learned Judge came (see page 689). It has been argued that if the occupancy right of an under-raiyat is not heritable what advantage does he get from it. The simple answer to this is that he enjoys all the rights of an occupancy raiyat. His heirs do not enjoy the right of inheritance that the heirs of the occupancy raiyat would have. It is perhaps unnecessary to re-capitulate what these rights are. The conclusion to which I have come is that whatever may be the origin of a right of occupancy, heritability of such a right is a creature of the statute created by the sec. 26 and that outside the statute there is no right of heritability on such a right and to determine if the occupancy right of an under-raiyat is heritable we must look to the Act itself. Sec. 26 specifically makes the occupancy right of a raiyat heritable. But the section makes no reference to under-raiyats nor is there any section which directly refers to the heritability of an occupancy right held by an under-raiyat. The expression raiyat does not include an under-raiyat. See sec. 4 of the Act where tenants are divided into tenureholders, raiyats and under-raiyats. Each of these classes of tenants is defined and they are kept distinct throughout the Act. Sec. 5 (3) makes the distinction between raiyat and under-raiyat quite clear.

The framers of the Act had in their mind the possibility of an under-raiyat

having a right of occupancy [see sec. 113 (1) where under-raiyats with a right of occupancy are referred to]. The conclusion is therefore inevitable that they deliberately excluded under-raiyat with a right of occupancy from the operation of sec. 26. It might no doubt be open to the under-raiyat to prove that by custom or usage the occupancy right was heritable. (Sec. 183, Bengal Tenancy Act). This he has not attempted to do nor apparently was it ever his case. My learned brother is however of opinion that he should be given an opportunity to prove this if he can and so I agree with the order of remand he proposes.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

JURY REF. NO. 62 OF 1924.

GREAVES, J.

MUKERJI, J.

1925,

Heard,

4, February.

Judgment,

12, February.

EMPEROR

v.

PREMANANDA DUTT,

Accused.

Criminal Procedure Code (Act V of 1898), sec 307 - Reference to High Court on difference between Judge and jury - High Court when justified in refusing to accept verdict of jury on such reference - Dying declaration, evidentiary value of - Distinction between English and Indian law - Circumstances which Court must consider in relying on dying declaration - Record of dying declaration - Desirability of recording statement verbatim and questions put with the answers.

In a Reference under sec. 307, Cr. P. C., what the High Court has got to find before it can refuse to accept the verdict of the jury is that the verdict is unreasonable.

Dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept

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a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon.

Under the Indian Evidence Act, the weight to be attached to a dying declaration depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, so that it becomes almost always a question of fact as to whether it should be relied upon or not.

Where in recording a dying declaration, the Magistrate appeared to have put questions which were not all recorded, though the answers were:

Held—That the procedure was open to objection, in that in the first place the questions might be leading questions and in the condition of a person making a dying declaration there was always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statements.

Per CAVE, J., in R. v. MITCHELL (1) referred to.

This was a Reference under sec. 307, Cr.

(1) 17 Cox. C. C. 503 (1892).

P. C., made by the Sessions Judge of Chittagong (Mr. H. C. Stork), dated the 29th September 1924, disagreeing with the verdict of the jury who had found the accused not guilty of the charge framed against him under sec. 302, I. P. C.

The facts of the case will appear from the judgment.

Mr. B. L. Mitter (Standing Counsel) for the Crown.

Mr. K. N. Chaudhuri and Babu Probooth Chandra Chatterjee for the Accused.

The JUDGMENT OF THE COURT was as follows:—

*MUKERJI, J.—The accused Premananda Dutt was tried by the Sessions Judge of Chittagong with the aid of a jury on a charge under sec. 302, I. P. C., for causing the death of one Prafulla Kumar Roy by shooting him on the *paltan* ground in the town of Chittagong on the evening of 25th May 1924 at about 8-30 P.M. The jury brought in a unanimous verdict of not guilty, and the learned Judge having disagreed with the same, has submitted the case to us under the provisions of sec. 307, Cr. P. C.*

In the course of an elaborate summing up, which is remarkable for its lucidity and its fairness, the learned Judge has set out all the facts and circumstances of the case and the various points that arise for consideration and his charge has been of immense assistance to us in dealing with the case.

The accused Premananda Dutt, according to his own statement, was a Preventive Officer in the Customs Department, which appointment, he says, he resigned and he became a congress volunteer. He appears to be a youngman of about 24 years of age, and is what is ordinarily known as a political suspect.

The deceased Prafulla Kumar Roy was

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a Sub-Inspector of the Criminal Investigation Department. The accused and the deceased appear to have been known to each other for some time past; and there is evidence to show that since February 1924, the deceased was in touch with the accused, presumably watching him as a political suspect, and had met him on several occasions—on some occasions by appointment.

The case for the prosecution is that on the day and at the hour mentioned before the accused and the deceased met by appointment at about 7 P.M., talked together for some time and they had talks on political matters, that they were seated under a tree, and eventually the accused said to the deceased: "Prafulla Babu, you are a very dangerous man, you caused the Maniktala case to be detected and Ananta Singh arrested;" that the deceased replied: "What can I do? I am a paid servant." It is said that the accused then stood up and asked the deceased whether he would not leave the place; to which the deceased replied in the negative and said that the accused might go. The prosecution case is that when in this position the accused fired 3 shots at the deceased. As far as can be made out the time when the shots were fired was somewhere near 8-30 P.M. Immediately after this people came to the spot hearing the shots or cries, and carried the deceased or assisted him on to the road to the east of the field, put him into a gharry which they were able to secure and removed him to a bungalow at a short distance to the south, and there first aid was administered to him. Thence he was removed to the General Hospital. Next morning it was considered necessary to remove him to Dacca in order to localise and trace the bullets and for better treatment. A journey by rail was unquestionably risky but it was decided to under-

take the risk as it appeared to be the only means of saving his life. He was put into a train, but expired on the way.

That the occurrence took place at or about the time mentioned above and under circumstances which clearly point to the offence as being one of murder are matters about which there can hardly be any doubt or dispute. Nine witnesses have deposed that they came to the spot immediately or shortly after the occurrence on hearing shots or cries from the place. They are P. W. No. 2, Rai Satish Chandra Sen Bahadur, P. W. No. 4, Nalini Kumar Choudhury, P. W. No. 5, Rajani Kanta De, P. W. No. 6, Biseswar Das, P. W. No. 7, Dharendra Nath Moitra, P. W. No. 8, Rasik Chandra Bhattacharja, P. W. No. 9, H. L. Black, P. W. No. 10, D. W. N. Coulter and P. W. No. 12, Pramatha Kumar Das. P. W. No. 15, Dr. Chatterji, the Civil Surgeon, has deposed to the injuries revealed on *post mortem* examination on the body of the deceased and said that they were caused by revolver or pistol shots and pointed to three shots having been fired, and the shots having been fired at close quarters, that is to say, from a distance of not more than two feet. P. W. No. 23, Mr. Howe, an employee of Messrs. Rodda & Co., on examining the discolouring round the two holes made by the shots in the shirt of the deceased, deposed that the distance of the muzzle of the pistol that fired the shirt would be over 3 and less than 18 inches from the shirt. Firing shots at such a close range unmistakeably indicates intention to cause death. Upon the evidence of P. W. No. 15, Dr. Chatterji, the Civil Surgeon, and also of P. W. No. 22, Dr. Lees, the Chief Medical Officer of the A. B. Railway, it is clear that the journey to Dacca was undertaken as it was considered to afford the only chance of saving the life of the deceased

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and there are absolutely no circumstances in the case suggesting that he would not have died if he was not so removed.

The prosecution, in order to fix the guilt on the accused, have adduced evidence, which falls into three groups: (1) Circumstantial evidence by which a motive is sought to be established for the crime; (2) evidence of witnesses who depose to the hearing of the shots and cries and who say that they came and saw the deceased and that the deceased then and there gave out the name of the accused as his assailant; and (3) the dying declaration of the deceased made before a Magistrate in which the details of the occurrence are given and in which is to be found a declaration alleged to have been made by the accused himself of his motive in taking the step that he was about to take.

So far as the first of the aforesaid items of evidence is concerned, the position is this. By an order (Ex. 6) passed by the Deputy Superintendent of Police, Chittagong, on the 5th January 1924, Prafulla Kumar Roy was deputed to Calcutta to assist in the arrest of four persons, amongst whom was the name of one Ananta Singh. From a Police Report [Ex. 7 (1)] it appears that he arrived at Calcutta on 7th January 1924 and two days later made a report to the effect that he had come to know that the accused Premananda Dutt associated with one Sachindra, a suspect. From entries in Police Diaries [Exs. 7 (4), 7 (3) and 7 (2)] dating from 7th February 1924 to 29th February 1924 it appears that the deceased met the accused during this time, and the latter made appointment with him to meet him which he did not keep and also gave a false address where the deceased was unable to find him. These entries show that the deceased was anxious to be in touch with the accused, but the accus-

ed was avoiding the deceased. From the evidence of P. W. No. 15, Upendra Chandra Ghose, a Sub-Inspector of Police and P. W. No. 16, Jinnatali, a constable, it appears that the deceased, while in Calcutta, was watching premises No. 100, Ward Institution Street, at Maniktola, along with other Police Officers, that they did so for the whole of February and up to the middle of March 1924 and two persons were arrested of whom one was the aforesaid Ananta Singh. It would seem that the object of the watch was to arrest absconders in a case which is described in the evidence as the Chittagong Robbery case in which Ananta Singh was an accused, and that in the course of the search of the aforesaid premises certain explosives were found which resulted in a case which is described as the Maniktola case. Apart from the dying declaration which I shall deal with hereafter and in which the accused is said to have declared that the deceased was a dangerous man for what he had done in the matter of the aforesaid two cases, the only other evidence as to the previous connection between the two is to be found in the deposition of P. W. No. 11, Shama Charan De, who states that on Saturday the 24th May 1924 at 7 or 8 A.M. in the morning the deceased had asked him to tell the accused that he wanted the latter to meet him that afternoon. This request suggests that it was not an altogether unusual thing that the two would meet. There is also the statement of the deceased contained in his dying declaration that he had met the accused twice or thrice before. The learned Judge pointed out to the jury that the name of the accused was not amongst those the deceased had been sent to Calcutta to enquire about, that there was no connection of a criminal nature proved between Ananta Singh and the accused,

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and there was nothing else beyond this that they were both political suspects, that they were friends and neighbours and both had been seen exercising together in a gymnasium. The learned Judge rightly warned the jury that the evidence referred to above is of little or no value as indicating a motive strong enough to prompt the accused to take the life of the deceased. As the learned Judge put it to the jury the "corner-stone of the prosecution case regarding motive" is the statement in the dying declaration, to which I have referred and for corroborating which the said evidence is only useful.

Turning now to the second group of evidence, it consists of the testimony of nine witnesses, namely, P. W. No. 2, Rai Bahadur Satis Chandra Sen, P. W. No. 4, Nalini Kumar Choudhury, P. W. No. 5, Rajani Kanta De, P. W. No. 6, Biseswar Das, P. W. No. 7, Dharendra Nath Moitra, P. W. No. 8, Rasik Chandra Bhattacharjya, P. W. No. 9, H. L. Black, P. W. No. 10, D. W. N. Coulter and P. W. No. 12, Pramatha Kumar Das. Of these so far as can be made out from the evidence the first to arrive on the scene were P. W. No. 5 and P. W. No. 6, the two excise peons, who came from the house of the Excise Superintendent just on the east of the field and separated from it by a road intervening. Their evidence is to the effect that on hearing shots, after a little delay sufficient to fetch a light, they went to a group of trees, found the deceased lying on the ground there and carried him or assisted him on to the road. P. W. No. 5 says he asked the deceased what had happened and the deceased replied that Premananda had shot him, that he and P. W. No. 6 then raised him and asked him "which Premananda?" and the deceased replied, "son of Harish Dutt." P. W. No. 5 gives practically

similar evidence and says that the deceased said: "Premananda has shot me, Premananda has shot me," and that as he and P. W. No. 5 were bringing the deceased along and while still in the field, he, *i.e.*, P. W. No. 6 asked him "which Premananda?" and the deceased replied, "Harish Dutt's son Premananda." Next came to the spot three witnesses—the exact order of their arrival being not very clear—P. W. Nos. 4, 7 and 8. These witnesses came from the house of Babu Manaranjan Moitra, the Personal Assistant of the Commissioner, which lies in a south-westerly direction from the alleged place of occurrence. Of these P. W. No. 4 is a clerk in the Traffic Manager's Office of the A. B. Railway, P. W. No. 7 is a gentleman who had then applied to be enrolled as a pleader and P. W. 8 is the Sadar Kanungoe of Chittagong. They came to the spot and saw the deceased being either raised or helped along towards the road. P. W. No. 4 says that when he was helping the deceased to go towards the road, when near some low-lying land, he said that Premananda had shot him, and that on the road some one asked him "which Premananda?" and he said "Premananda, son of Harish Dutt." P. W. No. 7 says that when the deceased was being taken along he followed the deceased, that the deceased sat down near a gate and then said Premananda had shot him, that he himself did not ask any question, but some one asked the deceased "who is Premananda?" and in answer the deceased said "son of Harish Dutt." P. W. No. 8 gives similar evidence. P. W. No. 2 appears to have arrived when the deceased was on the road. He is the Government Pleader of Chittagong and his house is to the east on the other side of the road, a little to the south of the Excise Superintendent's Bungalow. He

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says that he found the deceased lying on the road, bleeding and he was very much upset and said "what has happened?" and that the deceased replied that Premananda Dutt had shot him. P. W. No. 9 and P. W. No. 10 arrived almost together as appears upon the evidence of the former. P. W. No. 9 is an assistant of Messrs. Bulloch Brothers and came from his Bungalow which is at some distance to the south, and P. W. No. 10 is the Town Inspector of Police whose Bungalow is on the west of the field. When these witnesses came the deceased was lying on the road. P. W. No. 9 says that he as well as P. W. No. 10 asked the deceased the name of the assailant, that this they did before the carriage, into which he was put for removal to his Bungalow, moved on, and that the deceased gave a name which he could not catch. P. W. No. 10 says that the deceased, when he was in P. W. No. 9's Bungalow gave the name as "Premananda Dutt, son of Harish Chandra Dutt." He said the deceased had told him before that he had recognised his assailant and he had then asked for the name but before the deceased had time to reply he was in conversation with P. W. No. 9. The last of the witnesses is P. W. No. 12 who is the Sanitary Inspector of Chittagong and lives in a house behind the house of the Government Pleader. He arrived when the deceased was being helped into the gharry in front of the Excise Superintendent's house. He says he went up to the deceased and heard him say, "How often must I repeat this," and that he heard the name of Premananda only. The meaning of this last mentioned statement is not very clear. He says he remained beside the carriage till it was taken away, that he did not hear any question put to the deceased as to who his assailant was

or his father's name and he did not hear mention of the name of Harish Chandra.

I have set out the evidence somewhat in detail in view of the contention which was put forward in the Court below and which has also been repeated before us to the effect that in view of the discrepancies and conflicts that appear in the evidence as to the circumstances attending the mention of the names of Premananda and of his father it should be held that the deceased did not give out the names or that at any rate it is very doubtful that he did. So far as this question is concerned the chief argument of the defence has been directed to show that there are discrepancies and contradictions as to the exact place or places where the deceased gave the name of the accused or his father. The evidence of these witnesses has also been criticised in respect of other matters as well that are to be found in their depositions, notably the contradictions between P. Ws. Nos. 4, 7 and 8 on the one hand and P. Ws. Nos. 5 and 6 on the other, the latter apparently denying that the former came to the spot when they were helping the deceased to walk up to the road, the conflicts as to the persons who were carrying the lights and the uncertainty suggested by some of them as to whether there were two excise peons or one. On the other hand the witnesses, judging from their position and character, are persons to whom no suspicion of bias or prejudice can reasonably be attributed. Allowance must be made for the state of their mind, having regard to the suddenness and horror of the crime and the confusion that it naturally caused. On a consideration of all the circumstances and not forgetting at the same time the improbability of every single person coming up to the deceased and making him repeat the name and father's name of the

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assailant, I think, on the whole it may be safely held that the deceased did in fact give out the name of his assailant and his father's name as well.

It is convenient to deal here with some of the other arguments which appear to have been advanced on behalf of the defence in the Court below and some of which were also put forward before us as to the naming of the assailant by the deceased at this time. It was argued that the deceased may have been inspired to give out the name, and that it was Inspector Coulter or some other Police Officer who was responsible for the inspiration. As for Inspector Coulter what is suggested in effect is this: that the occurrence took place not at the place where the three trees grow but at a place under a mango tree which is somewhere to the south of the Inspector's Bungalow; what basis there is for such a suggestion I propose to say later on; that he was then helped to go or taken to the place where the three trees grow, and Inspector Coulter's apathy is criticised as suggesting that he had a hand in such removal in the course of which he had an opportunity to put the name into the mouth of the deceased. Reference in this connection was made to the fact spoken to by him in his evidence that he did not come to the spot till sometime after the occurrence and that he spent ten minutes in getting his rifle out of a box; and comment has also been made on the fact that he did not display any anxiety to send the deceased to the hospital. The inference sought to be drawn is hardly justifiable and nothing appears on the record which would suggest that the charge levelled against the Inspector had the slightest foundation in fact. As regards the other Police Officers, the evidence is sufficiently clear to the effect that one of them, P. W. No. 21, Sub-

Inspector Benimadhub Choudhury, was not at Chittagong at all on that night and the only two other officers stationed there, namely, P. W. No. 19, Sub-Inspector Sarafatulla and P. W. No. 20, Sub-Inspector Sachindra Kanta Bhowmik, were at the Thana when the telephone message gave them the first intimation of the occurrence. Taking into account the evidence of P. W. No. 22, Dr. Lees, and also the other evidence on the record bearing upon this point, there can be no room for doubt that the name had been given by the deceased before these Police Officers even came to know of the occurrence. Certain circumstances were pointed out on behalf of the defence to show that P. W. No. 19, Sarafatulla and P. W. No. 20, Sachindra Kanta Bhowmik, were not at the Thana at that hour; but to my mind, they do not lead to such a conclusion. Reading the evidence as a whole, there can be no doubt that the deceased did give out the name before any interested person could possibly have had any access to him.

This giving out of the name of the assailant, however, in the peculiar circumstances of the case and in the absence of anything further, would not necessarily show or conclusively prove that the shots were actually fired by the person who was so named. It is an admitted feature of the prosecution case that the deceased and the accused were to meet by appointment. Whatever conflict there is between the dying declaration on the one hand and the evidence of P. W. No. 11, Shama Charan Dey, on the other as to the circumstances connected with this appointment—a conflict to which I shall refer when dealing with the dying declarations itself—there can be no question that the deceased was expecting to meet the accused at the *paltan* field at about 7 P.M. that evening. P. W.

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No. 14, Srikantha Chakravarti, Inspector of Police, says in his evidence that on the date in question at about 6-30 P.M., he went to the Police Club and met the deceased there, that he was with the deceased for 15 or 20 minutes and the deceased then went away after asking him if it was 7 P.M., and on his replying that it was nearly so, and that the deceased said he had to go and meet a gentleman. The deceased evidently came to the place and at the hour appointed and if after waiting for some time he came to be shot it is only natural that regard being had to the character of the man he was there to meet and for whom he was waiting recognition or no recognition—he would name the man as his assailant. It was not a moment when one, shot thrice on vital parts of his body, could be expected to calculate and discriminate between what one has seen with his eyes and what one honestly believes as being what must have happened. The name of the accused was uppermost in his mind and it is not unreasonable to hold that situated as the deceased then was he would not find it necessary to make a distinction between the man who had shot and the man who was responsible for the shooting. The evidence of P. W. No. 2, Rai Bahadur Satish Chandra Sen, is to the effect that it was a very dark night, the moon would rise about six hours after sunset and it was a cloudy night, the first part of the night was very dark and one could not identify another person without a light within 2 or 3 feet. There is also a body of evidence on the record that many of the people that came to the spot did not start until they got their lanterns. To my mind therefore the mere fact that the deceased gave out the name and father's name of the accused does not carry the case very far, certainly not far

enough to bring the offence home to the accused. The third item of evidence, to my mind, is the most material one. To that we must look, as affording an adequate motive for the offence, the details of the occurrence and the circumstances which would go to show that the deceased had opportunities to recognize and did in fact recognize his assailant. If this dying declaration can be relied upon, the case becomes a clear one and no reasonable doubt can possibly arise as to the guilt of the accused. So far as the dying declaration is concerned the learned Judge has not clearly dissented from the opinion which the jury formed of it. The foreman of the jury stated: "We find that the statements in the dying declaration are vitiated by these having been elicited as a result of question and answer." The learned Judge in his letter of reference observed with regard to this matter as follows:—"The point has been fully discussed in the charge to the jury, and it is a finding against which I am diffident in expressing a contrary opinion." He makes his position quite clear in these words: "I consider it unnecessary to enlarge on this question as my position is that the statements of Prafulla Babu to the above-mentioned witnesses are sufficient to establish the guilt of the accused, and even if the evidentiary value of the statement recorded by the Sub-Divisional Magistrate is impaired or even altogether destroyed, by a conviction that it was mainly or entirely the result of leading questions, such a finding cannot alter the fact that those previous statements were made." He thus relies for his recommendation not upon the dying declaration but upon the statements made previously by the deceased to or in the presence of the witnesses. With this, I regret, I cannot agree. As I have said the dying declara-

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tion must be referred to for the solution of the difficulties as to motive and as to recognition. The learned Standing Counsel has asked us to rely upon such portions of the dying declaration as may be taken to have been made not in pursuance of any leading question, or such portions of it as are corroborated by other evidence. In my opinion a dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. In the case of a dying declaration which by the law of this country assumes a character very widely different from what it is under the English law, which is relevant under the Indian Evidence Act, whether the person who made it was or was not at the time when it was made, under expectation of death, and the weight to be attached to which depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not. There is high authority for the proposition that "where a statement is not the *ipsissima verba* of the person making it but is composed of a mixture of questions and answers, there are several objections open to its recep-

tion in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statements." [*Per Cave, J., in R. v. Mitchell* (1)]. The Sub-Divisional Officer Mr. Satish Chandra Majumdar was examined as a witness, being P. W. No. 3. He stated that such unimportant words or questions as "go on" or "and then," "what else," "on what topic," may have been asked by him. He stated that very few questions and only the unimportant ones were left out. He stated that it was not necessary to put down all questions in recording a dying declaration, and he did not consider it necessary to put down a question "do you know so and so" or "have you met so and so." As to certain specific statements he was positive that they were not made in answer to any question of his, and he also said that before the deceased said that Shama Charan was a shop-keeper he may have put a question to him to elicit who this Shama Charan was. It is unnecessary to refer to other portion of his evidence. The jury heard him and they had also the record of the dying declaration before them and it was a matter entirely within the province of the jury as to what value they should attach to it. The matter could be

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left to the jury in no better words than those of the learned Judge: "If you consider the statement was elicited as a result of leading questions, that is to say, questions suggesting answers, if you believe this against the word of the Sub-Divisional Officer then you are bound to regard the statement with the gravest suspicion, to the extent even of refusing to give it any credence at all, because unless such questions are recorded it is impossible for a tribunal sitting in consideration of the evidentiary value of the statement, to assess how much, if any, of it is the voluntary outcome of the man's own mind and volition, and how much is the result of such suggestion." The jury, as I have said, had the record of the declaration before them. They had also before them the fact proved in this case that before the deceased made the statement, outsiders and Police Officers had ample access to him. If therefore the jury were not prepared to rely upon the declaration it is hardly a matter upon which we can dissent from them when dealing with the case under sec. 307, Cr. P. C.

There are also certain other arguments which have been advanced before us and to them I desire shortly to refer. It is urged on behalf of the defence that the dying declaration is at variance with the other evidence on the record, and it should not therefore deserve that sanctity which might otherwise attach to it as being the statement of a man who was about to die. In the first place it is pointed out that the deceased spoke of a mango tree as being the tree under which the shots were fired and it is pointed out that the only mango tree there was the one on the south-east corner of Inspector Coulter's house, and it is pointed out that the deceased upon his own statement knew the place very well and was hardly likely to mis-

take the three *jungly* trees for a mango tree. In support of this point, reference is also made to a passage in the deposition of P. W. No. 5 who says as follows:—"I saw a man run and fall down and another man running away to the north-west. I saw a figure fall and a figure in white running. I did not see actually a man fall. It looked like something falling." It is said that this lends support to the defence suggestion that the occurrence did not take place under the three trees. Next it is said that whereas the deceased said in his declaration that he was sitting under the tree and the accused shot him standing, P. W. No. 9, Black, in his evidence stated that the deceased had told him that the man who shot him was walking with him and talking with him on the golf maidan. It is next said that the statement of the deceased that he met the accused in front of Satish Babu's house at 7 P.M., is falsified by what has been spoken to by Satish Babu and the Excise Peons. It is urged that the accused was not in the habit of wearing shoes and in support of that reference is made to the evidence of P. W. No. 2 and P. W. No. 9. Comment is also made as to the non-examination of Mr. Kelly, Mr. Makean, Mr. Shallow, the coachman and some other witnesses. It is urged that the place is a much frequented one and also that the Rai Bahadur's horse is groomed there, so that it was not a likely spot to be used either for the crime or for the purpose of sitting on the ground. It is unnecessary to deal separately with these matters. Most of them to my mind present no real difficulty and are easily explicable.

There are, however, two matters which present some difficulty to my mind—I shall not say that it is altogether an insurmountable difficulty. The deceased

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said that the day before the accused sent information to him through Shama Charan he had business with him and had asked him to meet the accused at the spot. In answer to a question as to what Shama Charan told him, he stated: "Babu, Premananda wanted you to meet him in that place." So there can be no mistake that the deceased meant to convey that the accused sought for an interview with the deceased through Shama Charan and requested him to be at the spot at that hour. P. W. No. 11, Shama Charan, is equally positive that no such thing took place. He is positive that he had no talk with the accused at any time on Sunday. He says that on Saturday, 24th May, he met the deceased about 7 or 8 A.M. in the morning and the deceased requested him to ask the accused to meet him that afternoon, i.e., on Saturday. There is therefore a conflict which it is hard to reconcile. It may be that a satisfactory explanation of it is obtainable; but there it is and it may have weighed with the jury. The next thing is this. If the accused sought for an interview with the deceased, and came there fully prepared and armed to shoot him to death, would he wait in the way suggested and be conversing with him all the time on various matters and then tell the deceased why it was that he was about to kill him and think it necessary to acquaint him with the fact that he was a dangerous man, that he had caused the Manik-tala case to be detected and Ananta Singh arrested and then fire the shots. It is not altogether impossible that such a conversation took place but it is certainly somewhat improbable and may have seemed to be so to the jury.

There remains to notice one further point which the defence sought to make in this case. P. W. No. 11, Shama

Charan, in his evidence stated that he met the accused on the evening of the occurrence at the time of candle-light just as the lights had been lit. He states that he then met him in front of his shop on the road, and there was a man, one Bimal Babu, with him. Bimal Babu was pushing a bicycle and the accused was walking slowly beside him. He also states that he met the accused again shortly before or shortly after nine o'clock and that he came from his house towards his shop and stayed there a couple of minutes. He states further that before the accused came Benoy had come to his shop and purchased some cigarettes and that the accused came and took one from him. It is sought to be shown from this evidence that the accused could not have been at the place of occurrence at the time suggested by the prosecution and that Benoy Babu, who was a witness on the charge-sheet, was withheld by the prosecution. In the absence of any further data it is not possible to appreciate the exact significance of this evidence.

On the whole therefore there were matters before the jury upon which they might have felt themselves unable to convict the accused and I am not prepared to hold that their verdict under the circumstances was an unreasonable one, such as would justify our refusal to accept the same. Most of the reasons given by the foreman in support of the verdict may not commend themselves to us or may not be very convincing but the reasons that the foreman gave need not necessarily be taken as constituting all the grounds which he and the other jurors may have had for their verdict. It is well-known that even trained minds find it difficult when asked off-hand to formulate all the grounds which they may have in support of an opinion which they may have form-

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ed. After all, what we have got to find before we can refuse to accept the verdict of the jury in a case under sec. 307, Cr. P. C., is that the verdict is unreasonable. In the present case it is not possible to say that the verdict of the seven jurors who sat at the trial was an unreasonable one.

The result is that in my opinion the verdict of the jury should be accepted. The reference should be rejected and the accused should be released.

GREAVES, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OGDH.]

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.
1924,
Heard, 24, 27, October.
Judgment,
17, November.

FATEH SINGH
and ors.,
Appellants,
v.
JAGANNATH
BAKHSI SINGH
and another,
Respondents.

Civil Procedure Code (Act V. of 1908), sec. 11, Expt. IV, Or. 23, rr. 1 and 2—Suit by remote reversioner to declare alienation by Hindu widow invalid—Case of collusion between immediate reversioner and widow given up and no case of title by family custom to sue made till death of widow pending suit—Amendment to change suit to one for recovery of possession upon title by family custom refused—Dismissal of suit by Court with liberty given to Plaintiff to bring fresh suit for possession—Order, if valid—Fresh suit for possession on basis of family custom, if lies—Res judicata.

Plaintiffs who were remote reversioners expectant on the death of a Hindu widow, one G being the immediate reversioner according to law, sued her grandson J for a declaration of the invalidity of a deed of gift by the widow to the latter and in reply to J's defence that G and not the Plaintiffs had the right to sue maintained that G

was colluding with the widow. They did not in their pleadings claim to be by family custom equal in degree with G, until the widow having died in the course of the suit, they applied for amendment of their plaint praying for recovery of possession of a certain share on the additional averment that according to a family custom they and G were equal reversionary heirs. The amendment was refused and on the admission of the Plaintiffs' Counsel that apart from custom their suit must fail, the Court dismissed the suit, but in the course of the judgment the Court stated, "The death of the lady has given the Plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession," though there was no application by the Plaintiffs to withdraw the suit and the suit was dismissed and not withdrawn:

Held—That to establish their title to impeach the widow's gift, the Plaintiffs might and ought to have set up and proved the family custom, since they did not rely on collusion between the widow and G and a subsequent suit by them to recover possession on the strength of the alleged family custom was barred by Expt. IV to sec. 11 of the Civil Procedure Code.

DOORGA PERSAD SINGH v. DOORGA KONWARI (2), ZEMINDAR OF PITTAPURAM v. PROPRIETORS OF THE MUTTA OF KOLANKA (4), MUSSUMMAT CHAND KOUR v. PARTAB SINGH (5) and KAILASH MONDUL v. BARODA SUNDARI DAS (6) considered and observation of Banerjee, J., in KAILASH MONDUL v. BARODA SUNDARI DAS (6) commented on.

- (2) L. R. 5 I. A. 149. s. c. I. L. R. 4 Cal. 190 (1878).
- (4) L. R. 5 I. A. 206: s. c. I. L. R. 2: Mad. 23 (1878).
- (5) L. R. 15 I. A. 156: s. c. I. L. R. 16 Cal. 98 (1888).
- (6) I. L. R. 24 Cal. 711 (1897).

FATEH SINGH v. JAGANNATH BAKHSH SINGH.

That the previous suit having been dismissed by the Judge he had no power to give leave to institute a fresh suit on the same matter.

This was an appeal from a decree, dated the 6th February 1923, of the Court of the Judicial Commissioner of Oudh, which affirmed a decree, dated the 14th July 1921, of the Court of the Subordinate Judge of Bahraich.

The suit was brought by the Plaintiffs as reversioners and presumptive heirs of Raghunath Singh, a Hindu, who died in 1892 and was succeeded by his widow Musammat Har Kunwar. In 1908 the widow executed a deed of gift of the whole of the property in favour of her daughter's son Jagannath Bakhsh Singh, the present first Respondent. In 1908 the present Appellants and others brought a suit to have the gift declared void. Pending the hearing the widow died and the Plaintiffs thereupon applied to amend their plaint by adding a claim for possession of the property under a family custom.

The Subordinate Judge refused the amendment and dismissed the suit with costs.

In his judgment he said :—

"The death of the lady has given the Plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession."

Further litigation ended in a compromise and the suit under appeal was brought in 1921 alleging the custom and praying for possession. The Defendants pleaded that the claim was barred by *res judicata* under sec. 11, Expl. IV of the Code of Civil Procedure, 1908.

This plea was upheld by both Courts in India who dismissed the suit.

Mr. DeMello for the Appellants.

Mr. Parikh for the Respondent No. 1 and Mr. Dubé for the Respondent No. 2 were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This is an appeal by the Plaintiffs from concurrent judgments against them given by the Subordinate Judge of Bahraich and affirmed by the Court of the Judicial Commissioner of Oudh.

It is a suit for possession of land, in which the Defendants and present Respondents raised as a first defence that the matter was *res judicata*, having already been decided between the same parties.

Both Courts being of this opinion and having determined this issue, found it unnecessary to determine any of the other issues and dismissed the suit.

The history of the case is as follows : The present Appellants and Plaintiffs with others filed a suit in July 1908, against one Musammat Ram Kunwar, and the present Defendant and Respondent Jagannath Bakhsh Singh, and one Ganga Bakhsh, now represented by the Defendant and Respondent Bishunath Singh, in which they stated that Musammat Ram Kunwar, being a Hindu widow, was in possession of her husband's property for the ordinary Hindu woman's estate, that they (the Plaintiffs) and Ganga Bakhsh were the presumptive heirs of her husband, and that she, intending to defeat their succession, had purported to make a deed of gift of the property to Jagannath Bakhsh, her daughter's son; and they claimed that the deed of gift might be declared void and illegal against them.

The Defendants in that suit among other defences pleaded that the Plaintiffs

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were not equal in degree with Ganga Bakhsh, but that he was the nearest reversioner and the only person entitled to dispute the deed of gift. To this the Plaintiffs replied that if he were the nearer heir—

“even then the Plaintiffs are entitled to maintain this suit on account of Ganga Bakhsh Singh's denial and his not joining the suit, owing to his indifference towards the preservation of his rights, having regard to his views expressed in the written statement and on account of his colluding with the Defendants Nos. 1 and 2; and the Defendants Nos. 1 and 2 cannot derive any benefit by setting up a *ius tertii* in favour of Ganga Bakhsh Singh, as alleged by them.”

In this state of the pleadings the widow died.

A suit for a declaration that a gift by a Hindu widow is void as against the reversionary heirs of her husband is one which is contemplated by the Specific Relief Act (Act I of 1877, sec. 42), as is shown by the explanation lettered (c) to that section. But it is established that such a suit is *prima facie* competent only to the nearest prospective reversioner, and that if a more distant relation claims to sue, he can only maintain his suit by showing that the nearer reversioner has colluded with the widow, or for some similar reason.

The rule of law on this subject is stated in the case of *Rani Anund Koer v. The Court of Wards* (1) in the following terms:—

“Their Lordships are of opinion that though a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. . .

The right to sue must, in their Lordship's opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue.”

When the widow died, the question of collusion between Ganga Bakhsh and her became comparatively unimportant. By this event the question of reversionary heirship became settled, and if Ganga Bakhsh was the nearest heir, the Plaintiffs could get no title to the property. They might indeed have brought their suit for declaration to a hearing for the purpose of determining in that suit the question of heirship as between them and Ganga Bakhsh, or to establish their averment of collusion in order to get the costs of the suit. But now that the widow was dead the real matter was to get possession; and they accordingly endeavoured to turn their suit into one for possession.

It seemed, however, that if according to the ordinary Hindu law of descent, Ganga Bakhsh was the heir, to the exclusion of the Plaintiffs, that they must fail in such a suit. They were minded accordingly to make a new case, namely, that by a family custom they were equal in degree with Ganga Bakhsh and entitled as such to maintain a suit for possession.

Accordingly, they made an application in the suit setting forth the death of the widow and claiming that they had become entitled to institute a suit for possession, and that in order to show their right it had become necessary to mention certain additional averments of fact in the plaint, the additional averments being allegations of the family custom and a

(1) L. R. 8 I. A. 14 (1890).

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statement as to the death of the widow, and the new relief claimed being a decree for possession of a ten-anna share in the property.

This application to amend came on for hearing on the 15th March 1909, and the learned Judge rejected the application to be allowed to add the amendments averring the family custom, holding that it was an attempt to introduce a new case. When he had intimated that this was his opinion, the question remained whether the Plaintiffs should be allowed to add their prayer for possession, and whether it was worth while continuing the suit. It was admitted by the Plaintiffs' Counsel that, apart from custom, they were one degree more remote than Ganga Bakhsh, and that if they could not make the case of a family custom, their suit must fail; and the learned Judge thereupon dismissed it with costs; and from this decision there was no appeal. He did, however, in the course of his judgment use the following expressions, which will need consideration:—

"The death of the lady has given the Plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession."

The Plaintiffs took no further steps till the 5th February 1921. In the meantime one of the present Defendants brought an action against the other; and the parties compromised on the terms of each taking one-half.

In the present suit brought on the 5th February 1924, the Plaintiffs are claiming possession of one-half of the property, founding their title on family custom. To this the Defendants, besides denying the custom and asserting the validity of the widow's gift, have pleaded that the suit was barred by sec. 11 of the Code of Civil Procedure as raising a question

which had already been heard and decided. Both Courts, as already stated, took this view, and without going into other portions of the case, dismissed the suit. In their Lordships' opinion their decisions were right.

The language of the section in question is as follows:—

"No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

With this must be read:—

"Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

When the Plaintiffs brought their first suit, they had to show their title to impeach the widow's gift. For this purpose they had to show either that they were some at least of the nearest reversionary heirs, or that the only nearer reversionary heir had colluded with the widow. In their plaint they did not rely on collusion, which they only introduced in their replication. Taking, however, that view of the pleadings which is most favourable to them and treating them as relying equally on both grounds of claim, it is now clear that they can only make out a claim to be some of the next reversioners on the footing of the family custom, and that the allegation of that custom therefore was an allegation which "might and ought to have been made" within the meaning of Explanation IV.

Or, to put it in another way. One of

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the alternative cases on which they were basing their title to sue was their nearness of kin, and to prove their nearness of kin it was essential to aver the family custom. They claimed as next heirs, and their claim was dismissed. They cannot fight it over again.

But, as the Judges in the Court of the Judicial Commissioner have observed, some complication was introduced by the language of the Judge who tried the first case and by thus expressing himself as if he had power to give leave to bring a fresh suit. It was contended on behalf of the Plaintiffs that in so expressing himself he was purporting to exercise the powers given to the Court by Or. 23, which allows the Court in certain cases to grant the Plaintiff permission to withdraw from a suit with liberty to issue a fresh suit, in which case the bar against a fresh suit which is otherwise imposed on a Plaintiff who abandons his first suit is removed.

The same point was raised at their Lordships' bar, but their Lordships agree with the Court of the Judicial Commissioner that it is not a good one. There was no application for leave to withdraw the suit, nor was it withdrawn: it was dismissed. And the power of the learned Judge ceased upon this dismissal. It may have been unfortunate for the Plaintiffs that the learned Judge thought that he had a power which he did not possess, but happily, as the Judges on the appeal observed, it is improbable that there was substance in the claim which they have been prevented from further prosecuting.

In passing it may be observed that if the learned Judge thought that he was exercising power under Or. 23, he must also have thought that the subject-matter of any future suit would be the same subject-matter as that of the suit which he dismissed. This confirms the view which the

Courts below and their Lordships have taken.

Several authorities upon the construction of sec. 11 of the Code of Civil Procedure were cited, which it was suggested put a construction on Exp. IV which was favourable to the Plaintiffs. They have been considered by their Lordship, but, in fact, they have no bearing upon the present case.

Perhaps the one which requires the most careful examination is that of *Doorga Persad Singh v. Doorga Konwari* (2), because in that case their Lordships intimated that the Plaintiff would not be barred from setting up a family custom of descent upon the death of a widow by reason of his having in a previous suit in which he was a Defendant averred the family custom as entitling him to oust the widow during her life and having failed on this point. But they held that as to the immediate point then under consideration he was barred, and after citing a very strong passage from *Udaya Tarai v. Katama Nachiar* (3), they proceeded to express themselves as follows:—

“If the Defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time.”

In *Zemindar of Pittapuram v. Proprietors of the Mutta of Kolanka* (4) the Plaintiff had brought a previous suit which had failed against his grandfather's widow and certain other Defendants; and some of the Defendants to the second suit might have been held to be successors-in-title to

(2) L. R. 5 I. A. 149: S. C. I. L. R. 4 Cal. 190 (1878).

(3) 11 Moo. I. A. 50, 73 (1886).

(4) L. R. 5 I. A. 206: S. C. I. L. R. 2 Mad. 23 (1878).

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some of the Defendants in the previous suit. But in the view which the Judicial Committee took of the facts, there were three properties concerned in the first suit, (1), (2) and (3), and numbers (1) and (2) were not in question in the second suit; while as regards number (3) no case was made in the first suit affecting the Defendants in the second suit, and the only way in which number (3) came into the first suit was because the Plaintiffs at that time sought to restrain the widow (since dead and not a party to the second suit) from waste. This being so, nothing had been decided in the first suit which affected the question of the title of the Plaintiff to property number (3), and as to it, there was held to be no case of *res judicata*.

Mussummat Chand Kour v. Partab Singh (5) was a suit by reversionary heirs alleging the intention of a widow to injure their right by selling or mortgaging the property, which failed, and then a second suit to set aside an actual deed of gift. This second suit was upon the construction of the earlier Act then in force, held to be a suit upon "a different and subsequent cause of action to that relied upon in the first suit." It may be added that in that case the failure of the first suit was caused by the non-appearance of the Plaintiff at the trial, and inasmuch as the first suit might have failed in either of two respects (either the Plaintiff might have no title or the widow might not have been threatening to sell or mortgage), a mere dismissal for non-appearance could not be held to determine that the Plaintiff had failed for want of title.

Lastly, their Lordships would refer to the case of *Kailash Mondul v. Baroda*

(5) L. R. 15 I. A. 156; s. c. I. L. R. 16 Cal. 98 (1888).

Sundari Dasi (6), decided in the High Court at Calcutta. In that case the Plaintiff had sued the Defendant for rent, and the Defendant had pleaded abatement and had adduced no evidence in support of his plea, so that the Plaintiff recovered judgment. Many years after the Plaintiff sued the Defendant for the rent subsequently accruing, and the Defendant sought to raise various defences. It was contended, and so held in the lower Courts, that the matter was *res judicata*, and concluded in favour of the Plaintiff. But the High Court held that it did not follow because rent was due from the Defendant in one year that it was necessarily due in later years; and this seems obvious, for the position of either of the parties might have changed. Maclean, C. J., said that it might be that on looking further into the matter some particular issue might be found to have been previously decided, and then the principle of *res judicata* might apply; but that as the matter stood it did not necessarily so appear. Banerjee, J., it is true, made some observations upon those words "heard and finally decided," which appeared in the old Act and are in the present Code; and to these observations, couched in language not so careful as it might have been, undue prominence has been given by the reporter in the summary of the case which appears in the head-note. But in the actual decision there is no conflict with the established authorities.

The other cases which were brought by the learned Counsel for the Appellants before their Lordships have, in their Lordships' judgment, no bearing upon the present decision. Upon the whole, therefore, their Lordships agree with

(6) I. L. R. 24 Cal. 711 (1897).

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the Courts below that this is a case of *res judicata*, and that the defence succeeded.

Their Lordships will therefore humbly recommend His Majesty that this appeal should be dismissed with costs; but the Respondents must have only one set of costs between them. •

Solicitor: Mr. E. Delgado for the Appellants.

Solicitors: Messrs. T. L. Wilson & Co. for the 1st Respondent.

Solicitor: Mr. H. S. L. Polak for the 2nd Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

Full Bench Reference

No. 3 of 1924.

WALMSLEY, J.

NEWBOULD, J.

C. O. GHOSE, J.

SUHWARADY, J.

B. B. GHOSE, J.

1925,

Heard, 27, April.

Judgment,

6, May.

PURNA CHANDRA
CHATTERJI, Plaintiff,
Appellant,
v.

NARENDRA NATH CHOU-
DHRY and ors., De-
fendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 105, 109—Application for settlement of fair rent under sec 105 withdrawn with leave to sue in Civil Court—Effect—Suit for enhancement, if lies.

Per CURIAM (SUHWARADY, J., dissenting)—When an application for settlement of rent is made under sec. 105 of the Bengal Tenancy Act and subsequently withdrawn, though with the permission of the Court, a suit on the same subject-matter (for enhancement of rent) is barred by the provisions of sec. 109 of the Bengal Tenancy Act.

This was a Reference to a Full Bench made by a Division Bench of this Court (Chatterjea, Greaves and Panton, JJ.),

dated the 1st December 1924, in Letters Patent Appeals Nos. 2 and 3 of 1924, which arose out of a difference of opinion in Miscellaneous Appeals Nos. 19 and 20 of 1923.

These appeals arose out of suits brought by the Appellant against the Respondents who were his tenants for enhancement of rent. In the record-of-rights the tenures were described as permanent, but *gar-mokurari*. The Appellant landlord thereupon presented an application for settlement of fair rent under sec. 105 of the Bengal Tenancy Act, but withdrew the application and obtained from the Settlement Officer an order permitting him to institute civil suits for the same purpose. The landlord then instituted the present suits, in which the defences set up by the tenants *inter alia* were (1) that the rents were fixed, and (2) that sec. 109 of the Bengal Tenancy Act was a bar to the suits. The Munsif, 1st Court of Barasat, Babu Biman Behari Sarkar, by his judgment, dated the 8th October 1920, rejected the second contention of the Defendants but was of opinion that the tenants who had proved over twenty years' payment of the same rent were entitled to a presumption that the rents were fixed under sec. 50 of the Bengal Tenancy Act. On appeal, the Subordinate Judge, 3rd Court of 24-Pergunnahs, by his judgment, dated the 7th August 1922, agreed with the Munsif in holding that sec. 109 of the Bengal Tenancy Act was no bar to the suits. On the other question he held that the presumption under sec. 50 of the Bengal Tenancy Act was excluded by the operation of sec. 115 of the Act. In the result he remanded the suits for the determination of fair rents upon evidence.

The tenant Defendants preferred Miscellaneous Appeals Nos. 19 and 20 of 1923 against the said order of remand, which

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came on for hearing before a Division Bench consisting of Walmsley and Subhawardy, JJ., who differed in opinion and on 22nd November 1923 delivered the following judgments :—

WALMSLEY, J.—These appeals are preferred by the Defendants and they arise from suits brought by the landlord for rent and for enhancement of the existing rents. The landlord's claim was made under sec. 7 of the Bengal Tenancy Act.

In the record-of-rights the tenures were described as permanent, but *gar-mokurari*. The Defendants asserted that the latter part of the entry was erroneous and that their rents were really fixed.

After the publication of the record-of-rights the landlord presented an application under sec. 105 of the Tenancy Act for the settlement of a fair rent on these tenures; but he withdrew the application and obtained from the Settlement Officer an order permitting him to institute civil suits for the same purpose.

Both the Courts below have held that sec. 109 of the Tenancy Act does not bar the suits on the ground that the application under sec. 105 was withdrawn with permission to bring civil suits. On the merits, however, they disagreed. In so far as the claim for enhancement is concerned, the first Court found that the Defendants were entitled to a presumption under sec. 50 of the Act, while the Appellate Court held that the Defendants could not claim the benefit of that presumption. The result was that the latter Court remanded the suits to the first Court for the determination of a fair rent. It is against these orders of remand that the appeals are directed.

The principal argument is that sec. 109 of the Tenancy Act does bar the suits. Two other arguments were put forward, namely, that the status of the Defendants

was that of *rayats* and that in suit No. 2 at any rate the evidence as to uniformity of rent is conclusive; but on examination of the record it appears that one of these arguments was not set out in the memorandum of appeal, and that the other is disposed of by the Judge's acceptance of the landlord's *jama wasil baki* papers.

On the principal question reliance is placed by the landlord on the case of *Soroj Kumar Acharji v. Umed Ali Howladar* (1). That case, however, is in opposition to other decisions of an earlier and a later date. There is the case of *Abeda Khatun v. Majubali Choudhury* (2) followed by the case of *Dino Nath Sikdar v. Anadi Krishna Dutt* (3)* in which the judgment was delivered by one of the Judges who decided *Abeda Khatun's* case (2). This later case is important because it shows that in the earlier case no emphasis was placed upon the absence of permission to withdraw—the point upon which *Abeda Khatun's* case (2) was distinguished in *Soroj Kumar Acharji's* case (1). Again there is the case of *Sasi Kanta Acharja Chowdhry v. Salim Sheikh* (4). I think therefore that the current of authority is against the view taken by the lower Appellate Court. So far as I am myself concerned, moreover, I am in the position that I was a party to the judgments in the case of *Dino Nath Sikdar v. Anadi Krishna Dutt* (3) and of *Sasi Kanta Acharja v. Salim Sheikh* (4) and I have not heard any argument which would induce me to change my views.

It is said that we ought to refer the case to a Full Bench, but I venture to think

(1) 25 C. W. N. 1022; s. c. 35 C. L. J. 19 (1921).

(2) I. L. R. 48 Cal. 157; s. c. 24 C. W. N. 1020; 33 C. L. J. 304 (1920).

(3) 28 C. W. N. 703 (1923).

(4) I. L. R. 50 Cal. 626; s. c. 27 C. W. N. 937 (1923).

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that the decisions to which I have referred make that course unnecessary.

In my opinion the appeals should be allowed, and the order of remand set aside.

My learned brother is of opinion that the appeals should be dismissed with costs. According to sec. 36 of the Letters Patent as explained in the case of *Bhaidas Shivdas v. Bai Gulab* (5) my opinion prevails with the result that the appeals are allowed with costs and the Plaintiff's suits for enhancement of rent are dismissed. The hearing-fee in this Court is assessed at one gold mohur in each case.

SUHWARDY, J.—I adhere to the view adopted in the case of *Soroj Kumar v. Umed Ali* (1) to which decision I was a party. The matter was further considered on the review from that decision and the same view was upheld. It is not necessary to repeat the reason on which our opinion was based.

I would therefore dismiss these appeals with costs.

[After the above judgments were delivered, the vakils for the parties were heard again on the question of the order to be made by the Court as the result of these dissentient judgments and the following judgments were delivered on the 8th January 1924 :—]

WALMSLEY, J.—After we had delivered our judgments and intimated that under sec. 36 of the Letters Patent, the opinion of the senior Judge would prevail, we were asked to hear arguments on this last point. It was urged that the decision which I have mentioned related only to appeals from the Original Side of this Court. It is true that the decision was in such an appeal, but I can find nothing in the

wording of the judgment to indicate that the rule is applicable to one kind of appeal and not to another.

My learned brother has examined the authorities with elaborate care and come to a different conclusion. It is only on account of the clearness, as I think, of the decision by their Lordships that I venture to differ.

We cannot continue to differ *ad infinitum* as to the effect of our difference; so, with my learned brother's assent, I direct that my opinion shall prevail, and that the appeals shall be allowed.

SUHWARDY, J.—We have differed as to the order to be passed in this case, my learned brother being for allowing the appeal while in my view it ought to be dismissed. Apparently and in accordance with the unvarying practice of this Court as well as all the other High Courts of India, this appeal should be dismissed under sec. 98, C. P. C., but it is argued, on the authority of the recent judgment of the Judicial Committee in the case of *Bhaidas v. Bai Gulab* (5) that this appeal should be decreed in accordance with the judgment of the senior Judge under cl. 36 of the Letters Patent of 1865 governing this High Court.

Before considering the Privy Council judgment above referred to it will be profitable to try and find the law as is to be found in the Letters Patent and the Code of Civil Procedure.

Cl. 15 of the Charter provides* for appeals within the High Court, *viz.*, from the judgment of a Judge of the High Court to a Bench of the same Court. Cl. 16 invests the High Court with Appellate Jurisdiction over the Provincial Courts. Cl. 36 regulates the procedure to be followed

(1) 26 C. W. N. 1023; s. c. 18 C. L. J. 19 (1921).

(5) L. R. 48 I. A. 181; s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

(5) L. R. 48 I. A. 181; s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

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in the case, among others, of difference of opinion between two Judges of the Court forming a Division Bench in the exercise of either Appellate or Original Jurisdiction. If this provision stood alone the Appellant's contention must prevail, but cl. 44 makes all the provisions of the Letters Patent subject to the legislative power of the Indian Legislature which was vested with similar authority by sec. 22 of the Indian Councils Act, 1861. It is therefore necessary to determine if the Legislature has by any subsequent enactment modified or superseded the provisions of cl. 36 of the Letters Patent.

Sec. 96 of the Code of Civil Procedure allows appeal not only from one Provincial Court to another but from a Provincial Court to the High Court which derives this jurisdiction under cl. 16 of the Charter. It has been held that sec. 96, C. P. C., concerns itself with cases not covered by cl. 15 of the Charter but in the application of the jurisdiction vested in the High Court by cl. 16, *Debendra Nath Dass v. Bibhudendra Mansingh* (6). If sec. 96, C. P. C., refers to the jurisdiction vested in the High Court by cl. 16 of the Letters Patent, sec. 98 which is in the same part as sec. 96 and a corollary to it *a fortiori* applies to such appeals. Sec. 117 of C. P. C. makes Part VII of the Code which includes sec. 98 applicable to the High Court and sec. 120 which excludes the applicability of certain sections to the High Court does not mention sec. 98 as one of them. It is therefore legitimate to suppose that to the extent to which sec. 98, C. P. C., is inconsistent with cl. 36 of the Letters Patent, the former has, by virtue of the power conferred on the Indian Legislature by cl. 44 of the Letters Patent superseded or modified the latter. No doubt sec. 4, C. P. C., saves provisions of other

(6) I. L. R. 43 Cal. 90 (93) (1916).

laws, in the absence of specific provision in the Code abrogating or superseding them. Such specific provision, so far as appeals to which the Code applies are concerned, is to be found in sec. 98 read with secs. 117 and 120 of the Code. This view has been consistently held by all the High Courts in India and formed subject of consideration by the Full Benches of Calcutta, Bombay and Allahabad, *Sri Giridhariji Moharaj Tickait v. Purusattom Gossami* (7), *Bhuta Valad Tayatsing v. Lakadu Dhansing* (8) and *Hussain Begum v. Collector of Mozaffernagar* (9). The Madras High Court has also adopted this view, *Narayanasami Reddi v. Osure Reddi* (10). It is redundant to observe that this practice has been invariably and uniformly followed by all the High Courts since the provisions as now embodied in sec. 98, C. P. C., found its way into the law of procedure of the Civil Courts of the land. In almost every volume of the Law Reports, instances of the application of sec. 98, C. P. C., are to be found. In the case of *Bibi Ahmedi Begum v. Tarak Nath Ghose* (11), the question of procedure was considered by Jenkins, C. J., at p. 424 and in *Mohunt Kissan Dayal Gir v. Irshad Ali Khan* (12), Mookerjee, J., at p. 538 accepted the same view. I may quote a few instances in this Court to show that the practice has been uniform since the Full Bench decision of *Sri Giridhariji Moharaj Tickait v. Purusattom Gossami* (7), the authority of which has to some extent been weakened by *Bhaidas's* case (5), but has not been

(5) L. R. 48 I. A. 181; s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

(7) I. L. R. 10 Cal. 814 (1884).

(8) I. L. R. 43 Bom. 433 (1918).

(9) I. L. R. 11 All. 176 (1889).

(10) I. L. R. 25 Mad. 548 (1901).

(11) 18 C. L. J. 399; s. c. 17 C. W. N. 1173 (1913).

(12) 22 C. L. J. 525 (1915).

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departed from even after the promulgation of the Privy Council judgment in that case. [*Mohendra Ch. Ganguli v. Ashutosh Ganguli* (13), *Lala Suraj Prosad v. Golab Chand* (14), *Ashutosh Roy v. Hari Narain Sing Deo* (15), *Bibi Ahmedi Begum v. Tarak Nath Ghose* (11), *Mohant Kissen Doyal Gir v. Irshad Ali Khan* (12), *Amrita Lal Roy v. Secretary of State for India in Council* (16), *Ram Narain Sing v. Chota Nagpur Banking Corporation* (17), *Cossipur-Chitpur Municipality v. The Corporation of Calcutta* (18), *Promotho Nath Pal Chowdhury v. Mohini Mohan Pal Chowdhury* (19), *Anilabala Chowdhurani v. Dharendra Nath Saha* (20), *Mohini Kanta v. Monindra Chandra* (21), *Biman Chandra v. Promotho Nath* (22) and *Uday Kumar Das v. Katyani Debi* (23).]

It is now necessary to consider the judgment of the Privy Council in *Bhaidas's* case (5). The suit out of which the appeal arose was tried on the Original Side of the Bombay High Court. There was an appeal under cl. 15 of the Letters Patent and the Division Bench, composed of two Judges, which heard it, was divided

in opinion, the Chief Justice being for allowing the appeal while the other learned Judge was for dismissing it. The Court apparently in view of the provisions of sec. 98, C. P. C., dismissed the appeal. In this state of the facts, their Lordships of the Judicial Committee were of opinion that sec. 36 of the Letters Patent applied to the case and not sec. 98 of the Code. The essence of their Lordships' opinion is that in the appeal before them, sec. 36 of the Letters Patent should have been applied. Though that opinion was expressed in wide and unrestricted terms, it must be taken to be confined to the facts of the case before them. It has been repeatedly urged to avoid abuse of application of precedents, to read a decision in conjunction with the facts of the case on which it is founded. The danger of regarding a decision based on a particular set of circumstances which were before the Judge's mind and formed the mould on which the proposition of law, however broadly stated, was shaped cannot be overrated and the law on the matter has been authoritatively laid down in *Karlinger v. Patagonia Meat Co.* (24) and *Quinn v. Leatham* (25). The Judicial Committee were considering a case under the Letters Patent and it would, according to the accepted canons of application of precedents, be misconstruction of their decision to extend its authority to appeals under the Civil Procedure Code, which were not then under their Lordships' consideration. This is patent from the arguments of Counsel at the Bar who cited authorities relating only to that particular class of appeals. This is also apparent from their Lordships' remark that the proposition they were laying down was not novel in India. Had their Lordships intended

(5) L. R. 48 I. A. 181: s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

(11) 18 C. L. J. 399: s. c. 17 C. W. N. 1173 (1913).

(12) 22 C. L. J. 525 (1915).

(13) I. L. R. 20 Cal. 762 (1893).

(14) I. L. R. 28 Cal. 517: s. c. 5 C. W. N. 690 (1901).

(15) 3 C. L. J. 143 (1905).

(16) 35 C. L. J. 221 (1918).

(17) I. L. R. 43 Cal. 332 (1915).

(18) I. L. R. 46 Cal. 910: s. c. 23 C. W. N. 727 (1919).

(19) I. L. R. 47 Cal. 1108: s. c. 24 C. W. N. 1011 (1920).

(20) I. L. R. 48 Cal. 577: s. c. 25 C. W. N. 178 (1920).

(21) I. L. R. 49 Cal. 661 (1922).

(22) I. L. R. 49 Cal. 886 (1922).

(23) I. L. R. 49 Cal. 945 (1922).

(24) [1914] A. C. 25 (40 et. seq.).

(25) [1901] A. C. 495 (506).

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that the view they were expressing was intended to qualify the interpretation put by the Indian High Courts on sec. 98, C. P. C., they would have surely expressed themselves in quite a different language, for as I have observed, all the High Courts in India had been unanimous in construing sec. 98, C. P. C., contrary to their Lordships' supposed opinion. Furthermore, their Lordships referred in support of their view to three Indian cases, the facts of which undoubtedly invoked the operation of cl. 36 of the Letters Patent. No reference is made to the Full Bench decisions of the High Courts in India holding sec. 98, C. P. C., applicable to cases from the Mofussil, specially that of the Bombay High Court [from which the appeal in *Bhaidas's* case (5) was taken to the Privy Council] passed shortly before, *Bhuta Valad Tayatsing v. Dhansing* (8), in which the learned Chief Justice has so ably and thoroughly discussed the question as to put it beyond cavil.

Now with regard to the cases on which reliance is placed by the Judicial Committee, the cases from Allahabad and Madras were of appeals under cl. 15 of the Letters Patent. The reference to the Calcutta case, namely, the case of *Nundee-pal Mahta v. Veraquhart* (26) which was an appeal from the Mofussil presents on the face of it some difficulty. But on closer examination it will be abundantly clear that the case supports the view pronounced by their Lordships while it does not militate against the view I am advocating. That case was decided in 1870. The Code of Civil Procedure, then in force, was Act VIII of 1859 which contained no provision in case of difference

of opinion between the Judges hearing a case. This omission was supplied by the supplementary enactment of Act XXIII of 1861, sec. 23 of which for the first time laid down the procedure similar to that in sec. 98, C. P. C. That Act was passed before the High Court's Letters Patent of 1862 or 1865 and is headed as not to be applicable to Courts established by Royal Charter. After the establishment of the High Court therefore there was no provision governing such cases except sec. 36 of the Letters Patent. Though Act XXIII of 1861 was made by the rules of the High Court framed under its general powers applicable to it, there was no enactment as contemplated by cl. 44 of the Letters Patent by the Indian Legislature modifying cl. 36. Norman, C. J., was therefore right in saying that the case before him was governed by cl. 36 of the Letters Patent. The provision contained in sec. 23 of Act XXIII of 1861 was included in the Civil Procedure Code of 1877, carried over to the Code of 1882 and reproduced in sec. 98 of the present Code. It is therefore clear that when *Nundee-pal's* case (26) was decided, cl. 36 of the Letters Patent was the only provision of law in force even in cases coming from Mofussil. This case therefore is no authority for proposition that cl. 36 of the Letters Patent is still applicable to Mofussil cases.

I may add that the right to prefer a second appeal to the High Court is granted by sec. 100 of the Code of Civil Procedure and is also restricted in some cases by that Code thus virtually qualifying the general Appellate Jurisdiction of the High Court over Provincial Courts conferred by cl. 16 of the Letters Patent. Sec. 117 of the Code makes all the provisions relating

(5) L. R. 48 I. A. 181 : s. c. I. L. R. 45 Bom. 718, 25 C. W. N. 605 (1921).

(8) I. L. R. 43 Bom. 433 (1919).

(26) 18 W. R. 209 (1870).

(26) 18 W. R. 209 (1870).

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to appeals as contained in the Code applicable to the High Court and sec. 120 does not exclude this specific provision.

In this connection reference may be made to r. 6 of Or. 47 relating to reviews where similar procedure is laid down. It is evident that the intention of the Indian Legislature is to uphold a decision, under appeal or review, where the Judges are equally divided in opinion as to its correctness thus giving effect to the concurrent view of two Judges in preference to that of one Judge though the latter may be the senior Judge composing the Bench.

For the reasons given above I am of opinion that under sec. 98, C. P. C., these appeals ought to be dismissed.

[The landlord Plaintiff preferred Letters Patent Appeals Nos. 2 and 3 of 1921 against the above decision.]

The appeal came on for hearing before a Division Bench consisting of Chatterjea, Greaves and Panton, JJ., who made the present Reference to the Full Bench on the 1st of December 1924.

The ORDER OF REFERENCE was as follows :—

One of the questions which arises in this appeal is whether sec. 109 of the Bengal Tenancy Act operates as a bar to a suit for enhancement of rent by reason of a previous application under sec. 105 having been withdrawn with liberty to bring a fresh suit. There is a conflict of decisions on the point. See *Soroj Kumar Acharji v. Umed Ali* (1), *Abeda Khatun v. Majubali* (2) and *Dino Nath v. Anadi Krishna* (3). We think the question should be referred to a Full Bench for deci-

sion and we accordingly refer the following question to the Full Bench : When an application under sec. 105 of the Bengal Tenancy Act for settlement of rent is withdrawn with liberty to bring a fresh suit, whether a suit for enhancement of rent is barred by the provisions of sec. 109 of the Bengal Tenancy Act? As the question arises in a second appeal (miscellaneous) the whole appeal is referred to the Full Bench.

This order governs the connected Appeal No. 3 of 1924.

Babu Sib Chandra Palit (with *Babu Sarosija Kanta Palit*) for the Appellant.—The wording of the section shows that the legislature contemplated some adjudication upon the suit or application before the Settlement Officer. The word "entertained" implies not merely reception but consideration. The words "made," "taken" indicate that mere presentation of a plaint or application is not enough to bring sec. 109 into operation. Sec. 109 should be read with sec. 107 which gives the effect of a decree to a "decision." Sec. 109 interpreted in the narrower sense would deprive sec. 107 of all its force and meaning : whereas the bar to suit if made to depend upon a previous adjudication would give sec. 107 its proper and intended effect. It would not be right to attribute to the legislature an intention to impose a bar in the nature of a *res judicata* where there has been no such adjudication. In the leading decision for the contrary view, *Abedd Khatun v. Majubali Choudhury* (2), the opinion expressed on the point is an obiter. Comments on *Soroj Kumar Acharji v. Umed Ali Howladar* (1) and *Abeda Khatun v.*

(1) 25 C. W. N. 1022 : s. c. 35 C. L. J. 19 (1921).

(2) I. L. R. 48 Cal. 157 : s. c. 24 C. W. N. 1020; 33 C. L. J. 304 (1920).

(3) 28 C. W. N. 708 (1923).

(1) 25 C. W. N. 1022 : s. c. 35 C. L. J. 19 (1921).

(2) I. L. R. 48 Cal. 157 : s. c. 24 C. W. N. 1020; 33 C. L. J. 304 (1920).

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Majubali (2). Refers to *Cheoditti v. Tulsi Singh* (28).

Babu Rupendra Kumar Mitter (with *Babu Dharmadas Sett*) for the Respondents.—*Soroj Kumar Acharji v. Umed Ali Howladar* (1) proceeds on the theory that an application or a suit withdrawn is to be considered as never made. The fiction originated in a dictum of Ghetty and Teunon, JJ., in *Cheoditti v. Tulsi Singh* (28). Their Lordships' view that Or. 23, r. 1, sub-r. (3) of the Civil Procedure Code had no application is erroneous. Sec. 109 of the Bengal Tenancy Act is not referred to either in argument or in the judgment. In *Kamini v. Abdul* (29), which simply follows *Cheoditti v. Tulsi Singh* (28), also no reference is made to sec. 109. These cases are dissented from by Mookerjee and Fletcher, JJ., in *Abeda Khatun v. Majubali* (2) and in a manner by Chatterjea and Subhawardy, JJ., also in *Soroj Kumar v. Umed Ali* (1). The cases against me violate established canons of interpretation by statutes. They should be construed in their natural sense and without addition or subtraction where they can be so interpreted. *Cowper Essex v. Local Board for Action* (30) and *Vacher & Sons v. London Society of Compositors* (31), 27 Halsbury, p. 147, sec. 275. The question of hardship has no place in construing statutes. *Secretary of State v. Shib Narain* (32) and *Timangowda v. Banepgowda* (33). If possible no provisions of a statute should be

deemed as surplusage. 27 Halsbury, p. 133, sec. 286. The interpretation suggested would make sec. 109 redundant and sec. 107 sufficient by itself. *Dino Nath v. Anadi* (3) and *Sasi Kanta v. Salim Sheikh* (4) proceeded on correct principles.

If sec. 109 had not been enacted, then secs. 105 and 106 would have been exclusive remedies as regards settlement of rent and correction of entries. Civil Courts have jurisdiction only in so far as sec. 109 allows and the restrictions imposed by it do not admit of being whittled down in the manner suggested. *Bhai Shankar v. Municipal Corporation of Bombay* (34), *Bhandi v. Ramadhin* (35) and *Pandub Dowari v. Ananda Krishna* (36). Proceeding under sec. 105 and sec. 106 and a suit in the Civil Court are alternate remedies and the principle of election of remedies applies. *Mahomed Ayejuddin v. Prodyot Kumar* (27). Coke upon Littleton, p. 146 (a). *Baikuntha v. Salimullah* (37) and *Sasi Kanta v. Salim Sheikh* (4).

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The question referred is as follows :—“ When an application under sec. 105 of the Bengal Tenancy Act for settlement of rent is withdrawn with liberty to bring a fresh suit, whether a suit for enhancement of rent is barred by the provisions of sec. 109 of the Bengal Tenancy Act ? ”

There have been several conflicting

- (1) 25 C. W. N. 1022; s. c. 35 C. L. J. 19 (1921).
- (2) I. L. R. 48 Cal. 157; s. c. 24 C. W. N. 1020; 33 C. L. J. 304 (1920).
- (28) I. L. R. 40 Cal. 428; s. c. 17 C. W. N. 467 (1912).
- (29) 28 C. L. J. 254 (1918).
- (30) 14 A. C. 158 at p. 169 (1889).
- (31) [1913] A. C. 107 at pp. 117, 119 (1912).
- (32) I. L. R. 46 Cal. 199 (1918).
- (33) I. L. R. 39 Bom. 472 (1915).

- (3) 28 C. W. N. 703 (1923).
- (4) I. L. R. 50 Cal. 626; s. c. 27 C. W. N. 987 (1923).
- (27) I. L. R. 48 Cal. 359; s. c. 25 C. W. N. 13 (1920).
- (34) I. L. R. 31 Bom. 604 (1907).
- (35) 2 C. L. J. 359; s. c. 10 C. W. N. 991 (1905).
- (36) 14 C. W. N. 897; s. c. 12 C. L. J. 195 (1910).
- (37) 12 C. W. N. 590; s. c. 6 C. L. J. 547 at p. 556 (1907).

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decisions on the question, but I do not think it would serve any useful purpose to discuss them or even to enumerate them. It is enough to say that one set of decisions favours the view that an application under sec. 105 (or sec. 106) of the Tenancy Act, if withdrawn by permission of the Court, is to be regarded as not having been made, while the other set proceeds on the footing that the making of an application under either of those sections, whatever be its fate afterwards, brings into operation the prohibition contained in sec. 109 of the Tenancy Act.

The words of sec. 109 are these: "Subject to the provisions of sec. 109A a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceeding taken under secs. 105 to 108 (both inclusive)." The provisions of sec. 109A have no bearing on the present matter.

The words "subject of an application made" seem to me so clear as to admit of only one interpretation, and that is that once an application is made, the Civil Court cannot entertain an application or suit in respect of the same matter. It is of no consequence what happens to the application: it may be prosecuted to a conclusion, or abandoned, or dismissed for default, or withdrawn by leave of the Court or without the leave of the Court. It is the fact of the application being made, and not the manner of its disposal that has to be considered.

The view that the presiding officer can prevent the making of the application from producing this result by permitting its withdrawal, involves the necessity of adding a gloss to the words of the section, and offends against the principle that the words of a statute must be understood in their plain and ordinary meaning.

In my opinion therefore it is the making of the application that brings into play the prohibition of sec. 109, and the answer that I would give to the Reference is to that effect, namely, that when an application is made under sec. 105 of the Bengal Tenancy Act, and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of sec. 109 of the Tenancy Act; and as concerns the appeals which have given rise to the Reference, I would allow them and dismiss the suits as not maintainable. The Plaintiff must pay the costs of the other side in all the Courts, the hearing-fee in this Court for all the hearings is assessed at ten gold mohurs for the two appeals.

NEWBOULD, J.—I agree that the question referred to this Full Bench should be answered in the affirmative for the reasons given by my learned brother Walmsley, J., in the judgment which he has just delivered.

I was one of the Judges who held in the case of *Mahomed Ayejuddin v. Prodyot Kumar Tagore* (27) that a suit lies to correct an entry in a finally published record-of-rights and that the fact that an application under sec. 106 of the Bengal Tenancy Act was withdrawn does not bar the jurisdiction of the Civil Court to deal with the matter. In the judgment in that case no reasons are given for that decision. I have no doubt that the reason is that, at the time of hearing, the decisions of this Court were all one way. In the case of *Cheoditti v. Tulsi Singh* (28), it had been held that an application under sec. 105 which had been withdrawn must be treated as non-existent. That decision appears

(27) I. L. R. 48 Cal. 359: s. c. 25 C. W. N. 13 (1920).

(28) I. L. R. 40 Cal. 426: s. c. 17 C. W. N. 467 (1912).

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to have been followed without question until doubt was thrown on it by the judgment in the case of *Abeda Khatun v. Majubali Choudhury* (2). This case was decided a short time before the hearing of the case of *Mahomed Ayejuddin v. Prodyot Kumar Tagore* (27) and had not been reported. Had we been aware of that decision our judgment would certainly have contained some reference to the law on this point. The point is mentioned as subsidiary to the question whether a Civil suit lies to correct an entry in the record-of-rights. It was contended on behalf of the applicant in that appeal that sec. 106 of the Bengal Tenancy Act provided an exclusive remedy. After discussing the rulings on this point we decided it against the Appellant without any further mention of the subsidiary question which is identical with the subject of the present Full Bench Reference. Now that I have considered this question more carefully and am no longer moved by the authority of previous decisions, I have no doubt as to the meaning of sec. 109 of the Bengal Tenancy Act. It clearly bars a suit for enhancement of rent in a Civil Court after an application has been made under sec. 105 of the Bengal Tenancy Act for settlement of rent, even though that application has been withdrawn with liberty to bring a fresh suit.

I also agree with my learned brother Walmsley, J., that the appeals should be allowed and the order of remand set aside.

C. C. GHOSE, J.—The facts of the case giving rise to this Full Bench Reference are set out in the judgment of Mr. Justice Walmsley and Mr. Justice Suhrawardy, dated the 22nd November 1923 and it is,

therefore, unnecessary for me to set out the same again. The learned Judges differed as to the proper construction of sec. 109 of the Bengal Tenancy Act and thereupon there was an appeal under sec. 15 of the Letters Patent. The learned Judges who heard the Letters Patent appeal were of opinion that having regard to the conflict of decisions on the question of the proper interpretation of sec. 109 of the Bengal Tenancy Act, the following question should be referred to the Full Bench: "When an application under sec. 105 of the Bengal Tenancy Act for settlement of rent is withdrawn with liberty to bring a fresh suit, whether a suit for enhancement of rent is barred by the provisions of sec. 109 of the Bengal Tenancy Act?" This Reference came on for hearing before us on the 27th April. There is no doubt that there has been a conflict of decisions on the question [see the cases mentioned in the order of the referring Judges and the case of *Sasi Kanta Acharji Chowdhry v. Salim Sheikh* (4)].

The question depends on the proper construction of sec. 109 of the Bengal Tenancy Act which runs as follows:— "Subject to the provisions of sec. 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceeding taken under secs. 105 to 108 (both inclusive)."

Now it is settled law that in construing the words of a statute one must give to them their plain, grammatical, natural and ordinary meaning and, in my opinion, construing this section according to the rule indicated above, it would follow that once a matter is or has been the subject of an application made under

(2) I. L. R. 48 Cal. 157; s. jo. 24 C. W. N. 1020; 33 O. L. J. 304 (1920).

(27) I. L. R. 48 Cal. 859; s. c. 26 C. W. N. 13 (1920).

(4) I. L. R. 50 Cal. 625; s. c. 27 C. W. N. 897 (1920).

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sec. 105 of the Bengal Tenancy Act, a Civil Court cannot entertain an application or suit in respect of the same matter. In my view, it is wholly immaterial for the purposes of construction of sec. 109 whether the application referred to above has been withdrawn with or without the leave of the Revenue Officer under sec. 105 or whether the application has been disposed of on its merits by the Revenue Officer. I, therefore, agree with Mr. Justice Walmsley in the answer which he proposes to give to the question referred to the Full Bench and in the order made by him.

SCHRAWARDY, J.—I have the misfortune to differ from my learned brothers in the answer proposed to be given to the Reference.

The sole question before us is where an application under secs. 105 to 108, Bengal Tenancy Act, is made before the Revenue Officer and withdrawn with leave to bring a fresh "suit," can the matter in dispute form the subject of a civil suit. I am not concerned with cases of withdrawal without leave or dismissed for non-prosecution of such application. I shall therefore confine myself to the consideration of the law as applicable to the facts of the present suit.

By giving liberty to bring a fresh "suit," I take it that the Revenue Officer meant to permit the applicant to present a fresh application before him. What is the effect of such an order? When a suit is allowed to be withdrawn with leave to bring a fresh suit under Or. 23, C. P. C., it should be regarded as never brought. It is available for no purpose. It does not save or give fresh start to limitation, nor does it afford a fresh cause of action.

Now, sec. 109, Bengal Tenancy Act, shows, as it has been held, that the

aggrieved party has under the law two alternative remedies. He can apply under secs. 105 to 108 before the Revenue Officer or he can bring a civil suit for the same purpose. By obtaining leave to make a fresh application, he has lost none of these remedies. He can, therefore, if he does not exercise his right to apply to the Revenue Officer, have recourse to the Civil Court.

The policy of the law seems to be that a party should not have two co-existing rights; he may either apply to the Revenue Officer or bring a civil suit. Where both the rights exist and the former right is not exercised there is no reason why the latter right should be denied to him. In my opinion the answer to the Reference should be in the negative. The second appeal should accordingly be dismissed.

B. B. GHOSE, J.—I agreed with my learned brother Mr. Justice Walmsley that the answer to the question referred to us should be in the affirmative. I had expressed my opinion previously in the case of *Sasi Kanta Acharja v. Salim Sheikh* (4) that the plain meaning of the words in sec. 109 of the Bengal Tenancy Act should be given effect to, and the argument addressed to us has not convinced me that I should alter my opinion and that the ordinary rule of construction of a statute should be departed from in this instance.

N. G.

(4) I. L. R. 50 Cal. 626; s. c. 27 C. W. N. 987 (1923).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]**RE : SUIT No. 1452 of 1924.**

C. C. GHOSH, J.	A. H. SKONE and anr.,
1925,	Defendants, Applicants,
Heard, 20,	v.
21, May.	V. M. BASON,
Judgment,	Plaintiff, Opposite
22, May.	Party.

Contempt of Court—Process-server insulted—Insult and maltreatment before service, if contempt of Court—Good service—Apology.

A process-server was insulted in most filthy language, caught by his throat and severely pushed out of the room by the Plaintiff while effecting service, of a notice; service was subsequently effected by him by affixing a copy on the outer door:

Held—That when a process-server in execution of his duty has been abused and assaulted, it is a contempt of Court, as it is an attempt to obstruct or unduly interfere with the administration of justice.

“Those who have duties to discharge pursuant to the orders of Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders.”

“The test is, did the person in question abuse or maltreat the serving clerk while he was engaged in the execution of his duty.”

This was a Rule nisi obtained by the Defendant A. H. Skone calling upon the Plaintiff V. M. Bason to show cause why he should not be committed to jail or otherwise dealt with for contempt of Court for having insulted Ashit Kumar Pal, a clerk in the service of Messrs. Orr, Dignam & Co., the Attorneys for the Defendants. It was alleged that a notice under Or. 21 of r. 37 (1) of Civil Procedure Code was issued by this Court call-

ing upon the Plaintiff to appear in person before the Judge in Chambers to show cause why he should not be committed to jail in execution of decree for costs passed against him on 9th February 1925 in the above suit. A clerk, Babu Ashit Kumar Pal, in the service of Messrs. Orr, Dignam & Co., was entrusted to go to the premises No. 6/1, Moira Street in Calcutta where the Plaintiff resided for the purpose of serving the said notice on the Plaintiff Bason. On 9th May 1925 at 2-30 P.M., the clerk met Bason in his flat and tendered the notice in original with a copy of the same. The Plaintiff Bason read the said notice and flung the papers down on the floor of his room. Thereupon Ashit Kumar Pal picked up the notice from the floor and showed the Plaintiff the seal of the Court on the original notice and informed him that in the event of his refusing to accept service, he would affix a copy thereof on the outer door. Bason became very angry and insulted the clerk by calling him a “damned swine” and caught him by the throat severely and pushed him towards the door. Thereafter the clerk affixed a copy of the notice on the outer door of the room. Bason denied everything saying that he handed back the notice to the clerk and told him to take that notice to his Attorneys Messrs. B. N. Basu & Co., who would accept it on his behalf and do the needful for him. His statement was corroborated by a servant of Bason who alleged that he was present all the time.

Mr. S. K. Chakraborty (with Mr. A. N. Chaudhuri) on behalf of the Defendants argued that the version given by the clerk as to what happened when he went to serve the notice on Bason, should be accepted, it being inconceivable why he should concoct a false story. Admitting that his version is a correct one there

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could be no doubt that these acts amounted to a gross contempt of Court. Cited *Lewis v. Owen* (4) and *Whitworth v. Duncan* (5).

Mr. W. W. K. Page for the Plaintiff Bason urged that the process-server should not be relied upon. Bason has told the truth, he ought not to be punished for any contempt.

Even assuming for the sake of argument that the allegations made by Ashit Kumar Pal are true, Bason might have been guilty of cowardly and despicable conduct which amounted to a criminal offence. A Criminal Court is the proper place for his trial. But certainly he did not prevent the serving clerk from affixing a copy of the notice on the door of the room and therefore he was not guilty of any contempt of Court. Cited *Price v. Hutchinson* (6), *Helmore v. Smith* (No. 2) (7), *Adams v. Hughes* (8), *Gilcs v. Vernon* (9) and *Myers v. Wills* (10).

The JUDGMENT OF THE COURT was as follows :—

C. C. GHOSE, J.—This is a Rule calling upon the Plaintiff Vernon Milward Bason to show cause why he should not be committed to jail or otherwise dealt with for contempt of Court for having insulted one Ashit Kumar Pal, a clerk in the service of Messrs. Orr, Dignam & Co., the Attorneys for the Defendant Anne Helen Skone in manner stated in the latter's petition.

The facts, shortly stated, are as follows :—The Plaintiff Bason instituted

this suit against the Defendants A. H. Skone and another for damages for breach of a certain agreement. The suit was dismissed with costs on scale No. 2 on the 9th February 1925. The Defendants' bill of costs was taxed and an allocatur was issued on the 2nd May 1925, for a sum of Rs. 5,827-4-0. It was served on Bason's attorneys on the 5th May 1925. On the 9th May 1924, the Defendant A. H. Skone took out a notice under Or. 21, r. 37 (1), C. P. C., signed by the Master of this Court requiring the Plaintiff to appear in person before this Court on the 22nd May 1925 at 11 o'clock in the forenoon to show cause why he should not be committed to jail in execution of the decree for costs passed against him on the 9th February 1925. Ashit Kumar Pal, who, as mentioned above, is a clerk in the service of Messrs. Orr, Dignam & Co., was entrusted by the latter with the duty of effecting service of the said notice on Bason. Bason had been a client of Messrs. Orr, Dignam & Co., and was known to Ashit Kumar Pal. It appears that on the 9th May at about 2-30 P.M. in the afternoon Ashit Kumar Pal called at premises No. 6-1, Moira Street, where Bason resides, for the purpose of serving the said notice upon him. Bason occupies a flat on the first floor of the said premises. There were servants downstairs but they were not Bason's servants and Ashit Kumar Pal went up to the first floor. He says that when he got to the first floor he did not find the front door of the sitting room of the Plaintiff to be closed; the door was open and a *purdah* was hanging at the entrance to the room. He found that Bason was sitting in a chair and reading a newspaper. Ashit asked him if he might enter and thereafter he entered the sitting room with Bason's permission.

(4) [1894] 1 Q. B. 102.

(5) [1893] Times, 14th January, p. 11.

(6) [1869] L. R. 9 Eq. 534.

(7) [1886] 35 Ch. D. 449 C. A. at 455.

(8) [1819] 129 Eng. Rep. 632.

(9) [1728] 94 Eng. Rep. 39.

(10) [1820] 4 Moore (C. P.) 147.

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He informed Bason of the purpose for which he had called and made over to him both the original notice under Or. 21, r. 37 (1), C. P. C. and a copy. (It may be noted in passing that Ashit in his affidavit states that he made over the original notice only to Bason.) Bason read the notice and flung the papers at the floor. Ashit thereupon picked the papers from the floor and showed to Bason the original notice bearing the seal of this Court and informed him that if he refused to accept service he would affix a copy on the outer door. Bason thereupon became very angry and called Ashit Kumar Pal a "damned swine" and caught him by the throat and dragged him and pushed him towards the door, so that he nearly fell down. Ashit states that thereafter he affixed a copy of the said notice on the front door of the room. He came back to the office of his employers and reported the matter to the Head Court Clerk of Messrs. Orr, Dignam & Co., Babu Kali Prosaanno Chakrabarty. The latter hearing what had happened, took Ashit Kumar Pal to Mr. D. C. Banerjee, a member of the firm of Messrs. Orr, Dignam & Co., who was in charge of the case and reported the incident to him. Mr. Banerjee directed that Ashit should make an affidavit setting out what had happened. It was a Saturday and the affidavit was not made till the Monday following.

Bason denies the allegation made by Ashit Kumar Pal and his account of what happened on Saturday, the 9th May, is as follows: "That on Saturday, the 9th instant, while I was resting in my sitting room (which is on the first floor of the premises No. 6-1, Moira Street) I saw a person on the other side of the *purdah* at the entrance door of my half flat. Not having my glasses on, I could

not distinguish the person and called out, 'Who are you and what do you want?' I then got up to go to the door but the man whom I had seen walked quickly into my room and informed me that he had a notice of the High Court to serve on me. I enquired of him if he was a Court official. He replied that he was a clerk of Messrs. Orr, Dignam & Co., and that it was not necessary for a Court official to serve me with the said notice. I read the said notice, handed it back to the said clerk and told him that it was quite unnecessary to take out the said notice, as I had been all along willing to pay the taxed costs and that I was unable to understand why such a notice had been taken out. I requested the said clerk to take it to my attorneys, Messrs. B. N. Basu & Co., who would accept service on my behalf and who were in communication with Messrs. Orr, Dignam & Co., then on the subject and had informed them that I would pay the taxed costs. I assured him that there would be no trouble about the payment of the costs. The clerk said, 'Yes, sir, I will go to Messrs. B. N. Basu & Co. now.' There the matter ended." Bason produced an affidavit in support of his version by his *khitmatgar*, Shaik Korban. There are affidavits by Mr. Banerjee and Kali Prosaanno Chakrabarty stating that Ashit Kumar Pal on his return from 6-1, Moira Street, reported to them that he had been abused and assaulted by Bason when he went to serve the said notice.

There being on the affidavits a direct conflict of testimony, I directed that the deponents should be cross-examined before me and accordingly this was done and I have had an opportunity of seeing the deponents in the witness-box and of listening to their respective versions of what happened on the afternoon of the 9th May

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last. Mr. S. K. Chakraborty, who appeared in support of the Rule, at first expressed his unwillingness to cross-examine Bason, as the latter was in the position of an accused; but Mr. Page, who appeared for Bason, waived all questions of privilege and thereupon Bason was cross-examined by Mr. Chakraborty. Bason in his evidence stated that the conversation between him and the clerk, Ashit Kumar Pal, was in "very nice and amicable language throughout" and that the last conversation was on the landing outside the door and was quite friendly. Mr. Page has argued that having regard to the denial of Bason no order against him could or should be made, and, secondly, that, assuming for the sake of argument that the allegations made by Ashit Kumar Pal are true, Bason has not committed contempt of Court.

I desire to say at once that I accept unreservedly as true the evidence of Ashit Kumar Pal. He was in the witness-box for some length of time and I am bound to say that he struck me as a witness of complete honesty and truth. A great deal of criticism has been levelled on slender and minute points in his evidence; but I have heard nothing to induce me to doubt the correctness of his evidence. It follows that I disbelieve the evidence of Bason and of his *khitmatgar* and I can conceive of no reason whatsoever why this inoffensive clerk, Ashit Kumar Pal, should have started a false case against Bason as is alleged by the latter's Counsel. It may be something difficult to choose between witnesses where there is oath against oath; but in my judgment having seen the witnesses in the box, it is not difficult to make out which side has told the truth. The question then arises whether what happened on the 9th May constitutes contempt of Court on the part of Bason.

The jurisdiction to punish for contempt of Court is inherent in this Court as a Court of Record and without it, its constitution as a Court of Record would be altogether useless. But the Court always exercises its power of punishing for contempt with great forbearance and acts with scrupulous care. It is ordinarily very chary in punishing people for contempt and when the occasion arises it deals with such questions in the interest of the public, bearing in mind that the greater the power it possesses, the more caution it is necessary to use in exercising it. In other words, the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice. Now from very early times, it has been held to be contempt of Court to assault, ill-treat or threaten a process-server engaged in his duty. The cases on this point are numerous and they will be found collected in Vol. 16 of the English and Empire Digest, pp. 32, 33; Oswald on Contempt, Third Ed., p. 85, and Vol. 7, Halsbury's Laws of England, p. 288. The object in punishing for contempt where a process-server in the execution of his duty has been abused and assaulted is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. As has been said the law has armed the Court with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to witnesses, jurymen and process-servers are not allowed. The principle is that those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on

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their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders. Bearing the above in mind, I have no doubt in my mind that Bason had been guilty of contempt of Court.

With reference to Mr. Page's contention that inasmuch as the alleged circumstances of contempt have been positively denied by Bason, this Court could not or would not punish him for the contempt. In this connexion I desire to quote the words of Shadwell, V. C., in the case of *Imery v. Bowen* (1). He said: "I must observe that I do not admit that this is the doctrine of the Court and in *Peachey v. Peachey* (2), I thought it right to commit the party and there was an appeal from my order to the Lord Chancellor and he affirmed the order and therefore I think that notwithstanding the positive denial of the party, it is the duty of the Court to look into all the affidavits and see on which side the truth lies." I have therefore looked into the entire evidence and I have come to the conclusion indicated above. Mr. Page said if I believed the process-server then no one would be safe in Calcutta. This, if I may say so, is an argument of despair and I propose to take no notice of it except to remark that the statement of it carries its own appropriate answer. Mr. Page argued that Bason might have been guilty of cowardly and despicable conduct, but he certainly did not prevent the serving clerk from affixing a copy of the notice on the door of the sitting room and therefore he has not been guilty of contempt of Court. Each case must depend upon its own facts and while I agree that the Court does not

and will not ordinarily take notice of mere rude behaviour on the part of the person against whom the allegation is made, the test is, did the person in question abuse or maltreat the serving clerk while he was engaged in the execution of his duty. In my opinion there can be one answer to this question on the facts of this case and that in the affirmative. It is intolerable that process-servers in the employ of attorneys while engaged in the execution of their duties should be treated in the manner in which Ashit Kumar Pal was treated and in my opinion it would be an abdication of the functions of this Court to refuse to take notice of a case like the present one. Ordinarily in cases like this, an apology is tendered and the party found to be guilty of contempt is made to pay the costs. This was what happened in the case of *D'Cunha v. The Alliance Bank of Simla, Ltd.* (3), where a process-server named Bhusan Chandra Das in the employ of Mr. P. N. Sen, an attorney of this Court, who had gone to serve a Rule on Messrs. Bird & Co. was abused by one Kenaram Laha, a cashier in the employ of Messrs. Bird & Co., at Chartered Bank Buildings in Calcutta. The matter attracted the notice of Mr. Justice D. Chatterjee, sitting as vacation Judge, and ultimately owing to the importance of the case, the then Chief Justice, Sir Lawrence Jenkins, formed a Special Bench consisting of himself, Mr. Justice Carnduff and Mr. Justice Chatterjee to hear the matter. The offending parties apologized and thereupon by their order, dated the 3rd November 1909, their Lordships held that it had been established that there had been contempt of Court and directed that the parties concerned should pay the costs. In this case, as far as I can find, the attitude of Bason is one of

(1) L. J. 5 Ch. 340 (1836)..

(2) Unreported.

(3) Unreported.

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insolent defiance and untruthfulness. In these circumstances I have very carefully considered what my judgment should be. I find as a fact on the entire evidence before me that Bason has been guilty of contempt of Court in having abused and assaulted Ashit Kumar Pal while he was engaged in the duty of serving the said notice and I direct him to pay a fine of Rs. 200 and to pay the costs of this application. In default of payment of fine, Bason will be committed to the custody of the Superintendent of the Presidency Jail for one week.

Messrs. Orr, Dignam & Co., Solicitors for the Defendants.

Messrs. B. N. Basu & Co., Solicitors for the Plaintiff.

P. D.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM ORIGINAL DECREE

No. 132 OF 1923.

WALMSLEY, J.	}	JAGANNATH MARWARI
B. B. GHOSE, J.		& anr., Defendants Nos.
1924,		1 and 2, Appellants,
Heard, 24 and		v.
25, November.		KALA CHAND
Judgment,		BANERJEE, Plaintiff,
25, November.		Respondent.

Provincial Insolvency Act (III of 1907), sec. 16, sub-sec. (2), cl. (a) and sub-sec. (5)—Receiver appointed under the Act, vesting of property in—Secured creditor, right of—Fresh suit to set aside a decree on the ground of its being erroneous, if maintainable.

On the making of an order of adjudication under sec. 16, sub-sec. (2) of the Provincial Insolvency Act, III of 1907, the whole of the insolvent's property becomes vested in the Receiver under cl. (a), sub-sec. (2), sec. 16 of the said Act for distribution amongst his creditors, subject to the right of the secured creditor (mortgagee) to realise his dues by en-

forcement of his security in the ordinary way just in the same manner as if there was no vesting order.

Per GHOSE, J.—The title of the mortgagor insolvent to the property mortgaged remains with him, notwithstanding the vesting of the insolvent's property in the Receiver under cl. (a), sub-sec. (2), sec. 16 of the Provincial Insolvency Act, for the purpose of the proceeding to enforce the mortgage.

Per GHOSE, J.—It is now well settled that a decree cannot be challenged on the ground of its being erroneous by a fresh suit.

This was an appeal against the decree of Babu Bejoy Gopal Chatterjee, Subordinate Judge of Asansole in Zillah Burdwan, dated the 5th of February 1923.

The Respondent Kala Chand Banerjee, Receiver to the estate of the insolvent Amulya Krishna Basu, brought this action in the Court of the Subordinate Judge at Asansole, on 10th March 1919, for recovery of possession upon redemption of the properties mortgaged to the Defendants-Appellants by Amulya's predecessor-in-title in February 1913, upon setting aside the final decree for foreclosure, dated the 31st August 1916, and obtained by the Appellant against Amulya substituted in place of his father who died before the passing of the preliminary decree, dated the 15th March 1916.

The learned Subordinate Judge of Asansole decreed the suit for redemption brought by the Respondent Kala Chand Banerjee being of opinion that the decree for foreclosure passed by his predecessor in office was erroneous and thus gave the Respondent an opportunity to redeem by reversing the final decree for foreclosure, dated the 31st August 1916. The points urged in this appeal to the High Court were

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(1) that the Defendants-Appellants being secured creditors were in a privileged position under the provisions of sec. 16, sub-sec. (5) of the Provincial Insolvency Act, III of 1907, and were entitled to enforce their security in the same manner as if sec. 16 of the Provincial Insolvency Act had not been enacted, and (2) that the circumstances of the case did not disclose any ground for a Judge of concurrent jurisdiction to reverse the decree of his predecessor in office.

Sir Provash Chunder Mitter and Babu Jyotish Chandra Sircar for the Appellants.

Babu Mohendra Nath Roy, Dr. Dwarkanath Mitter and Babu Hira Lal Chakravarti for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by the Defendants. The material facts of the case are these : In February 1913, one Tara Prasanna Bose and his wife executed a mortgage for the sum of Rs. 40,000 in favour of the first Defendant Jagannath Marwari. The mortgage was by way of a *kot kobala* and the mortgagee Jagannath Marwari was acting for himself and for one Bepin Behary Banerjee, the second Defendant. The mortgage related to three pieces of property. Two years later, these mortgagees instituted a suit on the document adding one Kedarnath Marwari as a Defendant because he had some interest in one of the properties. It is unnecessary, however, to refer again to Kedarnath's interest. Tara Prasanna Bose and his wife, after making two applications for time, put in on the 6th of March 1915 a petition of compromise with the mortgagees undertaking to pay the interest that might accrue due on the principal amount within the month of Chaitra

every year and securing in return the advantage that time should be extended up to the end of 1926 B. S. for payment of the whole debt in the event of their fulfilling this promise to pay the interest regularly. They agreed also that, if they failed to pay such interest within the time stipulated, the mortgagees would be entitled to foreclose the mortgage. This petition was filed in March 1915. The suit, however, was not disposed of because of the contest with Kedarnath Marwari. On the 7th September 1915, Tara Prasanna Bose died and he was succeeded by his only son Amulya Krishna Bose. This Amulya Krishna Bose had previously, before the institution of the suit even, been adjudicated an insolvent in another Court at Bankura and a Receiver had been appointed with regard to his property. This Amulya ratified the deed of compromise executed by his parents and a decree was passed thereon on the 15th March 1916. In these proceedings subsequent to the death of Tara Prasanna, the Receiver appointed in Amulya's insolvency case was not made a party. Shortly after the passing of the decree, the Receiver entered appearance before the Judge and put in two applications asking that he should be made a party to the suit, that the suit should be tried in his presence and so forth. Meanwhile, Amulya and his mother failed to pay the interest as stipulated and the Court was then asked to make a decree for foreclosure. The petitions filed by the Receiver were dealt with by the learned Judge in his judgment, dated the 31st August 1916, and were rejected and a decree for foreclosure was made. In accordance with that decree, the mortgagees obtained delivery of possession. There were certain other proceedings, one of them being that there was an appeal by the Receiver to this

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Court. Finally, the present suit was instituted on the 10th March 1919. The learned Subordinate Judge has decreed the suit. He has held that the decision of his predecessor, dated the 31st August 1916, granting a foreclosure decree to the mortgagees is bad and, in accordance with that view, he has given the Receiver an opportunity of redeeming the mortgage.

On behalf of the mortgagees who are the Appellants before us numerous points have been taken. Two of them appear to me to stand out very prominently, and, with regard to these two, we asked the learned pleader for the Respondent whether he could support the learned Judge's judgment. The two points are these: First, that the Appellants being secured creditors are in a privileged position under the provisions of sec. 16, cl. (5) of the Provincial Insolvency Act and, secondly, that the circumstances do not disclose any ground for a Judge of concurrent jurisdiction to reverse the decision of his predecessor.

I do not propose, however, to deal with the second ground because, to my mind, the Appellants are entitled to succeed on the first ground.

Now, the wording of sec. 16, cl. (5) of the Provincial Insolvency Act is very clear. It runs as follows:—"Nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." Now, there is no doubt that the Appellants are secured creditors. It follows, therefore, that they are entitled to deal with their security in the same manner as they would have been entitled to deal with it if the section referred to had not been passed. Then, in the earlier part of the section provision is

made for the vesting of the property in the Court or in a Receiver. To me, it seems clear, therefore, that a secured creditor is entitled to deal with his security as though there has been no vesting in the Court or in the Receiver. If that is so, I fail to see how the fact that Amulya has been declared an insolvent and a Receiver of his property has been appointed can affect the present case. Amulya was the only son of his father Tara Prasanna and the substitution of Amulya for Tara Prasanna was all that was necessary when Tara Prasanna died. Reference has been made in this connection to certain English cases; but I am not satisfied that they are based upon the same simple provision of the law. In my opinion, the wording of cl. (5) of sec. 16 of the Provincial Insolvency Act admits of no obscurity and, so far as this question is concerned, I feel satisfied that it was not necessary for the Court to add the Receiver as a party to the mortgage suit. On that ground alone, I think that this appeal ought to be allowed.

The result, therefore, is that the decision of the lower Court is set aside and the Plaintiff's suit dismissed with costs.

GHOSE, J.—I am of the same opinion. I agree entirely with the reasons given by my learned brother for holding that a secured creditor may enforce his security in the same manner as if sec. 16 of the Provincial Insolvency Act had not at all been enacted and this is so even with regard to the question of parties to the suit. It is contended on behalf of the Respondent that, in a mortgage suit, all persons having an interest in the equity to redemption must be made parties and, as the right of the insolvent vested in the Receiver under sec. 16, he was a necessary party. I consider the contention to be unsound. Under one of the provi-

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sions of sec. 16, the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce his mortgage? That would be clearly absurd. The reasonable construction of sec. 16, sub-sec. (5) must, therefore, be that a secured creditor is not in any way affected by the other provisions of that section, and for the purpose of enforcing the mortgage, it should be held that the title to the property remained with the mortgagor.

With regard to the second ground urged on behalf of the Appellants with which we were pressed, namely, that the Subordinate Judge exercised his jurisdiction properly in deciding the former suit on the questions raised before him and his decision cannot be reversed by a fresh suit, it is necessary to state the facts in some detail. The preliminary decree for foreclosure was passed on the 15th March 1916 after Amulya had been substituted in the place of his deceased father. Apparently, on the application of Amulya, an order was passed in the insolvency proceedings by the District Judge of Bankura on the 25th March 1916 directing the Receiver to pay the interest accrued due to the Appellants on the mortgage. The Receiver, however, did not act according to the directions of the District Judge. On the other hand, in his application of the 11th April 1916 to the Subordinate Judge before whom the mortgage suit was pending, he prayed that the preliminary decree which had been passed might be set aside and that he might be made a party in the said suit as Receiver and the suit tried in his presence; and he also prayed, in the alternative, that the decree passed by the Court on the 15th March 1916 might not be enforced against the property mortgaged. A prayer to the

same effect was also made in a petition on the 28th April 1916. The Subordinate Judge decided the question against the Receiver and held that, so far as the mortgagees were concerned, the properties did not vest in the Receiver under sec. 16 of the Act and, overruling his objections, made the final decree for foreclosure on the 31st August 1916. The Receiver preferred an appeal to this Court against that judgment. But he seems to have urged his appeal only as if it was from an order of the lower Court refusing his prayer for extension of time to pay in the mortgage money under Or. 34, r. 3, sub-r. (2) of the Code of Civil Procedure. The learned Judge of the High Court dismissed the appeal on the ground that no prayer for extension of time under the rule referred to had been made to the Court below. The Appellants entered into possession on the 19th September 1916 and have been in possession since then and they make this also a grievance, that they have been made liable to render accounts as mortgagees in possession since that date by the decree appealed against. The Receiver brought this suit for redemption of the mortgage on the 10th March 1919. No appeal was taken against the final decree for foreclosure by the Receiver which was the proper method of challenging it. It was argued by the Respondents that the Receiver not having been made a party it was incompetent for him to lodge an appeal. I am unable to appreciate this argument. The Receiver derived his interest, if any, during the pendency of the suit and he would surely have been allowed to maintain an appeal on proper application to the Appellate Court. As a matter of fact, the Receiver did appeal to the High Court but upon a matter which was not before the Court below. His right to prefer the appeal was never ques-

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tioned. The decree of the Subordinate Judge of 31st August 1916 stands unreversed and is final. The Subordinate Judge held that the mortgagee was not bound to make the Receiver a party to the mortgage suit and the mortgagee was entitled to a decree for foreclosure. In the present case, the Court below is in error in holding that it can set aside the former decree on the ground that it was erroneous. It is now well settled that a decree cannot be challenged on the ground of its being erroneous by a fresh suit. In my opinion, the Receiver is bound by the judgment and decree of the Subordinate Judge of the 31st August 1916 and cannot maintain a fresh suit to redeem the mortgage, and the contention that he is not bound by the former decree, as he was not a party to it, although he was a necessary party, cannot now be entertained. The appeal must, therefore, be allowed, the judgment and decree of the Court below set aside and the suit dismissed with costs.

H. D. C.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD ATKINSON.

LORD SUMNER.

SIR JOHN EDGE.

1924,

Heard, 22 and

24, July.

Judgment,

30, October.

LALA JAI NARAIN,
Appellant,

v.

LALA UJAGAR LAL
and ors.,
Respondents.

Hindu law—Mitakshara—Partition amongst brothers, effect on coparcener and his sons—Whether they become separated or continue joint.

When a Hindu governed by the law of the Mitakshara, who had sons living, separated from his brothers, there was no presumption of law that he had separated from his sons and that he

and his descendants ceased to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family.

BALABUX LADHURAM v. RUKHMABAI (1) and HARI BAKSHI v. BABU LAL (2) referred to.

These were appeals from a decree, dated the 3rd April 1919, of the High Court at Allahabad, varying a decree, dated the 2nd May 1916, of the District Court of Mainpuri.

The suit was instituted by Ujagar Lal and Gouri Shankar, Respondents to this appeal, under sec. 92 of the Code of Civil Procedure, for the removal of the trustees of the Sital Prasad Trust, the appointment of new trustees, the delivery of possession of the trust estate to the new trustees, and rendition of accounts.

The present Appellants were impleaded as Defendants as being in possession of the trust property. The Plaintiffs based their right to sue on the ground that they were members of the settlor's family and they charged the trustees with neglect to fulfil the objects of the trust and with misappropriation of the trust funds.

The facts and the Will under which the endowment was made are fully set out in the judgment of their Lordships. The District Judge held that the endowment was a public charitable trust, and ordered that the committee of management should be re-constituted. Jai Narain and Gur Narain were removed from the trust committee and the former was ordered to render an account of the capital sum bequeathed for the purposes of the endowment by the founder, as also an account of the property comprised in the trust.

(1) L. R. 30 I. A. 130: s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 642 (1903).

(2) I. L. R. 5 Lah. 92; s. c. 28 C. W. N. 953 (P. C.) (1924).

LALAJI JAI NARAIN v. LALAJI UJAGAR LAL.

On appeal the High Court (Rafique and Piggott, JJ.) affirmed the findings of the District Judge but deleted from it the direction to Jai Narain to render accounts and instead directed that the present Appellants should pay to the new committee Rs. 48,000 with interest less a sum of Rs. 1,308.

Messrs. Clauson, K. C. and Dubé for the Appellants Prag Narain and Brahma Narain.—The Will of Sital Prasad did not create a public charitable trust, it merely gave directions creating precatory trusts. There was no disposition in favour of the committee or any particular person and failing any such disposition the testator's sons are entitled to the property.

The decree of the trial Judge was against Jai Narain alone who was President of the committee. Jai Narain appealed merely on the ground that no trust had been established and the High Court was not entitled to alter the decree so as to make the other Appellants here liable. The question of the liability of these Appellants was not raised in Jai Narain's appeal.

Mr. Parikh for Jai Narain adopted the argument that the Will did not create any valid charitable trust.

Messrs. DeGruyther, K. C. and Wallach for the Respondents.—The question of the liability of the Appellants other than Jai Narain was raised in the High Court and is taken in the Appellants' case before the Privy Council where it is specifically stated that the Appellants and their relations obtained possession of Sital Prasad's estate. The whole of the funds of the estate were immediately carried into the joint family funds, and a debt due to the joint family was paid out of the trust fund which was credited with the debt.

In any event the High Court had power to make the order required by the circum-

stances under Or. 41, r. 33 of the Civil Procedure Code.

Messrs. Clauson, K. C. and Parikh replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—The suit in which these two consolidated appeals from a decree of the High Court at Allahabad have arisen was brought in the Court of the District Judge of Mainpuri in the United Provinces on the 20th May 1915. The reliefs claimed in the suit were the removal of the then trustees of an endowment for religious and charitable purposes on account of alleged misappropriation of the endowed property, and the appointment of new trustees to whom the possession of the entire endowed property should be given; that accounts should be furnished of the property of the endowment and the misappropriations should be made good; that a scheme for the management of the endowment should be settled; that any other beneficial relief should be granted; and that costs should be decreed against any of the Defendants who might be found liable. The suit was brought under sec. 92 of the Code of Civil Procedure, 1908. The Plaintiffs had obtained the consent in writing of the Legal Remembrancer of the United Provinces to the institution by them of the suit, such Legal Remembrancer having been the officer appointed under sec. 93 of the Act to exercise in those Provinces the powers in that respect which are conferred on the Advocate-General by sec. 92.

The parties to the suit are residents of Etawah in the United Provinces, and are Hindus of the Agarwal caste. The caste name is also written Aggarwal. The Plaintiffs are through a common ancestor related, more or less distantly, to the De-

LALA JAI NARAIN v. LALA UJAGAR LAL.

fendants, and are persons who were interested in the proper management of the trust properties of the endowment. The Defendants are descendants of one Sital Prasad who founded the endowment by his Will of the 24th February 1904.

The Agarwal is a well-known caste and has caste sub-divisions. The members of the caste in the United Provinces and the Punjab are mainly Zamindars, or agriculturists, or are engaged in other forms of trade. The Agarwals of the United Provinces and of the Punjab carry on their business, whatever it may be, either separately or as joint families. When the business is carried on as the business of a joint family it is as a rule carried on in the name of the managing member of the joint family or in a firm name.

The first of these appeals is by Lala Jai Narain, who was Defendant No. 1. The other of these appeals is by Lala Prag Narain and Lala Brahma Narain, who were respectively Defendants Nos. 2 and 3.

As there are nine Defendants in the suit against all of whom a common liability is not alleged it is advisable to state at once who the different Defendants are. Sital Prasad, who founded the endowment in question, and his elder brother, Kunj Behari Lal with their father Lala Gopi Nath, constituted a joint Hindu family, which was governed by the law of the Mitakshara. After the death of Lala Gopi Nath, the brothers Kunj Behari Lal and Sital Prasad separated in 1900, and subsequently Kunj Behari Lal died childless. Before the endowment in question was founded Kunj Behari Lal had by his Will left all his property to his eldest nephew, Banke Behari Lal. Sital Prasad had married and had sons, Banke Behari Lal, above mentioned, Girwardhari Lal, Banarsi Das and Sheo Narain, De-

fendant No. 8. Banke Behari Lal married and had sons Lala Jai Narain, eldest son, Defendant No. 1, Rup Narain, who died before suit leaving a son, Shyam Behari Lal, Defendant No. 1, Lala Prag Narain, Defendant No. 2, and Lala Brahma Narain, Defendant No. 3. Girwardhari Lal, second son of Sital Prasad, married and had sons Lala Gur Narain, Defendant No. 9, and Lachmi Narain. Banarsi Das, third son of Sital Prasad, married and had sons Lala Suraj Narain, Defendant No. 5, Brij Narain, Defendant No. 6, and Keshab Narain, Defendant No. 7.

Sital Prasad separated from his sons in or before 1903 and made his Will of the 24th February 1904 and died on the 5th March 1904. There is evidence on which their Lordships find that Banke Behari Lal separated from his brothers. Banke Behari Lal and his sons constituted a joint Hindu family. Banke Behari Lal and his sons carried on business under a firm name of Banke Behari Lal Jai Narain. It is not proved, nor, indeed, has it been even alleged, that Banke Behari Lal and his sons had ever separated, and as such a separation has not been proved, the presumption in law is that they continued joint. It has not been proved that the sons of Banke Behari Lal after he died, on the 5th March 1907, separated. Consequently it is to be assumed, unless the contrary has been proved and it has not been proved, that the business, which was carried on under the firm name of Banke Behari Lal Jai Narain has continued to be the business of a joint family. At all material times Lala Jai Narain, Defendant No. 1, was a member of that joint family, and appears to have acted as the managing member of the joint family, and he was also a member of a committee of trustees which was appointed by the Will

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of Sital Prasad to manage the property of the endowment created by that Will. When Shyam Behari Lal, Defendant No. 4, was born has not been proved, but it is stated in the plaint of the 20th May 1915, that he was then about 8 years of age; it is thus uncertain whether he became a member of the joint family before or after the death of his grandfather Banke Behari Lal, but the question is not material as it appears to their Lordships.

Owing to a misconception of the effect of a judgment of the Board which was delivered by Lord Davey in *Balabux Ladhuram v. Rukhmabai* (1), it was generally, but erroneously, assumed that the Board had decided that when a Hindu governed by the law of the Mitakshara, who had sons living, separated from his brothers it was a presumption of law that he had separated from his sons and that he and his descendants ceased to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family. It was pointed out, however, by the Board in a judgment which was delivered on the 22nd January 1924, in *Hari Bakhsh v. Babu Lal* (2), that that was an erroneous conception of the effect of what Lord Davey had said, and that no authority had been brought to the attention of their Lordships for introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara. In the case of *Hari Bakhsh v. Babu Lal* (2), the parties were Hindus of the Bakkal Aggarwall caste of the Punjab. In the present case the learned Judges of the High Court in appeal decided that Shyam Behari Lal, Defendant 4, was not liable

in respect of the *waqf* trust fund, which was deposited by Banke Behari Lal with Banke Behari Lal Jai Narain. Possibly, the explanation of that decision is that the learned Judges had, as others had done, misconceived the effect of the judgment which had been delivered by Lord Davey.

In their plaint the Plaintiffs alleged that Sital Prasad, who died on the 5th March 1904, had by his Will, dated the 24th February 1904, made a *waqf* of his property for religious and charitable purposes, had appointed a committee of trustees, of which his eldest son Banke Behari Lal should be president; that after the death of Sital Prasad the whole of the *waqf* property was taken possession of by Banke Behari Lal; that the Defendants Nos. 1, 2, 3 and Shyam Behari Lal, Defendant No. 4, were at the date of the suit in possession of the *waqf* property.

The Defendants Nos. 1, 2, 3 and 4 jointly filed a written statement in which they did not deny or admit the statement in the plaint that the Defendants Nos. 1 to 4 were, when the suit was brought, in possession of the *waqf* property; consequently it must be taken that that statement was not traversed and was not in issue. They alleged that the Will of Sital Prasad created a private endowment and that sec. 92 of the Code of Civil Procedure, 1908, did not apply, the meaning of that allegation is that Sital Prasad's Will did not create any trust for public purposes of a charitable or religious nature. They also alleged that they had been satisfactorily carrying on the management of the *waqf*, and they denied that there had been any misappropriation of the *waqf* fund and that there was any liability on them. It is not necessary to refer to the written statement of any other Defendant, Sital Prasad, who was by occupation a

(1) L. R. 30 I. A. 130: s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 642 (1903).

(2) I. L. R. 5 Lah. 92: s. c. 28 C. W. N. 663 (P. C.) (1924).

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money-lender and zamindar, made his Will on the 24th February 1904. As translated it was so far as is material as follows:—

"I, Sital Prasad, son of Lala Gopi Nath, deceased, caste Agarwal Sahu resident of the city of Etawah, do declare as follows:—

Let it be known that under the decree of the Civil Court, dated the 16th April 1903, passed by the Subordinate Judge of the district of Mainpuri on the basis of the arbitration award, dated the 31st March 1903, the whole of my property is partitioned as against my sons and grandsons. I enjoy full proprietary rights of every sort in respect of the said property and have no co-sharer or co-parcener therein. I, therefore, give it in writing as regards the said property that I shall remain in proprietary possession of the property during my lifetime, that as regards the moveable and immoveable properties that might remain in my possession at the time of my death, I make a Will as follows:—A committee should be formed to carry out the directions given below. The committee would have all sorts of powers regarding the management of the said properties. My eldest son, Bankey Behari Lal, should be appointed as the president (of the committee), Banarsi Das, my third son, should be the secretary and Sheo Narayan, my fourth son, Jai Narayan, son of Bankey Behari Lal aforesaid, Gur Narayan, son of Girdhari Lal and Gauri Shanker, son of Haghbar Dayal, should be appointed as the members of the said committee. The president's vote should be treated as three votes, the secretary's vote as two, and each member's vote as one. The resolutions should be always passed with reference to the majority of votes and the resolution passed should be considered to be the orders of the committee and all proceedings of every sort should invariably be taken in accordance therewith. The power to remove or re-appoint the president, secretary and the members shall remain in the hands of the committee, but let it be known that anyone who shall be admitted into the committee as directed above shall be from amongst my sons, grandsons and their descendants. No stranger can be admitted into

the committee, nor can he, under any circumstances, make any sort of interference.

I.—I consider it admissible to give some of the directions below:—

The committee, so far as possible, shall be bound to comply with them.

(a) Bisrent (ghat) of Sri Jamunaji should be built in Etawah at a cost of about Rs. 2,500.

(b) A 'dharamsala' containing two temples, one of Sri Mahadeoji Maharaj and the other of Sri Thakurji Maharaj should be built in Etawah at a cost of about Rs. 5,000.

(c) In the said 'dharamsala' each of the four sons of mine should cause 4 small rooms to be built at his own cost under the management of the committee, with reference to the plan of the 'dharamsala.' The amount that might be given in charity on the occasions of the marriages of my sons, grandsons or their male children, should be given in this 'waqf' fund to the extent of $\frac{1}{2}$. Should anyone fail to do so, he and his sons should be debarred from holding any of the aforesaid offices so long as they do not comply with the above directions.

(d) The principal amount of cash or the property should not be utilised in defraying any expenses other than those enumerated above. So far as possible about $\frac{1}{3}$ of the income yielded thereby, i.e., interest or profits should be spent on the following objects according to the discretion of the committee or on any other act of charity.

1. Such quantity of unparched grain, flour or parched barley should be given for eating to 'sadhuis,' 'hairagis' (mendicants) and pilgrims as might be considered proper or in the winter season some clothes, etc., or medicine might be distributed to the sick.

2. Expenses in connection with the staff, pay of employees, repairs of the 'dharamsala,' temple and 'bisrent,' etc. (should be defrayed out of the said fund).

3. Should any of my sons or their descendants lead a retired life and sit in contemplation and wish to be supplied with clothes and food, then the said person should get such assistance so long as he lives in the 'dharamsala.'

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II.—The president and the secretary shall have power to realise every sort of money, grant receipts, acknowledge full payment, affix signature, purchase and sell property, verify at the time of registration, advance money on interest, carry on every sort of trade, take all sorts of Court proceedings either themselves or through their general attorney, in short they shall have power to take all the proceedings of every sort, but all the said proceedings relating to the 'waqf' shall be taken in the name of me, Lala Sital Prasad. The president and the secretary shall be competent to institute every sort of suit, set up defence and take Court proceedings in their own names. There shall be no necessity to include the names of other members.

III.—In addition to the cash, etc., due to or by me under my account-books and 'hundis,' a 5 biswa zamindari share in mauza Kutubpur, pargana Bhartna, district Etawah, which forms the subject-matter of a former gift and in respect of which my name is entered in the public papers, i.e., the 'khewat,' is also included in the subject-matter of this Will. As regards the said property it is also directed that it may be sold if it can be sold with profit at a low rate of interest.

IV.—No one at any time under any circumstances shall have any sort of claim in respect of the aforesaid property. The income and expenditure, etc., of every sort shall be daily entered in the account-book.

V.—The president and the secretary should, according to the arbitration award, dated the 31st March 1903, take all proceedings in the cases relating to the shops at Cawnpore, the full particulars whereof are given in the said arbitration award and get their names entered in the Court (papers) in place of my name. They should incur expenses out of the amount standing to my credit in the papers. Moreover, the president and the secretary should cause mutation proceedings to be taken in respect of such property or land as might belong to any party under the said arbitration award but which might be entered in my name and in respect of which mutation proceed-

ings, etc., might not be completed in my life-time.

I have, therefore, executed this Will so that it may serve as evidence."

It is obvious to their Lordships that Sital Prasad by his Will disposed of all his property.

When Sital Prasad died his property was represented by Rs. 48,000 in cash or securities, two houses at Etawah valued at Rs. 2,000, and zamindari property valued at Rs. 2,000. The committee took over the houses and the zamindari property. His eldest son, Banke Behari Lal, got possession of the cash and securities and handed them over to a "shop" which he and his sons carried on as a joint family, trading under the firm name of "Banke Behari Lal Jai Narain."

It has been held by the two Courts below, the District Judge and the High Court, that Sital Prasad by his Will created a trust for public purposes of a charitable or religious nature and that it was not void as being vague or uncertain as to the charities to which it applied. Their Lordships agree with that construction of the Will. Having regard to the fact that the bathing ghat might be washed away or damaged by floods in the Jumna and the expenses which might have to be incurred in replacing it or in repairing it, and having regard to the fact that the expenses of maintaining a *dharamsala* would much depend on the number of pilgrims using it, it was a prudent provision of the Will, as their Lordships understand it, that one-fourth of the income of the endowment should ordinarily be kept in reserve by the trustees to meet such extraordinary expenses when they should occur. It is quite clear from cl. IV of the Will that no one, except as provided by the Will, should have any claim to any part of the income of the *waqf* property.

From 1904 until 1907 the committee ap-

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pear practically to have done nothing to carry out Sital Prasad's directions, it is doubtful if during that period the committee held any meetings. So far as has been proved the first meeting of the committee was held on the 5th December 1907. The committee, however, on the 12th September 1904, or one of them applied to the municipality of Etawah for permission to construct a bathing ghat on the Jumna and to erect a *dharamsala*. The application to construct the bathing ghat was refused because the committee required the municipality to divert a *pucca* drain from the land which the committee required for the construction of the ghat. The application for permission to erect the *dharamsala* was refused because the committee wanted the government to grant to them *nazul* lands gratis. It may be doubted whether either of those applications was made *bond fide*. Nothing further was done by the committee for the construction of a bathing ghat, and until 1907 nothing further was done by the committee with the object of erecting a *dharamsala* or of providing a building which could be used as a *dharamsala*.

Banke Behari Lal died on the 5th March 1907, and was succeeded as President of the committee of trustees by his second son Rup Narain, and later Lala Jai Narain, Defendant No. 1, was appointed Secretary. On the 14th March 1907, Banarsi Das and Sheo Narain, two of the younger sons of Sital Prasad, brought a suit against Lala Jai Narain, Defendant No. 1 of this suit, Girwardhari Lal, their then eldest surviving brother and Gur Narain, the elder son of Girwardhari Lal, for cancellation of the Will, of 24th February 1904, of Sital Prasad and for possession of their share of the estate of Sital Prasad, or in the

alternative, if that Will should be held to be genuine, an order that the directions contained in that Will should be carried out. It may be inferred that the directions given in that Will were not being carried out by the committee.

It is now necessary to be considered whether there were any misappropriations of the *waqf* property by the trustees, and if there were, then it is to be considered whether the joint family trading as "Banke Behari Lal Jai Narain" can be made liable to repay any of the moneys misappropriated. The misappropriations which the District Judge and High Court have concurred in finding began in 1907 and ended in 1914, and in the aggregate amounted to Rs. 48,000. Their Lordships agree with the Courts below that these misappropriations for which the trustees are responsible were committed and amounted in the aggregate to Rs. 48,000. These misappropriations began after Banke Behari Lal died and they were committed with the knowledge and assent of Lala Jai Narain, Defendant No. 1, and for those misappropriations of the trust fund their Lordships agree with the Courts below that Lala Jai Narain, Defendant No. 1, is responsible.

After the death of Banke Behari Lal in 1907, the joint family continued to carry on the business which had been carried on in the firm name of "Banke Behari Lal Jai Narain." Whether there was any change in the trading name of the joint family after the death of Banke Behari Lal their Lordships do not know, it is immaterial whether there was or not a change in that trading name, and their Lordships will continue to refer to that trading name as the trading name of the joint family. It appears to their Lordships that after the death of Banke Behari Lal his eldest son Lala Jai Narain

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was the managing member of the joint family. After the death of Banke Behari Lal the joint family continued to hold on behalf of the trustees the moneys of the *wagf* fund which Banke Behari Lal had, on the death of Sital Prasad, deposited with "Banke Behari Lal Jai Narain." Lala Jai Narain, Defendant No. 1, on behalf of the joint family, was a party to the following transactions which affected the trust fund of the trustees in the possession of the joint family. In 1907 some people in Etawah trading in the name of "Durga Prasad and Sital Prasad" owed to "Banke Behari Lal Jai Narain" Rs. 16,000. The debtors were in difficulties, and Lala Jai Narain, Defendant No. 1, repaid that debt to the joint family by transferring Rs. 16,000 from the credit account of the trustees to "Banke Behari Lal Jai Narain" and took a mortgage for Rs. 16,000 in favour of the trustees, thus substituting the trustees for "Banke Behari Lal Jai Narain" as the creditors of "Durga Prasad and Sital Prasad." Another instance is, the Bharat Bank owed to "Banke Behari Lal Jai Narain" Rs. 10,000. The Bharat Bank got into difficulties and subsequently failed. Lala Jai Narain, Defendant No. 1, on behalf of the joint family transferred that debt to the *wagf* account of the trustees with "Banke Behari Lal Jai Narain." In 1914, after Lala Prag Narain, Defendant No. 2, who was one of the joint family, had become a member of the committee of trustees, a firm trading as "Ram Din and Sital Prasad" owed Rs. 15,000 to "Banke Behari Lal Jai Narain." The debt was unsecured and the debtors were unable to pay it. Lala Jai Narain, Defendant No. 1, in the interests of "Banke Behari Lal Jai Narain" transferred that debt of Rs. 16,000 to the *wagf* account of the trustees. The three instances to which

their Lordships have referred represent in the aggregate Rs. 41,000 of the total sum of Rs. 48,000 which was misappropriated, and in their Lordships' opinion for that Rs. 41,000 Lala Prag Narain and Brahma Narain, Defendants Nos. 2 and 3, as members of the joint family trading in the name of "Banke Behari Lal Jai Narain" are equally responsible in this suit with Lala Jai Narain, Defendant No. 1, but in their Lordships' opinion it has not been proved that the joint family is responsible for the balance of Rs. 7,000 of the Rs. 48,000 of misappropriation of the *wagf* fund.

The learned District Judge decreed the suit in the manner following :—

"(1) The committee will be reconstituted as follows subject to their acceptance: Lala Sheo Narayan, president; Lala Prag Narayan, Lala Suraj Narayan, Defendants, Lala Gauri Shankar, Plaintiff and Babu Dharam Narayan, pleader, Mainpuri, members.

(2) The entire property will be put in charge of the said trustees for management on the lines suggested.

(3) Lala Jai Narayan will, within 3 months, furnish full accounts of the affairs of the trust, showing how the capital sum estimated at Rs. 52,000 has been utilised, and also how the interest thereon at a rate fixed by the Court at 4 per cent. per annum has been spent. Neither the transfers to Lala Jai Narayan himself in lieu of mortgages, 'hundis' or other securities can be accepted by the Court, nor can the release to Lala Benarsi Das of Rs. 10,000, with interest thereon be allowed as a charge against the fund. The balance due to the fund on these accounts which are to be furnished will be handed over to the committee in the form of cash or realisable securities.

(4) The committee will have full power to carry out the testator's wishes as laid down in the Will. They will close the Gracey Hindu School, prepare a scheme of systematic charity and either build a

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'dharamsala' or some similar institution of a kind approved by this Court.

5. The Plaintiffs' costs will be borne by Lala Jai Narayan personally, who will bear his own costs and those of Lala Gur Narayan.

The other Defendants will bear their own costs with the proviso that those of the heirs of Lala Benarsi Das will be paid out of the estate of Lala Benarsi Das. Interest at 6 per cent. per annum will be allowed on the costs as usual.

And that the sum of Rs. 1,079-2-0 be paid by Jai Narayan, Defendant, to the Plaintiff on account of costs of this suit with interest thereon at the rate of 6 per cent. per annum from this date to date of realisation.

It is further ordered that Jai Narayan, Defendant, do pay Rs. 76-8-0 to Gur Narayan, Defendant, with interest at 6 per cent. per annum from this date up to the date of realisation and Rs. 203-4-0 on account of costs of Suraj Narayan and others, Defendants, with interest be charged to the property of Lala Benarsi Das."

From that decree the Plaintiffs appealed to the High Court as also did Lala Jai Narain, Defendant No. 1, and Lala Sheo Narain, Defendant No. 8; who so far as his costs only were concerned, filed a cross-objection.

The High Court heard the two appeals together and dealt with them and the cross-objection in one judgment, as the Court was entitled to do. The High Court made the following decree:—

"It is ordered and decreed that the decree of the Judge of Mainpuri be modified to this extent that the direction to Jai Narain to render accounts to the new committee be deleted therefrom and instead thereof it is hereby directed that the first three Defendants shall pay to the new committee Rs. 48,000 with interest at 4 per cent. per annum from the 5th of March 1904, to the date of payment, less a sum of Rs. 1,308 and shall deliver the houses and the share in the village of Kutubpur

to the new committee and that the rest of the said decree be maintained and this appeal and the cross-objection filed by Sheo Narayan under Or. 41, r. 22 of the Code of Civil Procedure be and they hereby are dismissed.

And it is further ordered that the Appellant aforesaid do pay to the Respondents Nos. 1 to 3 aforesaid, the sum of Rs. (1,331-11-3) one thousand three hundred and thirty-one annas eleven and pies three only, the amount of costs incurred by the latter in this Court.

And it is further ordered that the costs incurred in the lower Court be paid with interest thereon as awarded by the said Court."

Their Lordships, having considered the facts in the suit and the law which appears to them to be applicable to the facts, will humbly advise His Majesty that the appeal of Lala Jai Narain, Defendant No. 1, should be dismissed, but the decree against Lala Prag Narain and Brahma Narain, Defendants Nos. 2 and 3, should be varied by making the principal sum which they are jointly and severally with Lala Jai Narain liable to pay to the new committee to be Rs. 41,000 with interest at 4 per cent. per annum from the 5th March 1904, to the date of payment, less the sum of Rs. 1,308 and that the rest of the decree of the High Court should stand. Lala Jai Narain must pay two-thirds of the costs of the Respondents in these consolidated appeals, and Lala Prag Narain and Brahma Narain must pay one-third of the costs of the Respondents in these consolidated appeals, as the variation of the decree of the High Court which their Lordships advise should be made was not suggested by them or on their behalf, and they have made no payment into Court, and have resisted the claim of the Plaintiffs from the first.

Before concluding, their Lordships must refer to a matter which has caused much

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trouble in the preparation of the advice which they will humbly offer to His Majesty.

In the judgment delivered by the learned Judges of the High Court they correctly said:—"The two appeals Nos. 140 and 241 of 1916 are connected and arise out of a suit brought under sec. 92 of the Code of Civil Procedure." In the case which was filed in this appeal on behalf of Lala Jai Narain, his Counsel stated:—"Against the said decree of the District Judge, Jai Narain and the Plaintiffs both appealed to the High Court." In the case which was filed in this appeal on behalf of Lala Prag Narain and Lala Brahma Narain their Counsel stated: "The 1st Defendant, Jai Narain, appealed from the said decree of the District Judge to the High Court of Judicature at Allahabad, and the Plaintiffs filed cross-objections in regard to costs." No copy of the appeal which presumably was filed by the Plaintiffs appears in the record which is before their Lordships, and the cross-objections in regard to costs which were in fact filed were filed not by the Plaintiffs, but by the Defendant Lala Sheo Narain. In the case which was filed in this appeal on behalf of two of the Plaintiffs by another Counsel it is stated: "Lala Jai Narain alone appealed to the High Court against the decree of the learned District Judge, and impleaded as Respondents the Plaintiffs and the Defendants who had not appealed." Such contradictory statements as to matters which were of record very rarely occur in cases filed in appeals to His Majesty in Council, but in the present case the contradictory statements and the absence from the record before their Lordships of a copy of the memorandum of appeal to the High Court of the Plaintiffs who did appeal to that Court must be the results of negligence for which persons in

India are presumably responsible. Their Lordships must accept as correct the statement of the learned Judges of the High Court in their judgment that there were two appeals before them, but they observe that only one decree is included in the printed record, and that was in the appeal No. 140 of 1916 of Lala Jai Narain.

Solicitor: *Mr. E. Delgado* for the Appellant Jai Narain.

Solicitor: *Mr. A. S. L. Polak* for the Appellants Prag Narain and Brahma Narain.

Solicitor: *Mr. Douglas Grant* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 94 of 1923.

SANDERSON, C. J.	} BHUBAN MOHAN GHOSE v. CO-OPERATIVE HINDUSTHAN BANK, LD., and others.
RANKIN, J.	
1925, 12, January.	

Civil Procedure Code (Act V of 1908), Or. 1, r. 3, Or. 34, r. 1—Mortgage suit—Joinder as Defendant of alleged benamdar of mortgagor in whose name property was purchased—Joinder, if competent and proper—Party claiming title adversely to mortgagor, if and when may be joined—Cross-objections, when lie—Or. 41, r. 22—Mortgage by deposit of title deeds—Letter of deposit not registered—Mortgage, if valid—Transfer of Property Act (IV of 1882), sec. 59.

Per SANDERSON, C. J.—Speaking generally, it may be said that a suit to enforce a mortgage, in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of mortgagor are sought to be investigated, is open to objection on the ground of misjoinder and inconvenience. The question, however, is not one of jurisdiction, and at most the misjoinder is an irregularity or inconvenience.

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Per RANKIN, J.—The correct view in the matter is to ask whether the case does or does not come under Or. 1, r. 3 of the Civil Procedure Code. If it comes under the rule, it is open to the Defendants to ask for a separate trial as a point not of law but of convenience. There is need for a high degree of caution before permitting questions of paramount title to be investigated in a mortgage suit. Both as to competence and convenience there will generally be much to consider.

Where the interest of a Respondent was really adverse to the Appellant's though the latter unnecessarily in his memorandum of appeal took, as against the other Respondents, grounds of appeal which were open not to the Appellant but to the first-named Respondent :

Held, per RANKIN, J.—That the first-named Respondent can take the same grounds as cross-objection in the appeal, this not being a case of a purely lateral cross-objection between the Respondents in which the Appellant was not interested.

Per CURIAM.—A letter which recorded a previously completed transaction of mortgage by deposit of title deeds did not require to be registered.

SUBRAMONIAN v. LUTCHMAN (1) *applied*.

This was a cross-objection filed by a Respondent against the judgment delivered by Mr. Justice Pearson on the 10th April 1923 in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Messrs. L. P. E. Pugh and B. Bosu for the Respondent S.

Messrs. Lungford James and A. K. Roy for the Respondent Bank.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a cross-objection filed under Or. 41, r. 22 of the Code of Civil Procedure by Srimati Susila Bala Dasi who is the wife of Bhuban Mohan Ghose

The suit was brought against Surendra Nath Pramanick and Bhuban Mohan Ghose carrying on business under the name, style and firm of " Eastern Trading and Engineering Co."

The third Defendant was Srimati Susila Bala Dasi, and the fourth was Priag Das Jamuna Das, who are alleged to be puisne mortgagees.

One of the allegations of the Plaintiff Bank was that premises No. 56, Amherst Row had been mortgaged to the Plaintiffs by deposit of the title deed as additional security for the amount owing to the Bank on an account called " O " which the Defendants Nos. 1 and 2 had with the Bank.

Bhuban Mohan Ghose and his wife Susila Bala Dasi alleged in their written statements that these premises belonged to Susila ; on the other hand, the Plaintiffs alleged that Susila was merely the *benamdar* of Defendants Nos. 1 and 2.

The learned Judge held that the premises were the property of the firm, i.e., of the Defendants Nos. 1 and 2 and that Susila was merely the *benamdar* in respect of the said premises. He gave a declaration that the Bank was entitled to a charge on the said premises ; and he directed accounts to be taken, and in default of payment of the amount found due he directed a sale of the premises.

There were other questions decided in the suit, but the cross-objection relates to 56, Amherst Row, only.

Judgment was given on the 10th of April 1923 and, on the 16th of June 1923,

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Bhuban Mohan Ghose filed an appeal against the said judgment.

On the 25th of June Susila applied for leave to file a memorandum of appeal. It appears that the time for filing the appeal had expired, and her application was refused.

On the 3rd of July Susila is alleged to have been served with notice of her husband Bhuban Mohan Ghose's appeal; and, on the 1st of August she filed the cross-objection which is the subject-matter of this appeal.

On the 20th of August 1923 Bhuban Mohan Ghose applied for extension of time to file the paper-book. He was allowed two months' further time, but he was directed to furnish security to the extent of Rs. 1,500 on or before the 14th of September 1923. This security was not given, with the result that on the 11th of March 1924 Bhuban Mohan Ghose's appeal was dismissed for default.

Susila Bala obtained leave to print the paper-book and to proceed with her cross-objection but this was subject to any objection which might be taken at the hearing.

The learned Counsel for the Bank took a preliminary point that the objection of Susila was not a cross-objection within the meaning of the above-mentioned rule and urged that the objection should not be entertained by this Court. After hearing the arguments on the preliminary point, my learned brother and I decided to hear the objection of Susila on its merits and we postponed our decision on the preliminary point. I propose to deal with the merits in the first instance. The first point made by the learned Counsel, who appeared for Susila, was that assuming that the premises No. 56, Ahmerst Row, were the property of the Defendants Nos. 1 and 2, there was no valid mortgage. He argued

that when the title deed was deposited by Bhuban Mohan Ghose with the Manager of the Bank, a letter dated the 31st October 1918 was given by Bhuban Mohan Ghose to the Manager, which constituted the bargain between the parties, that it was not registered under the Indian Registration Act and consequently it was not admissible in evidence and that no oral proof of the mortgage was admissible.

The learned Judge held that registration was not necessary because it could not be said that it was the letter of 31st October 1918 and nothing else that created the charge: he based this decision on the evidence of the Bank Manager which he accepted as truthful and reliable evidence.

The principle which is applicable to this point was stated by Lord Carson in *Subramonian v. Lutchman* (1). After examining the authorities relating to the matter, Lord Carson is reported to have said as follows: "Applying the principles thus laid down to the present case what this Board has to determine is, did the document of 15th July 1908, constitute the bargain between the parties, or was it merely the record of an already completed transaction?" In my judgment that is the test which should be applied to the question involved in this case. The effect of the evidence of the Manager of the Plaintiff Bank is that Bhuban Mohan Ghose told him that he was purchasing the property, 56, Amherst Row, for the firm, that Bhuban Mohan Ghose asked him to assist by advancing the money necessary for the purchase, and that when the property was purchased it would be used as additional security to the Bank for the advances made by the Bank to the Defendants Nos. 1 and 2.

This happened in August 1918. Accord-

(1) I. L. R. 50 Cal. 338 at p. 345: s. c. 28 C. W. N. 1 (P. C.) (1922).

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ingly the money was advanced to the extent of about Rs. 12,000 on the understanding that it would be used for the purchase of the property and that the property would be given as an additional security to the Bank.

The property was in fact purchased in August 1918.

On the 31st October 1918 the Manager of the Bank was in the office of Bhuban Mohan Ghose, and I have no doubt that the object of the visit was to obtain the title deed of the premises No. 56, Amherst Row. On that day Bhuban Mohan Ghose handed the conveyance to the Bank Manager.

The Bank Manager was examined as to what happened on that occasion, several answers were obtained to questions of a leading character.

Eventually he was asked to state what happened on that date. His evidence was as follows :—

“ Q.—Tell me what happened on the date on which this letter was made over to you and the title deeds were handed over?

“ A.—He handed over the title deeds to me and I wanted from him a letter. I said you must give me a letter to say that this deposit is an equitable mortgage, and he sent this letter to me.

“ Q.—The Court :—How long after the handing over to you of the document was the letter given to you?

“ A.—It may have been on the same day or a day or two after this was brought to me. This was to be brought to me from time to time and whenever required he would hand over the document to me, and that day he handed it over to me, but whether it was on the same or a day or two after that, I do not exactly remember.”

Again in cross-objection the Manager was asked.

“ Q.—Until a letter was given you considered there would be no valid mortgage? Why not?

“ A.—I knew it was the firm's property.

The money was taken from me on the understanding that the property would be purchased for the firm and I would get that property as security. Bhuban told me that distinctly many times.

“ Q.—At this interview did you tell Bhuban that according to Bank's laws a married woman's property could not be taken as security unless she has fully explained the nature of the security and the consequence thereof?

“ A.—There was no such talk. He only laughed at me when I wanted his wife's letter.

“ Q.—Who drafted this letter which was signed by Bhuban, this letter of 31st October 1918?

“ A.—I do not remember. I do not think I did. I only gave general directions as to what should be mentioned in that letter.

“ Q.—You were satisfied that the letter was in order?

“ A.—I got that letter from him subsequently and I kept it in the safe. I did not carefully go into it. I thought it was all right.”

It therefore appears to me on the evidence of the Bank Manager, which the learned Judge accepted and the truth of which has not been seriously attacked in this Court, that the money was advanced in August 1918 by the Bank on the understanding that the property would be purchased by the firm of the Defendants Nos. 1 and 2 and that when purchased the property would be utilised as additional security for the Bank's advances. It was in pursuance of this arrangement

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that the title deed was handed to the Bank Manager on the 31st October 1918 by Bhuban Mohan Ghose. There was no record of the arrangement which had been made and it was therefore only reasonable that the Bank Manager should ask for a letter from Bhuban Mohan Ghose.

Consequently the letter of the 31st October 1918 was given as a record of the agreement which had been made.

The wording of the letter is not only consistent with but in my opinion supports this view.

The phrase "we beg hereby to keep with your Bank" seems to point to the fact that the deed had already been placed in the hands of the Bank, and the letter was written for the purposes of stating the object for which the Bank was entitled to keep the same.

The fact that the Bank Manager subsequently drafted a letter which he desired Susila to sign does not in my judgment militate against this view.

The Bank Manager said that he came to know that the conveyance was in the name of Susila when he received it on the 31st October 1918, and the Manager, when he discovered this, naturally desired a letter from Susila; he stated: "Though he said it was the firm's property, yet I thought it safe to have his wife's permission in writing."

I understand from this that he was told the property belonged to the firm but the property appeared to be in the name of Susila. Consequently, *ex majore cautela* he desired a letter from Susila. The result is that in my opinion the letter of the 31st October 1918 did not constitute the bargain between the parties: on the contrary, it was merely the record of a transaction which had already been completed. Consequently, oral evidence of the transaction was admissible.

The next point relied upon by the learned Counsel for Susila was that she should not have been made a party to the suit and that the suit should have been dismissed as against her.

It was argued that the only proper parties to a suit on a mortgage in which the prayer is amongst other things for a sale, are the mortgagor and mortgagee and any parties who may have acquired an interest from them subsequently to the mortgage, and that no adverse party who is a stranger to the mortgage should be joined as a party to the suit or, in other words, that the only proper parties to such a suit are persons interested in the equity of redemption.

Speaking generally, it may be said that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, is open to objection on the ground of misjoinder and inconvenience: see *Radha Kunwar v. Thakur Reoli Singh* (2).

The question, however, is not one of jurisdiction, and at most the misjoinder is an irregularity or inconvenience; in this case the Plaintiffs' case was that the mortgage was made by Bhuban Mohan Ghose on behalf of the firm and that Susila was merely the *benamdar* and consequently she was joined as a party. That question was investigated in the suit. Evidence was called in respect thereof and the learned Judge found that the Plaintiffs' case was true. I am not satisfied that on the facts of this case it was improper for the Plaintiffs to join Susila as a party. Assuming, however, for the moment that it was irregular for the Plaintiffs to join Susila as a party to the suit, it is clear that she has not suffered any

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prejudice by reason of the course which was adopted. In my judgment the irregularity, if any, is not such as would justify this Court in setting aside the decree. The learned Judge on the facts came to the conclusion that the premises were the property of the firm and that Susila was merely the *benamdar*. I see no reason for disagreeing with the learned Judge in this respect.

The result is that I am of opinion that this appeal should be dismissed.

In view of the conclusion, at which I have arrived on the merits of the objections raised by Susila, it is not necessary to give any decision on the preliminary point raised by the learned Counsel for the Plaintiff Bank. It is sufficient for me to say that as at present advised and without deciding the question, I am not satisfied that the objection of Susila was one which ought not to be entertained and adjudicated upon by the Court. For the above reasons in my judgment the cross-objection of Susila must be dismissed with costs.

RANKIN, J.—I propose to deal first with the question whether the cross-objection taken by Susila ought to be entertained on the merits.

Mr. Langford James for the Respondent Bank contends that her objections are not cross-objections, that they are directed solely against the Plaintiffs and that they repeat Bhuban's own grounds of appeal. He says that Susila should have filed her own independent appeal in time and that to allow her cross-objections in this case is to defeat the limitation law. He relies upon the principle deduced from certain decided cases that cross-objections as between Respondents are not as a rule admissible. It appears to me that the difficulty on this part of the case arises entirely because

Bhuban in his grounds of appeal made a certain number of complaints against the judgment of the learned Judge which did not lie in his own mouth at all. He complained that the interest of Susila had been held to belong to himself or to his firm. He complained that the property of Susila was being taken from her to the extent of the mortgage notwithstanding she had never authorised the mortgage and he complained further that it was being taken from her although the mortgage was void for want of registration of the memorandum.

Now one can understand that a man has an interest to object to a declaration that he has mortgaged his wife's property without her permission, but the judgment of the learned Judge in this case was given in the presence both of Bhuban and of Susila. If the judgment stands, Susila could never sue her husband on the ground that he had in fraud of her intermeddled with her property. Accordingly, on this part of the case most of the grounds of Bhuban's appeal were grounds which might be good or bad in the mouth of Susila but which on the face of them had nothing really to do with him.

Now, it is quite plain that the rights of Susila, whatever they may be, cannot be taken from her because her husband has wrongly chosen to fight her case as well as his own. She must be entitled to fight her own case. Looking at it from that point of view one has to ask oneself whether Susila's cross-objections are really objections directed against Bhuban. In my opinion, whatever Bhuban may admit and whatever Bhuban may assert, Susila's contentions that the property was hers and not Bhuban's and that if Bhuban mortgaged it at all he did it without her authority—these contentions are contentions adverse to Bhuban's interest. They

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may not be contrary to what Bhuvan says; but the learned Judge has disbelieved both Bhuvan and Susila altogether. Seeing that her claim in this appeal to substantiate that the property was hers and that she never authorized a mortgage is a claim to have that established as against Bhuvan as well as against the Plaintiff Bank, it appears to me that the cross-objections are cross-objections in the full sense of the word. She is establishing or seeking to establish a right of her own adverse to Bhuvan's right. That fact has consequences as against the Plaintiff-Respondent. But this is not a purely lateral cross-objection between the Respondents in which the Appellant is not interested.

For these reasons it appears to me that the case does not come within the decisions which say that in the case of a purely lateral objection as a rule the Court will not permit it to be urged. I think, therefore, that Mr. Langford James's preliminary point fails.

The next question is whether or not this suit was bad for mis-joinder of causes of action and cannot be entertained. It appears to me that there is a certain danger, in dealing with the decided cases, of omitting to notice that the form of this question has been very greatly changed since the case most relied upon before us was decided. I refer to the case of *Jaggewar Dutt v. Bhuvan Mohan Mitra* (3). It is the leading authority in this Court upon this subject. The case was decided in 1906 and the case proceeded upon the Code of 1882 and upon certain prior decisions in the Privy Council and elsewhere. In 1896 a change was made in Or. 16, r. 1 of the Rules of the English Supreme Court. It was made as a consequence of a decision in the House of Lords in

(3) I. L. R. 33 Cal. 425 (1906).

Smurthwaite v. Hannay (4) [compare also *Sadler v. Great Western Railway Company* (5)]. In the English Rules, as in the present Code, there is one order dealing with joinder of parties—Or. 16. There is another order dealing with joinder of causes of action—Or. 18. The change was made by inserting certain words into Or. 16 and, I do not think, it can be said to have been well-settled that the change enlarges the right to join causes of action until the decision in *Bullock v. London General Omnibus Company* (6). It was followed by the case of *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co. Limited* (7).

It is now, however, well-settled that the change in Or. 16, r. 1 does extend to enlarge the right to join causes of action. In England as regards Defendants r. 4 of Or. 16 was not dealt with, but by course of decisions it is now established that the change in r. 1 impliedly makes a corresponding change in r. 4. That took a considerable further time to establish, but the authority for that may be seen in such a decision as *Thomas v. Moore* (8).

Now, until 1908 the law in India under the Code of 1882 was the old law of *Smurthwaite v. Hannay* (4), but in 1908 the legislature not only carried into effect the English change of 1896 by altering the words of what is now r. 1 of Or. 1 but it carried into effect also an express alteration of r. 3 of Or. 1 applying the change specifically to Defendants. R. 3 now reads: "All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or tran-

(4) [1894] App. Cas. 491.

(5) [1896] App. Cas. 450.

(6) [1907] 1 K. B. 264.

(7) [1910] 2 K. B. 854.

(8) [1918] 1 K. B. 555.

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sactions is alleged to exist, whether jointly, severally, or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise."

It may be observed that when the Code intends that certain causes of action should not be joined at all or except with special leave, it says so. Certain causes of action cannot be joined with suits to recover immovable property. There is another Rule precluding the joinder of causes of action against an executor, but there is no such Rule in the case of mortgage suits.

There is further in Or. 34, r. 1, a revised edition of what used to be sec. 85 of the Transfer of Property Act and that Rule is to the effect—"All persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage." The old phrase in sec. 85 having any interest in the property comprised in a mortgage "gave rise to considerable difficulty and was altered in 1908. Whether one is dealing with sec. 85 or with Or. 34 (1)—the purpose of the Rule is to state what parties are necessary parties in a pure mortgage suit and the Rule is in no way directed to the question whether any causes of action may be joined with a claim upon a mortgage, or, if so, in what circumstances.

I would like here to make a parenthetical observation. In a case such as the present the Plaintiffs' cause of action against Susila was not in substance or otherwise a cause of action in ejectment. They had no claim and they made no claim to possession of the property. So far as the Plaintiffs were concerned, they were bound to suppose that if they got a mortgage decree Susila or her husband

or any body else interested in the equity of redemption might very well pay off the mortgage, in which case the Plaintiffs never would have a claim to possession either by themselves or through any auction-purchaser taking under a sale in their suit.

These matters being premised, it seems to me that the present case must be governed not by the old Rules of the Old Court of Chancery but by the Code. It seems to me further that the case for the present purpose is highly exceptional. I am not going into the facts, but the question whether a mortgage had been concluded or not was in that case inextricably bound up with the question of *benami*. It was also bound up with the question whether or not Bhuban was a partner of Surendra. That question of partnership in turn affects the question whether the property was given by Bhuban to his wife. In turn that affects the question whether or not the document of the 31st October was itself the repository of the agreement to mortgage or was a mere record of a completed transaction. If in this case the Plaintiffs had sued upon their mortgage raising no question of Susila's title to the property and if afterwards they brought a suit for a declaration that she was a mere *benamdar* and that her interest was bound by the mortgage, not one but several identical questions of fact would have had to be litigated twice. The mortgage in this case, if Susila was not a *benamdar*, was in everybody's view a pure nullity. It was suggested at the Bar that the proper course was to bring a simple mortgage suit, sell the interest of the Plaintiffs (which might very well be nothing) under the decree, and then let the auction-purchaser litigate with Susila the question of her title. Whatever is right or

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wrong, that undoubtedly would have been calamitous. The only possible way to ensure that the property should not be wasted from the point of view of the mortgagors and the mortgagees would have been to bring a declaratory suit against Susila to a conclusion before this mortgage interest was sold. In these circumstances and these being the provisions of the law as to joinder it appears to me that the correct view in this matter is to ask whether the case does or does not come under r. 3 of Or. 1. However painful it may be to old fashioned equity lawyers to find causes of action lying together in one suit, if such a case comes under Or. 1, r. 3, it cannot be held to be incompetent. In my opinion, the case is very plainly within Or. 1, r. 3. If there were any objection on the ground of convenience, it must be observed that this case was tried in the High Court and not before a Munsif, with the apparatus of settlement of issues at the first hearing. Susila could, either before the filing of the written statement or immediately after, have applied to the Judge under Or. 2, r. 6 to have a separate trial if she wanted to make that application. As I understand what she did she acted just as if the case was being tried in the Mofussil. She took the ground of misjoinder in her written statement and the matter only came before the learned Judge when the parties were prepared for trial. The point was taken not as a point of convenience under Or. 2, r. 6, but as a point of law which the learned Judge as a matter of procedure was bound to give effect to. The learned Judge rejected that argument as I think correctly. He was satisfied that there was no reason or prejudice to Susila in the course of the trial, and rightly did not regard the joinder of the causes of action in

the circumstances of this case as incompetent.

After discussing English cases and American cases Mr. Justice Mookerjee in the case of *Joggeswar Dutt v. Bhuban Mohan Mitra* (3) gives two sets of reasons as the basis of his judgment. He says: "In our opinion the rule is founded on two broad and intelligible grounds. In the first place, it is based on the reason that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and mortgagee, are sought to be investigated, is open to objection on the ground of misjoinder and multifariousness. Under secs. 14 and 15 of our Civil Procedure Code there cannot be joinder of causes of action of this description." Subsequently the legislature has taken that ground away. "In the second place," says the learned Judge, "if adverse claims be allowed to be litigated in a mortgage suit such claims may obviously be determined by a Court, which would have no jurisdiction to entertain a suit for their determination, if properly framed. The valuation of a suit to enforce a mortgage is dependent upon the amount claimed by the Plaintiff, which may obviously have no relation to the value of the property in respect of which an adverse claim is set up," and he gives illustrations to show that there would be difficulty in these circumstances. The present case was tried on the Original Side where there is no question of valuation and no question of court-fee. The property was a property situated within the jurisdiction of the Original Side and there is under the second ground mentioned by Mr. Justice Mookerjee no difficulty at all in the present case. I would point out, however,

(3) I, L. R. 33 Cal. 425 at p. 440 (1906).

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that the position in such a case as the present is not simply that of an ordinary mortgage claim. The Plaintiffs in effect sought against Susila a declaration that she was only a *benamdar*. They got such a declaration. Under sec. 17 of the Court Fees Act you can join two or more things as far as the Code allows; and, the amount of fees will be the accumulated amount you have to pay for each cause of action. Under the Suits Valuation Act in case of a declaration where there is no right to consequential relief it would appear that the case is not one where the charge is *ad volorem* and consequently the matter is governed by sec. 9 which allows the High Court to make rules. It is quite clear that a cause of action cannot be joined unless the Court has jurisdiction to deal with it. I see no special difficulty or complication when we come to join a cause of action in a mortgage suit as distinct from any other suit. For these reasons I do not think that the objection as to misjoinder requires us to allow the present appeal. I must not however be understood to throw doubt upon the need for a high degree of caution before permitting questions of paramount title to be investigated in a mortgage suit. Both as to competence and convenience there will generally be much to consider.

Reference has been made to the case of *Radha Kunwar v. Thakur Reoti Singh* (2). There the observation is that the adverse claim was entirely independent of the mortgage transactions. Their Lordships stated that they thought that the joinder of these parties was irregular and that it would only tend to confuse. I only desire to observe that if we look at the terms of Or. 1, r. 3 we find that joinder is not always permitted where a right to relief arises out of the same

transaction: there is a further condition, namely, "where if a separate suit were brought against such a person any common question of law or fact would arise." It appears to me that the dictum with reference to the case of *Radha Kunwar v. Thakur Reoti Singh* (2) affords no justification for refusing to apply the terms of Or. 1, r. 3.

As regards the question of registration of the document of 31st October I entirely agree with the judgment of the learned Chief Justice and have nothing to add.

Mr. M. L. Mullick, Solicitor for the Respondent Susila Bala.

Messrs. H. N. Dutt & Co., Solicitors for the Respondent Bank.

B. B.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

Suit No. 2267 of 1924.

G. C. GHOSE, J.	} ADVOCATE-GENERAL OF BENGAL and anr. c. CAPT. S. WEBB-JOHNSON and others.
1924,	
27, August.	

Cy pres doctrine—What it is—Application of.

The income of a fund originally created for the higher education of the children of Indian soldiers who have fallen or been permanently disabled during the Great War having become greater than is necessary for the purpose originally named:

Held, on the author of the trust agreeing—That the Court, on the *cy pres* principle, has power to apply the surplus for the education and assistance of children and dependants of the Indian officers and soldiers who rendered military services under the Crown during the late Great War or who have taken part or may hereafter take part in subsequent warlike operations.

ADVOCATE-GENERAL OF BENGAL *v.* CAPT. S. WEBB-JOHNSON.

The facts of the case will appear from the judgment.

The Standing Counsel (Mr. B. L. Mitter) for the Plaintiffs.

Mr. S. M. Bose (Sr.) for the Defendants.

The JUDGMENT OF THE COURT was as follows :—

This suit has been instituted by the Advocate-General of Bengal for a declaration that the objects of a certain trust known as the Silver Wedding Fund are the education and assistance of children and dependants of Indian officers and soldiers (including non-combatants) who rendered military service under the Crown during the late Great War, or who took part or may hereafter take part in subsequent warlike operations and for an order that the Defendants as administrators of the Silver Wedding Fund may be directed to give effect to the said objects and apply the income of the said fund towards helping those who come under the said objects.

The facts are as follows :—On the occasion of the anniversary of the silver wedding of their Majesties the King-Emperor and the Queen-Empress in 1918, a large sum of money was subscribed as an offering to Her Majesty the Queen-Empress as a token of loyalty and affection. Her Majesty the Queen-Empress was pleased to accept the gift and to express a desire that the said gift should be devoted to the benefit of His Imperial Majesty's Indian subjects and further that the contributions made should form a fund for promoting the education of the children of Indian soldiers who had fallen in the Great War. The said fund is now vested in the treasurer for charitable endowments. By a vesting order made by the Governor-General in Council under the provisions of the Charitable Endowments Act, 1890,

the income of the fund was directed to be devoted and applied to and for the higher education of the children of Indian soldiers (including non-combatants) who have fallen or been permanently disabled during the war. A scheme was settled for the administration of the said fund and certain administrators were appointed. The Defendants are the present administrators.

For some years past the entirety of the income of the said fund has not been spent on the said objects, it having been found impracticable to do so, with the result that there has been an accumulation of income of the said fund, which has been added to the capital of the said fund. It was, therefore, suggested that the objects of the said trust should be extended so as to include the education and assistance of children and dependants of the Indian officers and soldiers (including non-combatants) who rendered military services under the Crown during the late Great War, or who have taken part or may hereafter take part in subsequent warlike operations. The proposed extension having been brought to the notice of Her Majesty the Queen-Empress, she has been graciously pleased to intimate that she agrees to the objects of the trust being extended in manner suggested.

The Plaintiff, as His Majesty's Advocate-General of Bengal at the relation of the treasurer of Charitable Endowments has now instituted the present suit for obtaining the leave of this Court for the extension of the objects of the said fund in manner indicated above. The Defendants, who are the present administrators of the said fund, are agreeable to the objects of the fund being extended in the way prayed for by the Plaintiff.

There is evidence before me that Her Majesty the Queen-Empress, who is the author of the trust, is agreeable to the

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extension of the objects of the trust; and therefore the only question which I have got to determine is whether in the events which have happened, namely, the income of the fund having become greater than is necessary for the purpose originally named, this Court has power to apply the surplus to such other purposes as it may deem proper upon the *cy pres* principle. In my opinion there can be no doubt that the Court has power, in the circumstances which have happened, to apply the surplus to such other purposes as it may deem proper upon the *cy pres* principle. The term *cy pres* is translated to mean as near as may be. The doctrine of *cy pres* is, therefore, the doctrine of nearness or approximation and it appears in English jurisprudence in three separate departments, yet with similar operation and effect; firstly, it is applied in the law of testaments; secondly, in the law of private trusts; and, thirdly, in the law of charitable trusts where gifts have been made for charitable purposes, which either originally or in course of time cannot be literally executed. Story in his Equity Jurisprudence points out that the doctrine has been borrowed from the Roman law, for by that law donations for public purposes were sustained and were applied *cy pres* to other purposes at least one hundred years before Christianity became the religion of the Empire. In the present case there is a surplus which remains after satisfying the prescribed objects and the present case comes within the rule laid down by Lord Selborne, L. C., in the case of *Chamberlayne v. Brockett* (1), where he says as follows:—"If the fund should either originally or in process of time be or become greater in amount than is necessary for that purpose or if direct compliance with the wishes and directions

of the author of the trust should turn out to be impracticable, this Court has power to apply the surplus or the whole, as the case may be, to such other purposes as it may deem proper upon what is called the *cy pres* principle." (See also 4 Halsbury, at p. 194.)

In this view of the matter I am satisfied that the intended objects are such as this Court will approve. Those objects are as near as may be within the meaning of the doctrine referred to above, and I therefore make the declaration asked for in the prayer B. of the plaint. There will also be a direction as prayed for in prayer C. of the plaint. The costs of both parties will come out of the fund as between attorney and client.

Mr. Gooding, Solicitor for the Plaintiffs.

Mr. Esson, Solicitor for the Defendants.
S. N. B.

[CIVIL REVISIONAL JURISDICTION.]

RULE. No. 164 OF 1924.

WALMSLEY, J.	}	MUNSHI MASIHUL AZAM
CHAKRAVARTI, J.		and ors., Petitioners,
1924,		v.
28, May.	}	GOLZAR AHAMMAD MIA
		& ors., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 43, r. 1 (m)—Suit for accounts—Preliminary decree, by consent, referring final decision to arbitrators—Award, remitted for reconsideration—Award set aside, because of arbitrators' default Order, if one refusing to record compromise—Appeal

Where in a suit for accounts, a preliminary decree was passed leaving the final accounting to the decision of certain persons named and the said persons made an award which was set aside by the Court on the failure of the arbitrators to re-consider it:

Held—That there was an intervention on the part of the Court at the instance of the parties by which the Court referred

(1) 8 Ch. App. 206 at p. 211 (1872).

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the matter to arbitration. Therefore the matter came within the second schedule of the Code of Civil Procedure, and no appeal lay against the order of the Court setting aside the award, under Or. 43, r. 1 (m), as against an order refusing to record a compromise.

This was a Rule against an order of the District Judge of Jessore, dated the 25th June 1923, reversing that of the Munsif, 2nd Court, Magura, passed in account suit No. 145 of 1922 and dated the 9th March and 7th April 1923.

The facts of the case will appear from the judgment.

Babu Profulla Kamal Das for the Petitioners.

Babu Bimal Ghunder Das Gupta for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This Rule was obtained at the instance of the Plaintiffs. They brought a suit against the Defendants alleging that the first Defendant Golzar had been their *tehsildar* and that money was due to them on account and they asked that an account should be taken and a decree passed for the sum of money found due after accounting. After some adjournments, it was agreed that there should be a preliminary decree passed to the effect that the Defendant No. 1 was liable to account to the Plaintiffs and that the amount to be paid by the Defendant No. 1 should be left to the decision of five persons named in the petition. These five gentlemen made an award which was submitted to the Court. Thereupon the Plaintiffs filed an objection and the learned Munsif remitted the award on the ground that the arbitrators had failed to decide three important points. One of the five arbitrators refused to sit any fur-

ther. The other four ratified their former order. The learned Munsif then held that there had been no reconsideration of the original award and that the arbitrators had shown bias in favour of the Defendants. He accordingly set aside the award and directed that the suit should be heard on its merits. The Defendants then preferred an appeal to the District Court and the learned Judge overruled the objection that no appeal lay, set aside the order of the first Court and directed the Munsif to accept the award of the arbitrators and draw up the final decree. The Plaintiffs then obtained this Rule and, in support of it, their first argument is that no appeal lay to the Court of the District Judge. It appears to me that this contention is right. The rules as to appeals are contained in sec. 104 and in Or. 43 of the Code. It is conceded by the learned pleader for the Opposite Party that this appeal could not be brought within the scope of sec. 104. He says, however, that it comes within Or. 43 as an appeal against an order refusing to record a compromise. This is the view which the learned District Judge took. The first question we have to decide is whether the learned Judge was right in taking this view and the question is really simply this whether there was an intervention on the part of the Court at the instance of the parties by which the Court referred the matter to arbitration. The learned pleader on behalf of the Opposite Party contends that the wording of the petition is against that view and that all that the parties intended was that the matter should be compromised out of Court on terms to be settled by the five persons named in the petition. This argument, it appears to me, is untenable on the simple ground that the learned Munsif in drawing up the preliminary decree clearly referred the matter

MUNSHI MASIHUL AZAM v. GOLZAR AHAMMAD MIA.

of the final decree to the award of the arbitrators. The wording of the preliminary decree is as follows:—
 অত্র মোকদ্দমা হোলে হুরতে প্রাথমিক ডিক্রী হয়।
 হিসাব নিকাশ লটবার জন্ত সালিশ নিযুক্ত করা যায়।
 তাহার ১৯২১২৩ তারিখ মধ্যে রোয়েদার দাখিল করে।
 No objection was ever taken to the form of this decree. It appears to me that the correct interpretation to be put upon it is that the parties asked the Court to refer the matter to the decision of the arbitrators and the Court did do so. It follows from that that the matter comes within the second schedule of the Code of Civil Procedure, and that no appeal lay against the Munsif's order to the District Judge. Consequently, I think the Judge's order was passed without jurisdiction. It must, therefore, be set aside and the case remitted to the Court of first instance for that Court to proceed to hear the matter on its merits and draw up a final decree. The costs of this Rule are to be paid by the Defendants to the Plaintiffs. The hearing-fee is assessed at one gold mohur.

CHAKRAVARTI, J.—I agree.

J. N. R.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

VISCOUNT CAVE.
 LORD CARSON.
 SIR JOHN EDGE.
 MR. JUSTICE DUFF.
 1924,
 Heard, 11, July.
 Judgment,
 21, October.

SAT NARAIN,
 Appellant,
 v.
 BEHARI LAL and ors.,
 Respondents.

Presidency-towns Insolvency Act (III of 1909), sec. 2, 17, 52—Mitakshara joint family—Father adjudicated insolvent—Son's interest in joint property, if vests in official assignee—"Property over which a person has disposing power," meaning of—Civil Procedure Code (Act V of 1908), sec. 60, bearing of, upon the question—Mitakshara son's

share of joint family property, saleability of, in execution of decree against father—Father's power of sale, not unconditional.

According to the true construction of the provisions of the Presidency-towns Insolvency Act, which alone have to be considered for the purpose, an order of adjudication as an insolvent passed against a Mitakshara father under the Presidency-towns Insolvency Act does not of itself vest his undivided son's interest in the joint family property in the official receiver or assignee.

FAKIRCHAND MOTICHAND v. MOTICHAND HURRUCKCHAND (4), RANGAYYA CHETTI v. THANIKACHALLA MUDALI (8), NUNNA BRAHMAIYA SETTI v. CHIDARABOYINA VENKATASWAMY (9), SANYASI (HARAN) MANDAL v. ASUTOSH GHOSE (1) and HARMUKH RAI-MUNNA LAL v. RADHA MOHAN (2) distinguished.

FAKIRCHAND MOTICHAND v. MOTICHAND HURRUCKCHAND (4) doubted.

The property of an insolvent which by sec. 17 vests in the official assignee must mean only the property which by that section and sec. 52 is divisible amongst his creditors.

The definition of "property" in sec. 2 of the Act seems to contemplate an absolute and unconditional power of disposal, and not such power as the Mitakshara father has to dispose of joint property, which is not absolute but conditional on his having debts which are liable to be satisfied out of that property.

This was an appeal (No. 153 of 1923) from a decree, dated the 25th July 1922, of the High Court at Lahore, which reversed

(1) I. L. R. 42 Cal. 225 (1914).

(2) [1919] P. R. No. 158.

(4) I. L. R. 7 Bom. 438 (1883).

(8) I. L. R. 19 Mad. 74 (1895).

(9) I. L. R. 26 Mad. 214 (1902).

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a decree, dated the 20th May 1915, of the District Judge of Delhi.

The Appellant and his father were members of a joint Hindu family governed by the Mitakshara and as such owned and lived in a house in Hira Nand Lane in Delhi. By an order, dated the 27th September 1913, the Appellant's father was adjudicated an insolvent under the provisions of the Presidency-towns Insolvency Act, III of 1909.

By a deed of sale, dated the 6th March 1914, the *pro formâ* Defendant-Respondent Mannun Lal sold his house in Hira Nand Lane, which was contiguous to the Appellant's house, to the Respondents Behari Lal and Jamna Das. The Appellant who was a minor instituted a suit in 1915 by his next friend claiming a right of pre-emption in respect of the house sold on account of rights of easement and contiguity.

The suit was contested by the vendees on the ground that after the 27th September 1913, the date on which the Plaintiff's father was adjudicated an insolvent, the entire property belonging to the joint family including the interest of the Plaintiff therein became vested in the official assignee and that the Plaintiff was therefore precluded from exercising the right of pre-emption.

The District Judge was of opinion that the vesting order passed against an adult insolvent member does not deprive a minor of his share in the family or partnership property and he decreed the Plaintiff's claim.

The High Court, on appeal, made an order referring the following question for the consideration of a Full Bench :—

“ Does an order of adjudication passed against a father vest in the official receiver his son's interest in the joint family property? ”

The question was considered by a Full Bench consisting of Sir Shadi Lal, C. J., and Chevis and Abdur Raoof, JJ., who decided it in the affirmative.

The appeal of the Defendants was thereupon heard by a Division Bench of the High Court which delivered judgment in accordance with the ruling of the Full Bench.

That decision is reported in I. L. R. 3 Lahore 329. From the decree of the High Court the Plaintiff appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Dubé for the Appellant.—The decisions relied on by the Full Bench that joint family property can be attached and sold in execution of a money decree passed against the father, and that the sale affects the interest of the sons as well as that of the father, are based on Hindu law and have no bearing on the rights of the parties under the Presidency-towns Insolvency Act, 1909. It is the Act which has to be construed here, and under the Act the father's adjudication does not annul the son's right to pre-empt under the Punjab Pre-emption Act, 1913.

The official assignee appointed in pursuance of an order of adjudication made against the father obtains a right to dispose of the father's interest but obtains no right against the property itself. The son's interest remains until a sale takes place for the benefit of the general body of creditors.

Sec. 60 of the Code of Civil Procedure, 1908, which refers to the property over which a judgment-debtor “ has a disposing power which he may exercise for his own benefit ” cannot have any bearing on property which has come into the hands of the official assignee under the provisions of the Presidency-towns Insolvency Act, 1909.

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The Appellant is still in possession of the house in Hira Nand Lane and his title has in no way been challenged by the official assignee; he is therefore entitled to pre-empt.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiff in the suit from a decree of the High Court at Lahore, which dismissed his suit. The suit was brought on the 17th March 1915 by the Plaintiff, then a minor, through his next friend, in the Court of the District Judge of Delhi for possession of a house in Delhi by pre-emption. The District Judge gave the Plaintiff a decree, but the High Court in appeal dismissed the suit on the sole ground that his father had been adjudicated insolvent on the 27th September 1913, under the Presidency-towns Insolvency Act, 1909, the High Court being of opinion that on that adjudication of insolvency the Plaintiff had ceased to have a right to pre-empt the house in question.

The question on which this appeal depends is, what is the right or interest which an official assignee acquires under Act III of 1909, the Presidency-towns Insolvency Act, 1909, in the joint and unpartitioned immovable property of a Hindu joint family governed by the law of the Mitakshara on, and solely by virtue of, an adjudication by a High Court that one of the coparceners of the joint property is insolvent? The question is one of importance and it depends on the true construction of the Presidency-towns Insolvency Act, 1909. In considering that question it has to be borne in mind that it is well established law that in families governed by the law of the Mitakshara no coparcener has in the joint family property any separate and defined share, although in

Northern India at least a coparcener of such joint family property has a right to obtain a partition and on such partition he will obtain a separated and defined share of the joint family property. A creditor of a coparcener may, under certain circumstances, obtain a partition of his debtor's share in joint family property, and when in executing a decree a Court sells what is joint family property as the property of the judgment-debtor the purchaser at the Court sale may under certain circumstances obtain a good title to what he purchases.

The facts of the present case are as follows :—Rai Bahadur Sri Kishen Das and his two sons, who were minors and the elder of whom is Sat Narain, the Plaintiff, were Hindus governed by the law of the Mitakshara, and were possessed of joint family property as coparceners. It is not suggested that the property was self-acquired property of Sri Kishen Das. Sri Kishen Das on behalf of himself and his two sons was the manager of the property. On the 27th September 1913, Sri Kishen Das by an order of the High Court of Bombay was adjudicated insolvent and by sec. 17 of the Presidency-towns Insolvency Act, 1909, his property vested in the official assignee and became divisible among his creditors. Sec. 52 of the Act defines the property of an insolvent which shall or shall not be divisible among his creditors thus :—

"52. (1) The property of the insolvent divisible amongst his creditors and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely:—

(a) property held by the insolvent on trust for any other person;

(b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessel, and furniture of himself, his wife and children, to a value inclusive of tools and apparel and other necessities as

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aforesaid not exceeding three hundred rupees the whole.

(2) Subject as aforesaid the property of the insolvent shall comprise the following particulars, namely:—

(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and"

The power to obtain a partition of the joint family property was a power which the official assignee might have exercised under (b), but he has not exercised that power.

The definition section of the Act is so far as it is material in this case as follows:—

2. In this Act, unless there is anything repugnant in the subject or context,—

(c) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;

The property of an insolvent which by sec. 17 vests in the official assignee must mean only the property which by that section and sec. 52 is divisible amongst his creditors.

On the 10th April 1914, Lala Mannun Lal, the third Defendant, sold the house in Delhi which the Plaintiff seeks to pre-empt by this suit, to Behari Lal and Jamna Das, the first and second Defendants. The house is urban immovable property within the meaning of the Punjab Pre-emption Act, 1913, which the Plaintiff was and is entitled to pre-empt by reason of that sale, unless he

had lost that right by reason of the order of the 27th September 1913, adjudging his father Sri Kishen Das an insolvent. The right to pre-empt is claimed by the Plaintiff as a co-sharer coparcener, in an adjoining house, that adjoining house being "immovable property contiguous to the property sold" within the meaning of sec. 16 of the Punjab Pre-emption Act, 1913.

Lala Mannun Lal, the vendor of the house in question, did not defend the suit. The other two Defendants Behari Lal and Jamna Das by their written statement raised this question, which has to be considered, thus:—

"These Defendants admit that the Plaintiff with his father R. B. Sri Kishen Das forms a joint Hindu family but deny that at the date of the sale of the house in suit or at the date of this suit the Plaintiff had any proprietary right in the property through which he claims pre-emption. The real facts are that Rai Bahadur Sri Kishen Das, the father of the Plaintiff, and the head and manager of his family, family estate and family firms as well as in his personal capacity was, in consequence of the failure of the family business, adjudicated insolvent on 27th September, 1913, by the order of the High Court of Bombay, and on and from the said date the whole of the family estates and effects as well as the right, title and interest of the insolvent became vested in the Official Assignee of Bombay, who since then became the legal owner with powers of control and disposal and obtained possession of and over all the estate and properties including the house through which Plaintiff claims possession."

That means that when a Hindu, who happens with his sons to constitute a joint family subject to the law of the Mitakshara, is adjudged an insolvent under the Presidency-towns Insolvency Act, 1909, not only his own rights but all the rights and interests of his sons who are his coparceners in joint family property vest in

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the official assignee by virtue of the adjudication alone. That is a startling proposition. It must depend on the wording of the Presidency-towns Insolvency Act, 1909, and the question is whether that could have been the intention of the Governor-General of India in Council when that Act was passed. It is quite clear that if this joint family could be treated as a firm carrying on its business in partnership an order adjudging the father who managed the business or even an order adjudging the firm insolvent could not be made under that Act even if the firm consisted solely of a Hindu father and his two minor sons, which would affect the interests of a minor who happened to be a partner in the firm.

The learned District Judge who tried this suit framed four issues. The first issue, which is the only material issue in this appeal, was as follows:—1. Does the adjudication of Rai Bahadur Lala Sri Kishen Das as an insolvent vest the interest of the present Plaintiff in the proprietary house in the official assignee, and if so, does he (the Plaintiff) cease to be an owner for the purposes of sec. 16 of the Punjab Pre-emption Act? On that issue several cases decided by Indian High Courts were cited on behalf of the answering Defendants. The learned District Judge decided the first issue in favour of the Plaintiff, and on the 30th May 1915, gave him a decree for pre-emption.

From that decree the Defendants Nos. 2 and 3 appealed to the Chief Court at Lahore. The appeal came on for hearing before Shadi Lal and Wilberforce, J.J., of the High Court, and these learned Judges after considering the authorities cited in argument before them stated that as far as the insolvency proceedings were concerned they were inclined to take the view of the Calcutta High Court in *Sanyasi*

Charan Mandal v. Asutosh Ghose (1) although they observed that that case was not directly relevant, and were inclined not to follow the decision of the Division Bench of the Chief Court at Lahore in *Harmukh Rai-Munna Lal v. Radha Mohan* (2) and they referred to the Full Bench of the High Court the question—Does an order of adjudication (as an insolvent) passed against a father vest in the official receiver (assignee) his son's interest in the joint family property?

The question so referred came before a Full Bench consisting of Sir Shadi Lal, C. J., and Sir William Chevis and Abdul Raoof, J.J., Judges of the High Court.

The answer of the Full Bench to the question referred was given by Sir Shadi Lal, with whose opinion the other two judges concurred. The concluding part of his opinion is thus stated:—

“The result of the above survey of the judicial decisions is decidedly in favour of the contention urged on behalf of the official assignee, but I must say that if the matter were *res integra*, I should find considerable difficulty in subscribing to the doctrine that the son's interest in the joint family property should, in the event of the father's insolvency, be regarded as the latter's property which vests in the official receiver. Upon general principles of the Hindu Law governing the rights of the father and his son in the coparcenary property I should be inclined to hold that an order of adjudication against the father has only the effect of replacing the father by the official receiver, and that the order does not by itself vest in the latter the interest of the son in the property. As the son's share is in certain cases liable for the debts of the father, the official receiver may be able to enforce that liability provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts.

(1) 1. L. B. 42 Cal. 225 (1914).

(2) [1919] P. R. No. 158.

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It has, however, been repeatedly held, *vide, inter alia, Jagubhai Lalubhai v. Vijbhukandas Jagjivardas* (3), and the Privy Council decision cited therein, that the joint family property can be attached and sold in execution of a decree for money passed against the father, and that the sale affects the interest of the son as well as that of the father, and in principle I see no real difference between an individual creditor realizing his debt from the coparcenary property and an official assignee who represents the general body of the creditors, seizing it for the satisfaction of their debts. It is to be observed that sec. 266 of the Civil Procedure Code of 1882, which enumerates the various kinds of property of a judgment-debtor, which are liable to be attached and sold in execution of a decree for money as well as sec. 60 of the Code of 1908, which has replaced that section mentions, *inter alia*, the property over which or the profits of which a judgment-debtor 'has a disposing power which he may exercise for his own benefit.' And as pointed out already, this is exactly the phraseology which has been used in the Insolvency Act, and it would be most undesirable that the same expression used in two enactments dealing with the rights of the creditors should receive two different interpretations.

Having regard to these considerations and to the judgments which are directly in point, I would answer the question referred to the Full Bench in the affirmative. The son, no doubt, has his remedy, but as pointed out in VII Bom. 438, he has to establish the circumstances which would show that his share is not liable for the debts of his father."

Their Lordships are of opinion that the question to be decided in this appeal must be decided on the wording of the Presidency-towns Insolvency Act, 1909, and on that Act alone. Cases which have arisen under sec. 266 of the Code of Civil Procedure, 1882, or under sec. 60 of the Code of Civil Procedure, 1908, depended on

different considerations, and decisions in cases under those sections are likely to mislead a Court which has to construe the Presidency-towns Insolvency Act, 1909. A sale under sec. 266 of the Code of Civil Procedure, 1882, or under sec. 60 of the present Code is a sale by a Court in execution of a decree which until the contrary is shown can be executed against the property which has been attached. When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son, the sale was good on the principle of Hindu law that it is the pious duty of a Hindu son to pay his father's debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality. Sec. 266 of the Code of Civil Procedure is so far as it is necessary here to refer to it:—

"266 The following property is liable to attachment and sale in execution of a decree (namely), lands, houses, or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in the capital or joint stock of any railway, banking or other public Company or Corporation, and except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf."

Their Lordships do not intend to say one word which might have the effect of disturbing and raising doubts as to decisions under sec. 266 of the Code of Civil Procedure, 1882, or under sec. 60 of the present Code, but they must deal with the

(3) I. L. R. 11 Bom. 37 (1886).

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matter upon the words of the statute which has to be applied in this case.

Their Lordships will now briefly refer to the more important of the cases mentioned or referred to in the answer of the Full Bench to the question submitted to it, observing that none of the cases apparently required that the Presidency-towns Insolvency Act, 1909, should be construed.

In 1883 the case of *Fakirchand Motichand v. Motichand Hurruckchand* (4) came before a Judge of the High Court at Bombay sitting alone. In that case a vesting order had been made by the High Court under sec. 7 of the Indian Insolvency Act, 11 & 12 Vic., cap. 21, vesting in an official assignee the real and personal estate of the Hindu father who with his son was a member of a joint family. It would appear that the father had carried on a separate business as a shroff and stopped payment and that it was in respect of a debt incurred by him in that business that the vesting order was made. After the death of the father the official assignee sold four houses which had been the joint property of the father and the son, and the son brought a suit for a declaration that he was entitled to a part of the four houses. Latham, J., held that as under the Mitakshara law a father has the right to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not contracted for immoral purposes, a vesting order made under sec. 7 of that Act vested that right in the official assignee, who could therefore give a good and complete title to such ancestral estate to a purchaser. Latham, J., referred to *Girdhari Lall v. Kantoo Lall* (5) and quoted the ruling of the Privy

Council in *Suraj Bunsu Koer v. Sheo Prasad Singh* (6) for the propositions:—

“First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for father's debts, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the purchasers had notice that they were so contracted: and, secondly, that the purchasers at the execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.”

[As to what is an antecedent debt in the case of a mortgage, see the most recent case of *Brij Narain v. Mangla Prasad* (7).]

Latham, J., in *Fakirchand Motichand v. Motichand Hurruckchand* (4) was putting his construction upon sec. 7 of 11 & 12 Vic., c. 21, which is as follows:—

“VII. And be it enacted, That upon the filing of any such Petition as is aforesaid, it shall be lawful for the said Court and the said Court is hereby authorized and required to order that all the Real and Personal Estate and Effects of such Petitioner, whether within the Territories within the Limits of the Charter of the East India Company or without, except the Wearing Apparel, Bedding, and other such Necessaries of such Petitioner and his Family, and the Working Tools and Implements of such Petitioner and his Family, not exceeding in the whole the Value of Company's Rupees Three Hundred for each Petitioner with his Family, and all Debts due to him and all the future Estate, Right, Title, Interest, and Trust of the said Petitioner in or to any Real or Personal Estate or

(4) I. L. R. 7 Bom. 438 (1883).

(5) L. R. 1 I. A. 321: s. c. 14 B. L. R. 187 (1874).

(4) I. L. R. 7 Bom. 438 (1883).

(6) L. R. 6 I. A. 88: s. c. I. L. R. 5 Cal. 148 (1879).

(7) L. R. 51 I. A. 129: s. c. J. L. R. 46 All. 95; 28 C. W. N. 258 (1923).

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Effects within or without the said Territories which such Petitioner may purchase, or which may revert, descend, be devised or bequeathed or come to him, and all Debts growing due to him before the Court shall have made its Order in the Nature of a Certificate as hereinafter mentioned, do vest in the Official Assignee for the Time being of the said Court, and that all Books, Papers, Deeds, and Writings in any Way relating to such Petitioner's Estate and Effects in his Possession, or under his Custody or Control, shall be deposited with such Assignee, and such Order shall be entered of Record in the said Court, and such Notice thereof shall be published as the said Court shall direct; and such Order, when so made, shall by virtue of this Act relate back to and take effect from the filing of the said Petition, and shall instantly, and without any Conveyance or Assignment, vest all the Real and Personal Estate, Effects, and Debts as aforesaid in the said Official Assignee, who shall have full Powers for the Recovery thereof, and shall hold and stand possessed of the same for the Purposes and in manner hereinafter mentioned: Provided always, that in case, after the making of any such Vesting Order, the Petition of any such Petitioner shall be dismissed by the said Court, such Vesting Order made in pursuance of such Petition shall from and after such Dismissal be null and void to all Intents and Purposes: Provided also that in case any such Vesting Order as aforesaid shall become null and void by the Dismissal of such Petition, all Acts theretofore done by any Assignee or other Person acting under his Authority according to the Provisions of this Act shall be good and valid, and no Action or Suit shall be commenced against any such Assignee, nor against any Person duly acting under his Authority, except to recover any Property of such Petitioner detained after an Order made by the said Court for the Delivery thereof, and Demand made thereupon; and until the Appointment of an Official Assignee as hereinafter is directed the Common Assignee of the Court shall stand and be in the Place of the Official Assignee and this

present Clause shall apply and have effect accordingly."

Sec. 30 of the 11 & 12 Vic., c. 21, was as follows:—

"XXX. And be it enacted, That all Powers vested in any such Insolvent which he might lawfully execute for his Benefit shall be and are hereby vested in the Assignee or Assignees of the Real and Personal Estate of such Insolvent or Insolvents by virtue of this Act, to be executed by his Assignee or Assignees for the Benefit of his Creditors."

If their Lordships had to construe sec. 7 of the 11 & 12 Vic., c. 21, they would doubt that the Imperial Parliament sitting at Westminster in passing the 11 & 12 Vic., c. 21, ever contemplated or intended that "the Real and Personal Estate of such Petitioner" which a Court might order to be vested in an official assignee, or a right to sell it for the debts of a Hindu father, might be held to include or should include the unpartitioned separate interest of a Hindu coparcener, who was not a Petitioner, in the immovable property of a joint family.

In *Rangayya Chetti v. Thanikachalla Mudali* (8) a vesting order was made under "Insolvent Act, sec. 7" (? 11 & 12, Vic., c. 21, s. 7) against the managing member of a Hindu joint family who was adjudicated an insolvent. The joint family consisted of the managing member of the family who was the insolvent, his sons and his brother. The official assignee conveyed a house which was part of the joint property of the family to a purchaser, who sued for possession. Subramania Ayyar, J., following the judgment of Latham, J., in the case of *Fakirchand Motichand v. Motichand Hurruckchand* (4) which has been above referred to, held that the official assignee

(4) I. L. R. 7 Bom. 438 (1888).

(8) I. L. R. 19 Mad. 74 (1895).

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could convey the share of the sons in the joint property, but not the share of the brother, and in so holding called in aid in support of his finding sec. 266 of the Code of Civil Procedure, 1882, and the decision in *Jagubhai Lalubhai v. Vijbhukandas Jagjivandas* (3) of West and Birdwood, JJ., in reference to that section.

In *Nunna Brahmayya Setti v. Chidaboyina Venktaswamy* (9) seven brothers who were of full age and a minor son of one of them were members of a joint Hindu family governed by the law of the Mitakshara, and carried on a business, which had previously been carried on for very many years by the joint family to which they belonged. The seven brothers applied under 11 & 12 Vic., c. 21, to be adjudged insolvents. The minor member of the family who was a son of one of the seven brothers was not a party to that application. The debts in the schedule to the application were all debts incurred in carrying on the family business. Upon that application a vesting order was made under sec. 7 of the Act. The official assignee sold a portion of the property of the joint family to the Plaintiffs. Subsequently to that sale a person, who was a Defendant to the suit, obtained a money decree against the son, who had been a minor, and in execution of that decree the son's share in the land was sold and was purchased by the Defendant. Thereupon a suit was brought by the Plaintiffs for a declaration that the purchase by the Defendant was inoperative by reason of the prior sale to them by the official assignee. The suit came on appeal before Bhashyam Ayyangar and Moore, JJ., who followed the decision of Latham, J., which has already been referred to. They referred to the decision of West and Birdwood, JJ.,

which has been also mentioned, and they relied in support of their judgment upon decisions under sec. 266 of the Code of Civil Procedure, 1882. These learned Judges followed the ruling of Latham, J., but they referred to an observation which had been made by him in the case which he had decided, "That it has been suggested that this right vests in the official assignee as being a 'power' within the meaning of sec. 30. But I think it falls more appropriately within the words of sec. 7, and that there is no occasion to resort to sec. 30, which seems to apply to powers in the ordinary legal sense of the term, created by Will or instrument *inter vivos*," and they held that the power could be derived only under sec. 30 and not under sec. 7. The 11 & 12 Vic., c. 21 was repealed by the Presidency-towns Insolvency Act, 1909, so far as it had not been previously repealed.

In *Sanyasi Charan Mandal v. Asutosh Ghose* (1) the question related to the power of a Court under the Provincial Insolvency Act of 1907 to adjudicate an infant an insolvent, who was a Hindu and a member of a family which carried on what is described in the report as "a joint family ancestral business in rice and firewood" in the District of the 24-Parganas. It also related to the power of a Court to appoint a receiver of the infant's property. It is not stated in the report of the case what was the school of Hindu law which governed the family. The material facts appear to have been that one Bhuban Mohun Mandal, who had carried on the business, had five sons of whom the infant was one. The five sons are said in the report to have "inherited" the business. It does not appear in the report when Bhuban Mohun died. On the 19th February 1912, creditors, whose firm

(3) I. L. R. 11 Bom. 37 (1886).

(9) I. L. R. 26 Mad. 214 (1902).

(1) I. L. R. 42 Cal. 225 (1914).

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name was *Kishenchand Kesharichand*, applied to the District Judge of the 24-Parganas to have all the partners in what may be described as the debtor firm adjudicated insolvents, and prayed for the appointment of a receiver of all the properties of the partners in the business. At the time when the application was made to the Court one of the five sons, Sanyasi Charan Mandal, was a minor. The District Judge refused the application for the adjudication of the minor son, but granted it with regard to the four other sons and appointed a receiver of all the business of the four sons who were of full age and of all the properties purchased after the death of Bhuban Mohun Mandal and of four-fifths only of the properties inherited by the brothers from their father. From that order the minor son and the creditors separately appealed to the High Court. The appeals were heard by Mookerjee and Beachcroft, JJ., who held that the minor being an infant under age could not be adjudicated insolvent and that his property and share in the business would not vest in a receiver who might be appointed. Those learned Judges also held that under the law in India when a partner in a firm has become bankrupt (adjudicated insolvent) the partnership is not necessarily dissolved except by an order of a Court made in a suit by a partner who has not been adjudicated insolvent, and added :

"Consequently, in this country (India), when a person has been adjudicated an insolvent the partnership is not necessarily dissolved, and the receiver who is appointed under sec. 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm, that is, the receiver and the partners who have not been adjudicated insolvents continue to constitute the firm. It may possibly be open to the receiver to take steps for the dissolution of the partnership, but he cannot claim, as receiver in

insolvency, to take exclusive possession of the assets of the firm, including, in this case, the interest of the infant who has not been adjudicated an insolvent. . . . But whatever remedies may be available hereafter to the receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings."

It does not appear from the report of the case whether any of the debts in respect of which the proceedings in insolvency were taken had been incurred when Bhuban Mohun Mandal was carrying on the business, but Sir Shadi Lal, C. J., in his judgment on the question submitted to the Full Bench, with which the other learned Judges concurred, referred to the decision of the Calcutta High Court in *Sanyasi Charan Mandal v. Asutosh Ghose* (1) although he considered it not directly relevant to the question before the Full Bench.

The only other case to which their Lordships think it is necessary to refer is that of *Harmukh Rai-Munna Lal v. Radha Mohan* (2); it was relied upon in the answer of the Full Bench in this case. In that case one Jai Narain and his son Banwari Lal, a minor, constituted a joint Hindu family, governed by the law of the Mitakshara, and carried on business as a firm under the name of Rama Nand-Jai Narain. Jai Narain was adjudicated insolvent on 21st August 1912, under the Provincial Insolvency Act, III of 1907. His son, Banwari Lal, was not adjudicated an insolvent. Their Lordships are unable from the report to state the facts of the case with any accuracy, but it appears that in execution of a decree against Jai Narain and Banwari Lal a cotton press belonging to them was sold on 7th October 1912, and Rs. 5,000 was realised by the sale. It also

(1) I. L. R. 42 Cal. 225 (1914).

(2) [1910] P. R. No. 155.

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appears that a firm of Harmukh Rai-Munna Lal obtained an *ex parte* decree against Jai Narain and Banwari Lal, and that Banwari Lal made an unsuccessful application to set aside that decree on the ground that he was a minor. Harmukh Rai-Munna Lal applied for on the 28th November 1912, and obtained a *pro-rata* share amounting to Rs. 2,382-15-9 of the Rs. 5,000 which had been realised by the sale of the 7th October 1912. It also appears that the receiver in the adjudication against Jai Narain brought a suit against Harmukh Rai-Munna Lal to recover the Rs. 2,382-15-9 and that it was held by Broadway and Abdul Raoof, JJ., that the receiver was entitled to recover the Rs. 2,382-15-9 on the ground that it was the duty of Banwari Lal to pay the debts of his father Jai Narain. These learned Judges appear to have relied for that decision on the judgment of Latham, J., in the case of *Fakirchand Motichand v. Motichand Hurruckchand* (4) which they considered was followed by Subramania Ayyar, J., in the case of *Rangayya Chetti v. Thanikachalla Mudali* (8) and by Bhashyam Ayyangar and Moore, JJ., in the case of *Nunna Brahmayya Setti v. Chidaraboyina Venktaswamy* (9).

No one has appeared for Respondents and consequently this appeal has been argued *ex parte*. Their Lordships have carefully considered the Presidency-towns Insolvency Act, 1909, and will now express the conclusions at which they have arrived.

In their Lordships' opinion the question referred to the Full Bench of the High Court should have been answered in the negative. It is true that sec. 17 of the Act of 1909 provides that on the

making of an order of adjudication "the property of the insolvent" shall vest in the official assignee and shall become divisible among his creditors, and that by sec. 2 "property" is defined as including any property over which any person has a disposing power which he may exercise for his own benefit; and it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power. But the definitions in sec. 2 are only to apply "unless there is something repugnant in the subject or context;" and it is necessary therefore to consider the effect of the definition of "property" contained in that section in relation to the subject-matter which is being dealt with and the other sections of the Act. Now, as to the subject-matter—namely, the joint property of an undivided Hindu family—it is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property; and sec. 2 seems to contemplate an absolute and unconditional power of disposal. And if the later sections of the Act are examined, it becomes apparent that this cannot have been the intention of the statute. Sec. 52 provides that the property of the insolvent divisible among his creditors shall comprise "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his

(4) I. L. R. 7 Bom. 438 (1883).

(8) I. L. R. 19 Mad. 74 (1895).

(9) I. L. R. 26 Mad. 214 (1902).

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own benefit," and it is difficult to reconcile this provision with the proposition that the property itself vests in the assignee. Sec. 23 provides that when an adjudication is annulled the property of the debtor shall (subject to any direction of the Court) revert to the debtor to the extent of his right or interest therein; but this section contains no provision for the reverter of property over which the debtor had a disposing power only to the persons who were entitled to it subject to that power. Sec. 76, which enacts that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors, is equally silent as to the destination of surplus property in which others had an interest. Having regard to these considerations and to the scope of the Act, their Lordships are satisfied that it was not the intention of the Act that on the insolvency of a father the joint property of his family should at once vest in the assignee. It may be that under the provisions of sec. 52 or in some other way that property may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act.

As to the authorities cited, it does not appear to their Lordships that they are inconsistent with the above conclusion. The cases of *Fakirchand Motichand v. Motichand Hurruckchand* (4), *Rangayya Chetti v. Thanikachalla Mudali* (8) and *Nunna Brahmayya Setti v. Chidaraboyina Venkataswamy* (9) were decided under a different statute. *Sanyasi Charan Mandal v. Asutosh Ghose* (1) and *Harmukh Rai-*

Munna Lal v. Radha Mohan (2) were partnership cases and are not directly in point.

For the reasons above given, their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the High Court should be set aside with costs and the decree of the District Judge should be affirmed, except that the date for the payment of the Rs. 11,500 less the costs of the Plaintiff-Appellant incurred by him on the appeal to the Court below and his costs of this appeal should be extended to six months from the date of the receipt in the High Court of the Order in Council.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 12 OF 1924.

GREAVES, J.	} SADASOOK KOTHARI, v. CHAITRAM RAMBILASH.
CHAKRAVARTI, J.	
1924, 16, December.	

Contract for the sale of goods - When property in them passes - Divisibility of a contract.

In a contract for sale of 1000 bales of jute, shipment to take place during August and/or September 1919, to be delivered "at Buyer's Mill-ghat or Press-house by Rail or Steamer and/or Flat," where 500 bales of jute were shipped on board a flat which caught fire and the jute was destroyed, on a construction of the terms of the contract:

Held—That the property in the goods did not pass until they reached their destination.

TREGELLES v. SEWELL (1) and THE BADISCHE ANILIN UND SODA FABRIK v. THE

(1) I. L. R. 42 Cal. 225 (1914).

(4) I. L. R. 7 Bom. 438 (1883).

(8) I. L. R. 19 Mad. 74 (1895).

(9) I. L. R. 26 Mad. 214 (1902).

(2) [1919] P. R. No. 158.

(1) 7 H. & N. (Exch. Rep.) 574 (1862).

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(2) explained.

Held further—*That the contract was one and indivisible and was not performed until 1000 bales of jute were delivered at their destination.*

THE MERSEY STEEL & IRON COMPANY,
LD. v. NAYLOR, BENZON & CO. (3) referred to.

This was an appeal from the judgment of Mr. Justice Buckland, dated the 4th December 1923, passed in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

The Advocate-General (Mr. S. R. Das), Messrs. C. Bagram, S. N. Banerjee and S. C. Bose for the Appellant.

Sir B. C. Mitter and Messrs. S. M. Bose and A. C. Ghose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by the Plaintiff in the suit from a judgment of Mr. Justice Buckland, dated the 4th of December 1923, dismissing the Plaintiff's suit. The facts which I shall shortly state are as follows: By a contract dated the 31st July 1919, to the terms of which I shall presently refer, the Plaintiff, who is the Appellant before us, sold and the Defendants, the Respondents before us, purchased 1,000 bales of Naraingunge jute. According to the terms of the contract shipment was to take place during August and/or September 1919. On the 23rd September 1919 in pursuance of the contract the Plaintiff shipped 500 bales of jute on board the Flat "Dwarka." The bill of lading in respect of these bales was made out in the name of the Defendants as consignees. On the 25th September 1919,

according to the case for the Appellant, the usual documents were presented through the International Banking Corporation to the Defendants for payment of 90 per cent. of the value in terms of the contract. Some dispute has taken place as to whether the bill of lading was with the documents that were presented and this is one of the points which I shall deal with later. The Defendants put off payment of the 90 per cent. on the 25th September on the ground—so the Appellant alleges—that there was no policy of insurance in respect of the 500 bales. On the same date, namely, 25th September, the Flat "Dwarka" caught fire and the jute was destroyed and the suit out of which this appeal arises was brought by the present Appellant to recover the value of the goods, namely, Rs. 42,199-6. The contention of the Appellant is that the property in the goods passed to the Respondents when they were shipped on board the Flat "Dwarka." The Respondents on the other hand contend that all the terms and conditions of the contract were not fulfilled merely by the shipping of the bales of jute on board the Flat "Dwarka" and that accordingly on the 25th September when the fire took place the property in the bales of jute had not passed to them but they were still the property of and at the risk of the Plaintiff and they say that if the shipping of the bales of jute amounted to appropriation it was merely a conditional appropriation which did not have the effect of passing the property in the jute until the other conditions in the contract were fulfilled. I now turn to the contract itself. It is, as I have stated, dated the 31st July 1919. It is signed by the brokers and addressed to Sadasook Kothari, the Appellant. Thereby one thousand bales of Naraingunge jute, each bale weighing about 3½ maunds, were

(2) [1898] App. Cas. 200 (1897).

(3) L. R. 9 A. C. 434 (1884).

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sold at rupees twenty and annas eight per Calcutta Bazar maund delivered free "at Buyer's Mill-ghat or Press-house by Rail or Steamer and/or Flat." Then follows a provision with regard to the weight which was guaranteed at the buyer's Mill-ghat or Press-house. The shipment, as I have already stated, was to take place during August and/or September 1919 and the costs of cartage were to be deducted from the seller's Margin Bill. So far as the payment is concerned the contract provides that 90 per cent. of the value of the goods was to be paid against the Railway receipts and the balance 10 per cent., on Press-house receipt. Then follows an arbitration clause to which I need not refer and in the margin of the contract these words are found: "1,000 bales at Rs. 20-8 per Calcutta Bazar maund. Delivered at Strand Bank Press, Cossipore." Now the whole question in this suit turns upon the construction of the contract of the 31st July 1919 and in my opinion it is idle to discuss whether the law with regard to the sale of goods is similar in India to that in England or the incidents of C. I. F. contracts or to cite cases dealing with sale of goods in other countries, because the real question that we have got to decide is what upon the true construction of the contract before us was the arrangement of the parties, namely, whether the contention of the Appellant is correct that the property in the goods, passed at the time when the goods were placed on board the Flat "Dwarka" or whether the contention of the Respondents is correct that the property had not passed at the time of the fire on the 25th September because upon the true construction of the contract there were other terms still to be performed and until such terms were fulfilled the property in the goods remained with the

seller the Appellant, and did not pass to the buyers, the Respondents. Now the Appellant contends before us that the words in the first clause of the contract in the printed copy before me, namely, the words, "Delivered free at Buyer's Mill-ghat or Press-house by Rail and/or Steamer and/or Flat," do not mean that the contract was not performed until delivery took place at the Mill-ghat or Press-house but that the reference to the Mill-ghat or Press-house merely means that the delivery there was to be free so far as the buyers were concerned, and that there was no obligation on the Appellant to deliver these goods there, that is to say, it really comes to this that the Appellant says that his obligations under the contract were performed when he had placed the bales of jute on a steamer or flat whose destination was the Press-house of the Respondents, namely, Strand Bank Press at Cossipur. Then so far as the words in the margin are concerned, namely, "Delivered at Strand Bank Press, Cossipore," the Appellant contends that these words do not import a condition that the contract was not completed so far as the Appellant was concerned until the goods had reached the Strand Bank Press at Cossipore but that they merely mean that the price of the goods at this place was Rs. 20-8 per maund. The Appellant complains that the learned Judge in the first Court has wrongly relied upon certain English decisions which are referred to in his judgment and contends that upon his construction of the contract the case is covered by the provisions of the Indian Contract Act, namely, secs. 83 and 91. Sec. 83 provides that where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are sub-

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sequently appropriated by one party for the purpose of the agreement and that appropriation is assented to by the other, the goods have been ascertained and the sale is complete. Sec. 91 provides that a delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods. There is no doubt, I think, if the construction put upon the contract by the Appellant is correct, that by the joint operation of secs. 83 and 91 of the Indian Contract Act the property in the bales of jute passed to the Respondents when the bales were put on board the Flat "Dwarka" whose destination was the Strand Bank Press at Cossipore. The Appellant further relies on certain indications in the contract as bearing out the construction which he seeks to put upon it, namely, that the contract was one made in Calcutta and that 90 per cent. of the value of the goods was payable in Calcutta against the Railway receipts and that the balance also was payable in Calcutta against the Press-house receipt. Numerous cases were cited to us in the course of the argument and we were especially pressed on behalf of the Appellant with two cases to which we think we should refer. The first of these is the case of *Tregelles v. Sewell* (1). In that case the contract was for 300 tons old Bridge rails at a certain price delivered at Harburgh; cost, freight and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a Dock Company's weighment note or captain's signature for

weighment to be taken by buyers as a voucher for the quantity shipped. The head-note states that it was held that according to the true construction of the contract there was no undertaking by the Defendant in that case to deliver the iron at Harburgh but that his obligation was performed when he had put the iron on board a ship which was bound for Harburgh and had handed to the Plaintiff the policy of insurance and other documents whereon his liability ceased and the goods were at the risk of the purchaser. We have had read to us the judgment of the learned Judges in that case and I have again perused those judgments since the conclusion of the hearing last afternoon and I think myself that the head-note correctly states the reasons of the decision, namely, that the decision was arrived at upon the construction of that particular contract. I understand that this case was cited to us as an authority for the proposition that notwithstanding the fact that the actual destination of the goods was stated in the contract the property in the goods passed when the seller had put the goods on board a ship whose destination was at Harburgh where the goods were to be delivered. It is noticeable in that case that the terms of the contract specifically provided that payment should be made for the goods upon the production of certain documents and upon the goods being placed on board a ship and upon the weight of the goods so shipped being established as indicated in the contract. In my opinion that case cannot be taken as laying down any general rule but must be taken as a decision upon a particular contract which was before the Court upon which they held that the seller had performed all his obligations and was entitled to payment when he had placed the goods on board

(1) 7 H. & N. (Exch. Rep.) 574 (1862).

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a ship destined for Harburgh and that it was immaterial so far as he was concerned whether the goods subsequently reached their destination or not. The other case to which we were referred was the well-known case of *The Badische Anilin Und Soda Fabrik v. The Basle Chemical Works, Bindschedler* (2). In that case a trader in England had sent an order to the Basle Chemical Works in Switzerland for certain goods and asked that these should be sent by post at once. The manufacturer in Switzerland handed the goods to a forwarding agent instructing the agent to wait for further directions from London. The forwarding agent without waiting for such instructions posted the goods and the question that arose was whether the goods when posted were at the risk of the purchaser in England or whether they remained at the risk of the seller, the Basle Chemical Works, until they reached London. It is not necessary, I think, to refer to the actual point upon which the suit was brought, namely, that what had happened amounted to an infringement of letters patent, but for our present purpose it is sufficient to consider what conclusion was arrived at with regard to the passing of the goods. In that contract the London trader had asked that the goods should be sent by post and accordingly it was held that directly the goods were placed in the post, it did not matter whether by the forwarding agent or by the seller of the goods, the property in the goods no longer remained in the seller but passed at once to the buyer and that the goods in transit were at his own risk. That decision again really seems to me to depend upon the construction of the contract which was before the Court, and we think that it cannot be taken as laying down any gene-

ral proposition. I have stated the contention of the Appellant upon the construction of the contract before us and I now turn to the contentions of the Respondents. What they say is that according to the true construction of the contract it was a contract for delivery of 1,000 bales of jute at the Press-house of the buyers and that until the goods had arrived at the Press-house by steamer or flat the carriers were the agents of the sellers and not of the buyers, that is to say, that no property in the goods passed merely by placing the goods on the steamer or flat but that the property in the goods did not pass until they reached their destination, namely, Strand Bank Press at Cossipore. The contention was put succinctly by the learned Counsel for the Respondents and I will read his own words. His contention was this, that where in a contract the place of delivery is indicated the delivery to a carrier does not amount to fulfilment of the contract at all and that in such a case, that is, where the destination is indicated, the carrier is the agent of the seller and not of the buyer; but that where no place is indicated, if you perform all the terms that you are bound to perform, all the terms incumbent on the seller have been performed and the carrier is the agent of the buyer and not of the seller. Stress was further laid by the learned Counsel for the Respondents on the fact that the contract in suit was not a C. I. F. contract in which the tender of the bill of lading, together with a policy of insurance without an actual tender of the goods, is sufficient performance of the seller's part under the contract, but that this not being a C. I. F. contract the goods themselves must be tendered and that the mere tender of the documents is not sufficient. This is only another way of putting the

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Respondents' contention upon the construction of the contract, namely, that if you read the contract in its natural meaning it means that the contract was not performed so far as the seller was concerned until the goods had reached their destination named in the contract, namely, Strand Bank Press at Cossipore. We have stated the two contentions on the construction of the contract urged respectively by the Appellant and Respondents and the conclusion we have come to is that the decision of the learned Judge is correct and that upon the true construction of the contract the property in the goods did not pass when they were placed upon the Flat " Dwarka " for conveyance to the Strand Bank Press at Cossipore, but that something remained to be done, namely, actual delivery of the goods themselves at the Strand Bank Press at Cossipore. This is the main point which was argued before the learned Judge in the Court below and which was argued before us. But there are two other points that were raised and it is necessary to deal with them.

The second point is the contention put forward on behalf of the Respondents that the bill of lading in respect of the goods did not accompany the other documents when the demand for payment was made by the International Banking Corporation. The learned Judge has come to a conclusion against the Respondents on this point and he states that the usual documents were presented to the Defendants on the demand for payment of 90 per cent. to the Bank. It is stated on behalf of the Respondents that this conclusion is wrong and we were referred to various passages in the evidence as showing that the learned Judge's conclusion on this point was not correct. The first passage to

which we were referred is contained in the evidence of Ramdutt Upadhyay who was a Bill-Collecting Jamadar of the International Bank. In his answer to question (16) he states that he presented the bills and asked the Respondents to pay and that he was asked by the Respondents' cashier to come some other time. He states that he went there again an hour after and represented the bill to one Mulchand, who asked him whether he had the bill of lading with him and that he replied that he had not the bill of lading but he had the bill which the Cashier Babu had given him. He again in his answer to question (23) states: " So far as I remember the bill of lading was missing, but it is impossible for me to remember the nature of the paper," and later on in answer to question (26) he states that he thinks that the document which was missing was a paper for realising the goods. Then again there is a passage which was relied on by the Respondents in the evidence of Mohendra Nath Mukerjee who is employed in the Bill Department of the International Bank. There is no doubt considerable force in what was urged on behalf of the Respondents having regard to the answers given by the Bill-Collecting Jamadar of the International Bank, but it is noticeable that this point was never taken in the written statement filed by the Respondents and the learned Judge who saw the witnesses came to the conclusion that the document alleged to be missing was not the bill of lading but the policy of insurance, and notwithstanding the evidence to which we have referred we think, having regard to the omission of any statement of this kind in the written statement, we should accept the learned Judge's finding on this point and hold that the bill of lading was presented to the Respondents on the 25th

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September 1919. This being so, there is no substance in this point.

The third point urged was also urged on behalf of the Respondents and this was that in any case, even if the contention of the Appellant as to the passing of the property was correct, the contract was not performed until the whole of the 1,000 bales had been shipped to the Respondents. This point was urged before the learned Judge and he came to the conclusion, relying on the case to which he refers in his judgment, that the contract was divisible and that under the terms of the contract it was open to the Appellant to ship the goods by different shipments so long, of course, as they were shipped during August and September and that there was no force in the contention of the Respondents that the contract was not completed until the whole of the 1,000 bales had been handed over to the carrier. This question again depends upon the construction of the contract itself. The leading case on matters of this kind is the well-known case of *The Mersey Steel and Iron Company, Limited v. Naylor, Benzon and Company* (3). The contract in that case was for the supply of 5,000 tons of steel to be delivered 1,000 tons monthly and the question that was debated before the House of Lords was whether the failure to deliver one of the monthly shipments of 1,000 tons justified the repudiation of the contract. The learned Judges in the House of Lords came to the conclusion that upon the true construction of that contract the contract was divisible and that the mere failure to deliver one of the monthly instalments did not justify the repudiation of the contract but was a claim founding in damages. Lord Blackburn in his speech reported at p. 444 states that he

(3) L. R. 9 A. C. 434 (1884).

repeatedly asked Mr. Cohen, one of the Counsel engaged in the case, whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract and Lord Blackburn states that the learned Counsel failed to produce any such authority. Lord Blackburn says that there are many cases in which the breach may do so; and that it depends upon the construction of the contract. Accordingly for the decision of this question we cannot rely upon any case cited to us, however high the authority may be, for we have to go to look at the contract itself and to say whether upon the true construction of the contract delivery in instalments was contemplated. I confess myself that I have felt considerable difficulty so far as this question is concerned but the conclusion I have come to is, that upon the true construction of this contract the contract was one and indivisible and that the contract was not performed until 1,000 bales of Narain-gunge jute were delivered at the Strand Bank Press at Cossipore.

There is a minor point to which also I ought to refer, namely, the terms of the bill of lading itself. If we are wrong in our construction of the contract and upon the true construction thereof the property in the goods passed upon their being placed on board the Steamer "Dwarka," then it is contended that the last portion of sec. 91 of the Indian Contract Act has not been complied with and that the Plaintiff's suit must fail on this ground. I have already referred to sec. 91 and it is unnecessary to read it again but the portion to which I desire to refer is the latter portion, namely, that a

SADASOOK KOTHARI v. CHAITRAM RAMBHA ASH.

delivery to be a good delivery must be a delivery which enables the buyer to hold the wharfinger or the carrier responsible for the safe custody or delivery of the goods. In the bill of lading before us there is a provision that the shipment is to be on account of and at the risk of the shipper, that is to say, the Appellant before us and there is one clause, cl. (5) of the contract, relating to the liability of the carrier for loss or damage and it is accordingly urged that if the construction of the contract contended for by the Appellant is correct, having regard to this provision in the bill of lading to which I have referred, the seller is not in a position to hold the carrier responsible for safe custody or delivery of the goods. This is a minor point and was not really pressed before us, but we only mention it because it was raised in the argument by the learned Counsel for the Respondents; but in the view we take upon the main issues in the case it is not, I think, necessary to come to any decision on this point.

The result is that we think that the learned Judge's reading of the contract was correct, and in this view the appeal fails and is dismissed with costs.

CHAKRAVARTI, J.—I agree.

The whole question turns upon the construction of the contract before us. As I agree with my learned brother in the view that he has taken of the contract I do not think it necessary to add anything further.

Mr. N. C. Bose, Solicitor for the Appellant.

Mr. C. C. Bose, Solicitor for the Respondents.

S. N. B.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1229 OF 1924.

WALMSLEY, J.
1925,
26, February.

NALINI RANJAN SEN
GUPTA, Defendant No.
2, Petitioner,
v.
THE CORPORATION OF
CALCUTTA and anr,
Opposite Party.

Master's liability for accident caused by cleaner of a motor car driving it during chauffeur's temporary absence from the car—Chauffeur, if guilty of negligence in leaving car in charge of cleaner.

A chauffeur left the car in the street in charge of the cleaner, who was forbidden to drive, and went to a neighbouring workshop, while the cleaner started the car and drove it against a Corporation lamp post breaking it to pieces:

Held—That the master was not liable merely on the ground that the cleaner was his servant, for the reason that driving the car lay outside the scope of the cleaner's employment.

A motor car with the engine at rest is a very different thing from a horse-drawn van with the reins attached to a hook, and a much larger measure of interference is needed to put it in motion. Unless it could be said that the chauffeur ought to have anticipated that the cleaner would try to drive the car, he could not be held guilty of negligence. So the chauffeur could not be regarded as negligent and it followed that the master was not liable.

ENGELHART v. FARRANT (1) distinguished.

This was a Rule granted on the 11th November 1924 against an order of Babu Jagadish Chandra Goswami, Judge of the Court of Small Causes at Sealdah, dated the 22nd July 1924.

The facts of the case were as follows:—

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The Petitioner sent a motor car in charge of Petitioner's chauffeur for some petty repairs to a workshop at Ballygunge. The chauffeur was accompanied by the cleaner of the car, who was employed by the Petitioner only to clean the car and was forbidden to drive it. When the car reached its destination, it was found that the lane leading to the workshop was too narrow and was further made impassable by reason of some obstructions lying on the lane. So, the chauffeur pulled up the car, and left it in charge of the cleaner while he went into the workshop. During the absence of the chauffeur, the cleaner started the car and collided with a lamp post belonging to the Corporation which was broken to pieces.

On a suit by the Plaintiff Opposite Party for recovery of damages the learned Small Cause Court Judge found the Petitioner liable relying on the authority of *Engelhart v. Farrant* (1), on the ground that the chauffeur's act in leaving the car in charge of the cleaner was the effective cause of the accident.

Babu Jaineswar Majumdar for the Petitioner.—The cleaner's act was outside the scope of his employment, he having exceeded his authority.

Beard v. London General Omnibus Co. (2).

Even assuming that driving the car was incidental to his employment, still the master was not liable, he having driven it for his own business. The accident took place while he was engaged on his own business.

Storey v. Ashton (3).

In cases of accident by motor car the rule in *Engelhart v. Farrant* (1) does not apply. A motor car requires skilful

handling which is not the case with a horse-driven car. Horses are live animals. They themselves go off or are easily frightened. Motor car requires a trained hand to be driven.

Ruoff v. Long & Co. (4).

Engelhart v. Farrant (1) is easily distinguishable. In that case, the van was driven by horses and the carriage was left in charge of a mere boy whose natural propensity would be to drive the horses.

Underhill's Law of Torts (2nd Indian Edition), p. VI.

Further, that decision lays down two rules—(1) finding of negligence and (2) that negligence must be effective cause of the accident. Here no finding as to negligence but only finding that the chauffeur's act was the effective cause of the accident.

Even assuming chauffeur's act was negligent, still the driving by the cleaner was "the conscious act of another volition" which was the proximate cause of the accident which will exonerate the chauffeur from the liability.

Dominion Natural Gas Co., Ltd. v. Collins & Parkins (5).

Also *Ruoff v. Long & Co.* (4).

Dr. D. N. Mitter (with him *Babu Jagat Chandra Bose*) for the Opposite Party.—The case of *Engelhart v. Farrant* (1) was really applicable. The master becomes liable for the tort of his servant committed in the course of employment. Refers to *Halsbury's Laws of England*.

Further, the chauffeur would be liable for the tort of the cleaner under the Workmen's Compensation Act.

Babu Jaineswar Majumdar in reply.—The law on the subject is thus stated in *Halsbury's Laws of England*, Supple-

(1) [1897] 1 Q. B. 240.

(2) [1900] 2 Q. B. 580.

(3) [1869] L. R. 4 Q. B. 476.

(1) [1897] 1 Q. B. 240.

(4) [1916] 1 K. B. 148.

(5) [1909] A. C. 640 at p. 646.

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ment 1918, at p. 1098—"The conscious act of another volition would now seem to be enough to discharge from liability the person originally guilty of negligence if he could not have guarded against it."

The JUDGMENT OF THE COURT was as follows :—

The Petitioner has been held liable for damage caused to a lamp post by his motor car. It is found by the learned Judge that the car was taken out by a chauffeur, that the cleaner accompanied him, that the chauffeur stopped the car when he came to an obstruction, that he left the car in charge of the cleaner while he went to a shop on business, and that while he was absent the cleaner put the car in motion and brought it into collision with the lamp post. The Defendant's statement that the cleaner was employed only to clean the car, and had been forbidden to drive it, has been accepted.

It is clear that the master is not liable merely on the ground that the cleaner was his servant, for the reason that driving the car lay outside the scope of the cleaner's employment. The learned Judge does not rest his conclusion on that ground: he holds that the chauffeur was negligent in allowing to the cleaner the chance to drive the car; and in taking this view he relies on the decision in the case of *Engelhart v. Farrant* (1). The rule stated in that decision is that the master is liable for the negligence of the servant if that negligence is an effective cause of the damage. That rule is well-established, but in this case as in that the difficulty lies in applying the rule to the facts. The learned Judge appears to think that the facts of this case are so similar to those of that case, that the rule may be applied without further con-

(1) [1897] 1 Q. B. 240.

sideration. That case, however, as Lord Esher, M. R., remarked, was on the border-line, and it would, therefore, be dangerous to rely upon inference from similarity. What is necessary in this case is to determine whether the chauffeur was in fact negligent in leaving the car in charge of the cleaner and, if he was, whether that negligence was an effective cause of the accident. A motor car with the engine at rest is a very different thing from a horse-drawn van with the reins attached to a hook, and a much larger measure of interference is needed to put it in motion. Unless we can say that the chauffeur ought to have anticipated that the cleaner would try to drive the car, I do not think that he can be held guilty of negligence. It is easy to imagine facts which would warrant such a finding but those facts must not be assumed without evidence. In this case I do not think that the necessary facts have been proved, so I hold that the chauffeur cannot be regarded as negligent. It follows that the master is not liable, and that the Rule must be made absolute, and the judgment and decree of the lower Court set aside, the suit being dismissed with costs in both Courts, hearing fee in this Court one gold mohur.

J. N. R.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 278 of 1924.

NEWBOULD, J.

B. B. GHOSE, J.
1925,

Heard, 12, 13
and 16, March.
Judgment,
16, March.

THE NABADWIP MUNI-
CIPALITY, Complainant,
v.
PURNA CHANDRA
MUKERJI, Accused.

Bengal Municipal Act (III, B. C., of 1884), sec. 202—Proceeding, if a judicial proceeding—Magistrate, if can take action on report of another Magis-

THE NABADWIP MUNICIPALITY v. PURNA CHANDRA MUKERJI.

trate—Order, if can be made without hearing parties concerned.

An order made under sec. 202 of the Bengal Municipal Act is a judicial proceeding and the High Court can revise it.

Though a Magistrate is bound to act judicially he is not debarred for that reason only from acting on a report made by a subordinate officer.

A Magistrate exercising his power under sec. 202 is not engaged in a criminal proceeding and, as no procedure is prescribed by the section, he would not be wrong in following so far as they seem applicable the provisions of the Code of Civil Procedure.

But a Magistrate cannot make an order under the section without hearing the parties concerned.

This was a Reference from the Sessions Judge of Nadia recommending that the order of the District Magistrate of Nadia, dated the 27th June 1924, refusing under sec. 202 of the Municipal Act, to direct the removal of the obstruction in question, as also his order, dated the 20th October 1924, directing the removal of the obstruction, may be set aside and the District Magistrate or any other Magistrate be directed to proceed and determine whether the obstruction was on any road and then to pass a legal order in the case.

The LETTER OF REFERENCE was as follows :—

The Commissioners of the Nabadwip Municipality moved the District Magistrate for an order to the Petitioner Babu Purna Chandra Mukerji under sec. 202 of the Bengal Municipal Act for removal of obstruction from a place which the Petitioner claimed to be his private land. On the 27th June last, the learned District Magistrate recorded an order stating that

he did not think an action under sec. 202 of the Municipal Act by him to be justifiable. He advised the Commissioners to establish their title by a civil suit or to acquire the land in question but he stated that he did not see his way to order summary removal of the wall. Subsequently the Chairman prayed for a re-consideration of the order passed by him and the learned District Magistrate on the 20th October 1924 thought fit to change his previous order and to pass the order that the Municipality was to remove the obstruction under sec. 202 of the Municipal Act and to recover costs from Purna Babu. Then there was a further letter from the Municipality complaining of further encroachment by Purna Babu and the learned District Magistrate wrote in reply that he thought it desirable to prosecute Babu Purna Chandra Mukerji. This letter is dated 25th October 1924. The Petitioner before me prays for revision of the order passed on the 20th October directing the removal of the obstruction and the direction to prosecute Babu Purna Chandra Mukerji given on the 25th October last. On the record being called for and notice being issued to the Opposite Party, the learned District Magistrate showed cause by his letter, dated 27th November 1924, and the Municipality also appeared by a pleader in support of the letter of the District Magistrate showing cause. It is contended that the order under sec. 202 was passed by virtue of executive powers vested by sec. 202 in the District Magistrate and that there was no proceeding before any inferior Criminal Court, the record of which this Court might call for under sec. 435 of the Criminal Procedure Code. It is further contended that on the merits there is nothing wrong in the order of the learned District Magistrate which calls for interference. It appears from the

THE NABADWIP MUNICIPALITY v. PURNA CHANDRA MUKERJI.

letter of the District Magistrate that on the first occasion a local enquiry was held by one Sub-Deputy Magistrate and it was upon his report that the first order of the 27th June was passed. On the second occasion a fresh local enquiry was held by a different Sub-Deputy Magistrate and upon his report the second order was passed as it appeared to the District Magistrate that the officer who held the first investigation did not pay any attention to the important documentary evidence on behalf of the Municipality. With respect to the letter dated the 25th October 1924 the learned District Magistrate says that it was an advice to the Municipality and that no case has yet been instituted.

On the question of jurisdiction of this Court to refer the case to the Hon'ble High Court I would point out that under sec. 205 of the Municipal Act every order made by the Magistrate under sec. 202 shall be deemed to be an order made by him in the discharge of his judicial duty. In the case of *Alaka Mohon Saha v. The Chairman of Naraingunj Municipality* (1), it was contended before their Lordships in the High Court that while sec. 205 says that the order shall be deemed to be an order by him in the discharge of his judicial duty, it does not mean that it is a judicial proceeding, the contention being that the Magistrate shall be treated as acting judicially only for a particular purpose, *viz.*, for his own protection. But this contention was repelled by their Lordships and it was held that the order made under sec. 202 is a judicial proceeding and the Hon'ble High Court had the power to revise the order of the Magistrate. A certified copy of their Lordships' judgment is placed

(1) 24 C. W. N. clxviii (1920).

on the record for facility of reference. I, therefore, hold that this Court is competent to make the Reference.

As to the merits I would point out that the term "Magistrate" is defined by cl. (8), sec. 6 of the Municipal Act to include every Magistrate subordinate to the Magistrate of the District to whom the Magistrate of the District may have made over any duties under the Act so that if the learned District Magistrate made over the duties under this Act to any particular Magistrate subordinate to him, that Magistrate could have proceeded to act under sec. 202. But what has been done in this case is that while the District Magistrate purported to act under sec. 202, he acted upon the report of another Magistrate without himself determining whether the case actually came within the provision of sec. 202 of the Act. In my opinion the learned District Magistrate could not perform his function under sec. 202 in the way that he did it and that neither the earlier order refusing to take action under sec. 202 nor the later order by which the removal of the wall was ordered was one that was properly passed.

I would therefore recommend that both the orders should be set aside and the learned District Magistrate be directed either himself or by any other Magistrate to whom the duties under the Municipal Act may be made over to proceed to determine whether the obstruction or encroachment was on any road and the case came under sec. 202 and then to pass a legal order in the case. As to the advice of the learned Magistrate to institute a criminal case appearing in his letter, dated 25th October 1924, I make no recommendation at this stage, for I am not shown any provision of law under which this advice may be deemed to be a judicial

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order and also because no case has yet been started against the Petitioner.

Dr. Bijon Kumar Mukerji and Babu Jatish Chandra Guha for the Complainant.

Mr. D. N. Bagchi, Advocate and Babu Mohini Mohon Bhattacharji for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference under sec. 438, Cr. P. C., made by the Sessions Judge of Nadia recommending that two orders passed by the District Magistrate under sec. 202 of the Bengal Municipal Act, dated the 27th June and 20th October 1924, be set aside.

The facts so far as they are necessary for the decision of this Reference are as follows :—By his letter No. 182 dated 23rd June 1924 the Vice-Chairman of the Nabadwip Municipality informed the District Magistrate of Nadia that on the 26th April the Commissioners passed a resolution regarding the raising of the northern portion of the Municipal Road named Dwarik Babu's Road. Babu Purna Chandra Mukerji, the Chairman of the Municipality, in opposition to this resolution erected a brick wall the very next morning right across the northern portion of the said road. On the 31st May the Commissioners passed a resolution that a notice under sec. 202 of the Bengal Municipal Act might be issued on Babu Purna Chandra Mukerji requiring him to remove the wall. On the 2nd June the Vice-Chairman issued a requisition on Babu Purna Chandra Mukerji under this section. As he failed to remove the obstruction within the prescribed time the Magistrate was asked in this letter to pass necessary orders for removal of the encroachment. On receipt of this letter the District Magistrate by an order dated the 25th June requested Babu Satish Chandra Bose,

Sub-Deputy Collector, to hold a local enquiry and report by the morning of the 27th. The Sub-Deputy Collector held a local enquiry in the presence of the Vice-Chairman, Babu Purna Chandra Mukerji and others. On receipt of his report the Magistrate on the 27th June recorded an order in which he stated that he did not think that an order by him under sec. 202 of the Municipal Act was justifiable and that he did not see his way to order summary removal of the wall. This decision was conveyed to the Municipality by the District Magistrate's letter No. 329M, dated 1st July 1924. The Vice-Chairman replied in his letter No. 258, dated 18th/21st July 1924, asking for reconsideration of the order and repeated this request in a letter of reminder No. 412, dated 19th September 1924. On the 20th September the District Magistrate asked his senior Deputy Collector Babu C. C. Gupta to hold an enquiry in the presence of parties and report. This officer held an enquiry accordingly and submitted a report dated 20th October 1924. On receipt of this report the District Magistrate passed an order on the same date directing the Municipality to remove the obstruction under sec. 202 of the Municipal Act and recover cost from Babu Purna Chandra Mukerji.

The learned Sessions Judge on an application made to him by Babu Purna Chandra Mukerji to set aside the order of the 20th October has recommended that both the order of the 27th June refusing to take action and the order of the 20th October taking action under sec. 202 of the Municipal Act be set aside on the ground that the District Magistrate could not perform his function under this section by acting on the report of another Magistrate.

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We think that the Magistrate's procedure was wrong in the present case but for a different reason from that stated by the learned Sessions Judge. We agree with him that the decision of a Divisional Bench of this Court in the case of *Alaka Mohon Saha v. The Chairman of Narain-gunj Municipality* (1) is authority for holding that an order made under sec. 202 of the Bengal Municipal Act, 1884, is a judicial proceeding and we have power to revise the order of the Magistrate. But though the Magistrate was bound to act judicially we do not think he was debarred for that reason only from acting on a report made by a subordinate officer. There is nothing that offends the first principles of justice in such procedure. In a Civil suit a Court can issue a commission for a local enquiry to a suitable person and take action on the report submitted by such a person. A Magistrate, exercising his power under sec. 202, is not engaged in a criminal proceeding. No procedure is prescribed by the section and we do not think he would be wrong in following, so far as they seem applicable, the provisions of the Code of Civil Procedure. But where the Magistrate was wrong was in passing orders on these reports without first giving the parties concerned an opportunity of being heard.

The provisions of sec. 202 so far as they are relevant to the present Reference are in the following terms:—"The Commissioners may issue a notice requiring any person to remove any wall which he may have built. . . . on any road . . . and if such person shall fail to comply with such requisition within eight days of the receipt of the same, the Magistrate may, on the application of the Commissioners, order that such obstruction . . . be removed and thereupon the

(1) 24 C. W. N. clxviii (1920).

Commissioners may remove any such obstruction . . . ; and the expenses thereby incurred shall be paid by the person who erected the same."

This section gives the Municipal Commissioners somewhat drastic powers and as might be expected the legislature has provided safeguards against the arbitrary exercise of these powers. One of these safeguards appears to have been overlooked in the present proceedings by all concerned. This is that provided by sec. 176, which a reference to sec. 175 shows to be applicable to requisition made by the Commissioners under sec. 202. Sec. 176 gives the person against whom the requisition is made the right to prefer an objection in writing to the Commissioners. This objection has to be heard and disposed of by the Chairman or Vice-Chairman except in cases where the work will cost more than three hundred rupees, when the objection will be decided by the Commissioners in meeting. Under sec. 178 the Chairman or Vice-Chairman or the Commissioners at a meeting, as the case may be, shall, after hearing the objection and making any inquiry which they may deem necessary record an order withdrawing, modifying or making absolute the order against which the objection is preferred. This section further provides that if this order does not withdraw the requisition, further time shall be specified within which it shall be carried out. Sec. 180 gives the Commissioners power to execute the work or do the thing if it is not done within the time specified in the requisition by the person required to do it. They can act under this section without applying to the Magistrate under sec. 202. But by proceeding under this latter section, if they obtain an order from the Magistrate, they are protected from a suit

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in the Civil Court by the provisions of sec. 205. Apart from the authority we have, cited above we should hold that the legislature could never have intended to enable a Magistrate to deprive a person of his right to a civil action for acts done by the Commissioners in excess of their powers except by a judicial order passed after hearing the parties concerned.

From the papers before us it does not appear that any objection was preferred by Babu Purna Chandra Mukerji under sec. 176. The learned Advocate who appears on his behalf informs us that such an objection was preferred and that he has a copy of this objection in his brief. If this is so we do not understand why no objection was taken to the whole proceedings on the ground that this objection has not been determined according to law. The Vice-Chairman in his letter of the 23rd June makes no reference to any order under sec. 178. But if such an order had been passed, making absolute the original requisition of the 2nd June, it would be necessary for the Vice-Chairman to inform the Magistrate that there had been a failure to comply with the requisition within the time extended by the order absolute.

For the above reasons we accept this Reference. We hold that the orders passed by the District Magistrate of Nadia both on the 27th June and on the 20th October 1924, were illegal orders since the Magistrate did not act judicially in that he passed these orders without giving the parties concerned an opportunity of being heard. We set aside these orders and direct the Magistrate to hear the parties concerned and after making such enquiry as may be necessary decide whether he should make an order directing that the wall be removed.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

LORD BUCKMASTER.	}	RAI BAHADUR LALA
LORD DUNEDIN.		NARSINGH DAS,
LORD SUMNER.		Appellant,
1924,		v.
Heard,		THE SECRETARY OF
17, November.		STATE FOR INDIA
Judgment,		IN COUNCIL,
5, December.		Respondent.

Land Acquisition Act (I of 1894), sec. 26 (2)—Reference as to valuation—Appeal from award to High Court—Decision of High Court—Appeal to the Privy Council, if lies—Grounds on which Privy Council will interfere—Principle of valuation

An appeal lies under the law as amended to the Privy Council from a decree of the High Court passed on appeal from a reference under the Land Acquisition Act as from a decree in an ordinary suit.

But the Privy Council in such cases will not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied.

Principle of valuation as laid down in FRASER v. CITY OF FRASERVILLE (2) referred to.

This was an appeal (No. 40 of 1924) from a decree, dated the 27th April 1922, of the High Court at Lahore, which modified in the Appellant's favour a de-

RAI BAHADUR IJALA NARSINGH DAS v. THE SECY. OF STATE FOR INDIA IN COUNCIL.

decree, dated the 15th April 1919, of the District Judge of Lahore.

The latter decree had confirmed an award made by the Land Acquisition Officer at Lahore for land which had been acquired compulsorily from the Appellant by the Punjab Government under the Land Acquisition Act, I of 1894.

The only question in the appeal was as to the market value of the land so acquired. The land in question was situated on the Montgomery Road, Lahore, and had been purchased by the Appellant in January 1908 and subsequently leased to the Lahore Municipality as a police station.

The Land Acquisition Officer of Lahore made an award in favour of the Appellant for Rs. 10,986-5-4 and that award was upheld by the District Judge on a reference to him under sec. 19 (2) of the Land Acquisition Act.

On appeal the High Court (Sir Shadi Lal, C. J. and Harrison, J.) varied the judgment of the District Judge in favour of the Appellant and increased the purchase price to Rs. 17,967-9.

The Appellant appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and A. Majid for the Appellant.

Messrs. Dunne, K. C. and W. Wallach for the Respondent.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD BUCKMASTER.—The Appellant is the owner of a plot of land having a frontage on the west side of Montgomery Road, Lahore. The Government of the Punjab, requiring this land for the purpose of a Police Post, duly notified the Appellant on 7th July 1917 that the land was so required and directed the Collector of the District to take steps for its ac-

quisition. The price not being agreed a reference was taken to determine the value and an award was consequently made allowing the Appellant at the rate of Rs. 2,000 per *kanal* for the land. The Appellant refused to accept this award and the case was accordingly referred to the District Judge of Lahore who delivered judgment on the 15th April 1919, affirming the award.

An appeal was thereupon laid to the High Court of Lahore, who varied the judgment of the District Judge in favour of the Appellant and increased the allowance to about Rs. 3,000 per *kanal*. From this judgment the Appellant has once more appealed to His Majesty in Council. The first comment to be made upon the appeal is this; that before 1921 such an appeal would have been incompetent, as was decided in *Rangoon Botatoung Company, Limited v. The Collector, Rangoon* (1), but the Land Acquisition Act, 1894, was amended in 1921 in the following way:

"Section 2.—Sec 26 of the Land Acquisition Act, 1894 (hereinafter referred to as the said Act), shall be re-numbered 26 (1), and to the said section the following subsection shall be added, namely:—

"(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of sec. 2, cl. (2), and sec. 2, cl. (9), respectively, of the Code of Civil Procedure, 1908."

and it is under this section that the present appeal is maintained. The matter, therefore, must be considered and determined in the same manner as if it were a judgment (?) from a decree in an ordinary suit, but it has been repeatedly laid down by the Board that in such cases they will not interfere with judgments of

(1) L. R. 39 I. A. 197; s. c. I. L. R. 40 Cal. 21; 16 O. W. N. 961 (1912).

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the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached, unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle, or because some important point in the evidence has been overlooked or misapplied.

Now, the principle upon which valuation of property compulsorily acquired should be measured has been repeatedly laid down before by this Board and by the House of Lords. To use the words to be found in *Fraser v. City of Fraserville* (2),

"it is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired."

Their Lordships are unable to find that this principle has been departed from by the High Court in the judgment that they have formed. The learned Judges appear to have examined the cases of the sales of property in the district and rejected those which, from their different locality and the different possibilities of value due to their position, were, in their judgment, inapplicable, and to have dealt with this case by considering the value of the land immediately adjacent at the rear and excluded from the road as determined by actual sale then to have assumed that the land in dispute was added with the advantages of the frontage and thus to

have fixed a value for the whole and then taken the fractional value of this sum represented by the ratio of the area of the land in question to the entire block and given to it the whole added value due to the frontage. Their Lordships see nothing wrong in the Court being thus guided to their conclusion, and the question as to the amount which they thought right to add for the advantageous position that the present property occupied, their Lordships are not prepared to examine.

For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

A small matter of the judgment was the omission of the right to interest to which the Appellant is entitled at the rate of 6 per cent. as from the 7th July 1917, when the land was acquired.

Solicitors: *Messrs. Rankin, Ford & Chester* for the Appellant.

Solicitor: *Solicitor, India Office*, for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD DUNEDIN.

LORD CARSON.

SIR JOHN EDGE.

1924,

Heard, 29 and

30, July.

Judgment,

21, October.

MAUNG DWE and
ors, Appellants,
v.

KHOO HAUNG SUEIN
and ors.,
Respondents.

Burmese Buddhist Law—Inheritance—Step-sons, if exclude collaterals of step mother—Non-residence with step mother and failure to bury her, if disqualification—Step-mother's share in her parent's estate remaining undivided at her death, succession to—Breach of filial relations—Onus.

According to Burmese Buddhist law,

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step-children are descendants and necessarily oust collaterals, for by Buddhist law property never ascends so long as it can descend.

But as regards the share of inheritance to which the step-mother was entitled in her deceased parent's estate which still remained undivided the step-children and the collaterals share half and half.

It is not incumbent on the person who proves that he is an heir to prove further that he has not broken filial relations in such a case.

The fact that the step-children did not live with the deceased step-mother and did not bury her, did not constitute such a breach of filial relations as would deprive them of their right to inherit.

Quare :—Whether in a contest between step-children and step-grandchildren, the former exclude or share with the latter.

Semble :—The strict Buddhist view that intestacy is compulsory has been so far impinged upon that a Burmese Buddhist is allowed to make a Will.

This was an appeal from a decree, dated the 30th January 1922, amended by consent on 15th May 1922, of the Chief Court of Lower Burma, which reversed a decree, dated the 6th December 1920, of the District Court of Tavoy.

The appeal relates to the succession to the property of Ma Shwe Kin, a Burmese Buddhist lady who died in 1919 possessed of considerable separate estate.

The deceased was the third wife of Khoo Shwe Goon, a Burmese Buddhist of Tavoy whom she survived but in whose property she took no interest.

The suit was instituted by the Respondents who were a son and grandsons of Khoo Shwe Goon by a prior wife.

They alleged that the Defendants who were a brother and a sister of the deceased

Ma Shwe Kin had intermeddled with her estate and they prayed for administration. The question for determination in the appeal was whether the Respondents as step-grandchildren of Ma Shwe Kin could be characterised under Buddhist law as her descendants, and as such, should be preferred to collaterals in the matter of succession.

The District Judge decided in favour of collaterals but his findings were reversed by the Appellate Court (Pratt and Duckworth, JJ.).

Messrs. Harney, K. C. and Parry for the Appellants

Mr. Sanders for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.— This is the case of a disputed succession to the property of a lady named Ma Shwe Kin, a Burmese Buddhist living in Tavoy, who was the third wife and the widow of Khoo Shwe Goon. Khoo Shwe Goon was first married to Ma Lin and by her he had a son now deceased and another son Khoo Ping Hoe, one of the Respondents in the appeal. Ma Lin died and Goon married Ma In, by whom he had a son Khoo Ping Kyan, now deceased. Khoo Ping Kyan married and had three sons and a daughter, who are the other Respondents. Ma In died, and after some years Goon married his deceased wife's sister Ma Shwe Kin. Goon died in 1917 before his third wife, who died in 1919. He disposed of his own property by Will.

Ma Shwe Kin died in 1919 possessed of considerable property, which was her own. She was also entitled to a share of the succession of her mother Pwa Zo. Ma Shwe Kin was survived by a brother and married sister. This brother, the sister and her husband are the Appellants

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in the present case. Originally a question was raised as to whether Goon really ever married his third wife, but it was held in the Courts below that the marriage was sufficiently established by habit and repute and no question as to that was raised before their Lordships. The case, therefore, resolves itself into the question, who are to be preferred, the step-son and step-grandchildren on the one hand, or the lady's own brother and sister on the other?

The case was tried before the District Judge, who preferred the Appellants. That learned Judge took the view that, though in the case of *Ma Gun Bón v. Maung Po Kywe* (1), the grandchildren, as descendants, were preferred to the collaterals, that case really turned, not upon the general principle, but upon the fact that the property there in question had come from the real father and gone to the second wife and thus only reverted to the original family. He also held that, in this case, the step-grandchildren had not lived with the deceased and had not buried her, that ceremony being performed by the brother and sister.

Appeal was taken to the Chief Court of Lower Burma, and the learned Judges in appeal reversed the judgment. They held that the case of *Ma Gun Bón v. Maung Po Kywe* (1) proceeded on general principles and not upon the special character of the property in question. They also held that the facts above narrated created no disqualification.

Their Lordships have examined the Digest of Burmese Buddhist Law, which is the available source of reference to the rules of the Dhammathats. They also considered the authorities cited. The leading case on the subject is undoubtedly

the case of *Ma Gun Bón v. Maung Po Kywe* (1). It is quite true that in that case the property in question had come from the husband to the wife and that it was that property, that was the subject of the disputed succession, but the judgment in no way proceeds on that point. There is a large citation of texts as to step-children, and the learned Judge sums up the matter thus:—

"These texts go to show that step-children are regarded as heirs without limitation, except in the case of ancestral property, and even in that they are granted a share provided the step-parent has lived to have a vested interest in it, or to reach it according to the Burmese expression"

This is quite in accordance with certain citations which are to be found in the Dhammathats. Thus sec. 6 (Manugye):—

"There are 4 kinds of inheritance, namely, (1) that which is obtainable by children, grandchildren and great-grandchildren only; (2) that which is obtainable by children and step-children."

and in sec. 295 (Manugye),

"The father marries again and both father and step-mother die leaving no offspring of the marriage.

"The rule of partition between the step-children and their step-mother's co-heirs is as follows:—

"The children shall receive the whole of their father's as well as their step-mother's animate and inanimate property. As regards the share of inheritance to which the step-mother was entitled in her deceased parents' estate which still remains undivided, her step-children shall inherit one half and her co-heirs the remaining half."

and Manu, to the same effect:—

"The children shall inherit the property owned by the father and step-mother jointly."

Once it is determined that step-children are descendants they necessarily

(1) 2 Upper Burma Rulings, p. 66.

(1) 2 Upper Burma Rulings, p. 66.

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oust collaterals, for by Buddhist law the property never ascends as long as it can descend. The learned appeal Judge in this case says :—

“The point of view of the Buddhist law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that, in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations.”

Their Lordships agree with this statement.

There remains the question whether the Appellants are disentitled to succeed, because, first, the Respondents did not live with the deceased, and, second, that they did not bury her. The learned Counsel for the Appellants contended that these services, which he designated by the name of the filial bond, were a condition precedent to the allowance of a step-child's right. Their Lordships cannot accept this view. In the same paragraph, sec. 6 of the Digest of Burmese Buddhist law, heading 4 is :—

“That which should be withheld from children who failed in filial duty.” and this is explained thus :—

“Among laymen disobedient and idle sons cannot inherit their parents' estate.” Their Lordships think it clear that conduct can indeed operate as a disqualification of the right, but that it is in no sense a necessary qualification to obtain the right. They agree with what was said in the case of *Maung Sein Thwe v. Ma Shwe Yi* (2) :—

“We are not prepared to assent to the view that a man who has proved that he is an heir has further to prove that he has not broken off filial relations in such a case as this.”

and again, p. 396 :—

“Mere separate residence does not nowadays and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights.”

Their Lordships, upon the whole matter, agree with what was said by the learned Judges of the Court of Appeal, that in this case there is no forfeiture. It would only be natural that the children, who are all minors, should live with their own mother, and for the same reason, they could not have been the conductors of the funeral ceremony.

As to the hereditary property to which the deceased became entitled in respect of her mother, but which was not as yet in her possession, the judgment is in accordance with the texts quoted.

In view of the fact that Buddhist law is in many ways obscure and the judgments are few, their Lordships think that it is necessary to make two observations in case this judgment should be used for the purpose of upholding propositions which it does not contain. The step-son here has made common cause with the step-grandchildren and was content that they should share along with him. Their Lordships pronounce no opinion as to what would be the result in a contest between the step-son and the step-grandchildren; but either or both are entitled to exclude the Appellants. Further, though the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory, this has so far been impinged upon that a Burmese Buddhist is allowed to test, which accounts in this case for Goon's Will as to his own property.

Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs.

Solicitors: *Messrs. Henry Hilbert & Son* for the Appellants.

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Solicitor: Mr. A. M. Bramall for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 145 OF 1924.

SANDERSON, C. J.	SREELAL MANGULAI,
RANKIN, J.	Plaintiffs, Appellants,
1925,	v.
Heard,	THE LISTER ANTISEPTIC
26, March.	DRESSING Co., LD.,
Judgment,	Defendants,
27, March	Respondents.

Indian Companies Act (VII of 1913), sec. 89—Hundi, endorsed by Managing Agents of Company, when binds Company—Negotiable Instruments Act (XXVI of 1881), secs 26, 27, 28—Proper test—Endorsement as agent of Company—Words, whether decorative and descriptive

Where Mitter and Sons who were Managing Agents of the Lister Antiseptic Dressing Co., Ltd., endorsed certain hundis drawn in their favour to the Plaintiffs in the following manner: "Mitter and Sons and Mitter and Sons, Managing Agents, Lister Antiseptic Co., Ltd.:"

Held—That the endorsement did not bind the Company as by it the responsibility of the Company was not made plain and could not be instantly recognised as the document passed from hand to hand.

The test laid down in *SADASUK JANKI DAS v. MAHARAJA SIR KISHAN PERSHAD* (2), was not satisfied where one person might upon a consideration of the endorsement suppose that the responsibility of the Company was intended to be involved whilst another might come to the opposite conclusion.

This was an appeal against the decision of Thornhill, J., dated 20th June 1924,

(2) L. R. 46 I. A. 36; s. c. I. L. R. 46 Cal. 663; 23 C. W. N. 937 (1918).

passed in the exercise of Original Civil Jurisdiction.

THORNHILL, J.—The subject-matter of this suit which comes before the Court under Or. 37 consists of five promissory notes, but as they are identical in form, I need only deal with one.

Messrs. Mitter and Sons were Managing Agents for the Lister Antiseptic Dressing Co., Ltd. On the 19th May 1922 Mrigendralal Mitter, the proprietor of Mitter and Sons, executed an instrument on hundi stamped paper to the following effect:

"(36) Three hundred and sixty days after date without graco I promise to pay to Messrs. Mitter and Sons or order the sum of rupees five thousand only for value received in cash.

Mrigendralal Mitter."

On the back of this document there are two endorsements, namely,

"Mitter and Sons and
Mitter and Sons,

Managing Agents,
Lister Antiseptic Co., Ltd."

The plaintiff alleges—"The said hundis were endorsed by Mitter and Sons to the Defendant Company, Lister Antiseptic Dressing Company, Ltd., and the latter endorsed them and delivered them for valuable consideration to the Plaintiff firm."

The Defendant Company deny having any knowledge of the drawing of the hundis by Mrigendralal Mitter in favour of Mitter and Sons or endorsement thereon, and deny that they ever endorsed and delivered those hundis to the Plaintiff firm or received any consideration whatever therefor.

Neither Mitter and Sons nor Mrigendralal Mitter have appeared. The point for decision does not arise between these parties and the Company. It is a third party in the shape of the Plaintiff firm

Accepted.
Mrigendralal Mitter.

SREELAL MANGTULAL v. THE LISTER ANTI SEPTIC DRESSING CO., LTD.

who seeks, as holder of the instrument, to impose liability on the Defendant firm. *

Sec. 89 of the Indian Companies Act lays down when a bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a Company and the authorities show that no evidence *dehors* the bill or note is admissible.

The descriptive or decorative words "Managing Agents, Lister Antiseptic Co., Ltd." do not indicate the instrument was made or endorsed by or on behalf of the Company.

The Plaintiffs hold a letter, dated the 19th May 1922, purporting to be a covering letter sent with the hundis in which Mitter and Sons allege endorsement of the hundis on behalf of the Lister Antiseptic Dressing Co., Ltd. The Defendant Company's Counsel does not admit this to be a genuine letter. On behalf of the Plaintiff it is argued the rule, that the intention of the parties must be gathered from the contents of the document *alone*, does not apply save in cases of drawer and drawee. In support of this contention the Court has been referred to *Castrique v. Buttigieg* (12). This case was decided in 1855. It decided that an endorser *prima facie* liable may show that under the terms of his employment he is not liable to the endorsee. In my opinion, it is not an authority showing any right to call evidence with a view to imposing liability on a party who is not *prima facie* liable on the instrument. I must, therefore, decline to hear evidence on this point, and I dismiss the suit with costs on Scale No. 2 against the second Defendants, *viz.*, The Lister Antiseptic Dressing Co., Ltd. Decreed against first and third Defendants, with costs on Scale No. 1.

(12)

1

Mr. S. N. Banerjee (with him Messrs. K. P. Khaitan and N. C. Chatterjee) for the Appellants.—There are two endorsements on the bill—one is by the firm of Mitter and Sons and the other is by Mitter & Sons as Managing Agents of the Company. The second endorsement is meant to bind the Company and, therefore, the provisions of sec. 89 of the Indian Companies Act have been complied with. It is a question of construction. Cited *Okell v. Charles* (3).

[Rankin, J.—“In that case the Company was the drawee and also the acceptor.”]

Sir George Jessel, M. R., pointed out that words “on behalf of” or “on account of” the Company need not be expressed on the face of the Bill, but only the meaning of these words should be there.

Cited also *Chapman v. Smethurst* (1).

In a note similar to the one in this case the Court of Appeal reversed the decision of Channell, J., and held that the Company was liable.

Cited also *Universal Steam Navigation Co., Ltd. v. James McKelvie & Co.* (4) and *Sadasuk Janki Das v. Maharaja Sir Kishan Pershad* (2).

The only reasonable construction from the double endorsement on the present bill is that the second one was on behalf of the Company. If the words “Managing Agents, etc.” were intended to be merely decorative or descriptive, they would have been inserted also in the first endorsement.

Sir Benode Mitter (with Mr. S. C. Bose) on behalf of the Respondents argued that

(1) [1909] 1 K. B. 927.

(2) L. R. 46 I. A. 36; S. C. I. L. R. 46 Cal. 663; 23 C. W. N. 987 (1918).

(3) 34 L. T. 822 (1876).

(4) [1923] A. C. at p. 591.

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the principle in *Universal Steam Navigation Co., Ltd. v. James McKelvie & Co.* (4) is not applicable in the case of negotiable instruments, as pointed out by the Court of Appeal in *Ariadne Steamship Co. v. James McKelvie & Co.* (5). Cited *Sadasuk Janki Das v. Maharaja Sir Kishan Pershad* (2). The responsibility of the party sought to be charged must be stated clearly on the face of the bill.

Dutton v. Marsh (6).

[Sanderson, C. J.—How do you explain the two endorsements? Why should the words “Managing Agents, etc.” be not also in the first endorsement?]

Because Mitter & Sons were the payee of the note, therefore an endorsement like that was necessary in the first case. The words “Managing Agents, etc.” in the second endorsement are merely decorative or descriptive and meant to identify the parties liable.

Cited *Landes v. Marcus* (7), *Gray v. Raper* (8), *Serrel v. The Derbyshire Railway & Co.* (9), *Mare v. Charles* (10), *In re New Fleming Spinning and Weaving Co., Ltd.* (11).

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Plaintiff firm, Sreelal Mangtulal, against the judgment of Mr. Justice Thornhill which was delivered on the 20th of June 1924.

(2) *L. R. 46 I. A. 36*; *s. c. I. L. R. 46 Cal. 663*; *23 O. W. N. 937* (1918).

(4) [1923] *A. C.* at p. 501.

(5) [1922] *1 K. B.* 530.

(6) *L. R. 6 Q. B.* 361 (1871).

(7) *25 T. L. R.* 478 (1909).

(8) *L. R. 1 O. P.* 694 (1866).

(9) *9 C. B.* 811 (1850).

(10) *5 E. & B.* 978 (1856).

(11) *I. L. R. 3 Bom.* 299 (1879); *I. L. R. 4 Bom.* 275 (1879).

The suit was brought under Or. 37 of the Code of Civil Procedure and was based upon five hundis, four of which were dated the 19th of May 1922, and one was dated the 23rd of May 1922. In all material respects they were in the same form; and, it will be sufficient if I refer to that which is marked A. It was in these terms: “Calcutta, 19th May 1922. (180) One hundred and eighty days after date without grace I promise to pay to Messrs. Mitter and Sons or order the sum of rupees five thousand only for value received in cash. Sd. Mrigendra Lal Mitra.” That document appears to be in the form of an ordinary promissory note; but for some reason, which is not apparent at present, it was accepted by Mrigendra Lal Mitra on the face of the document. It was endorsed by the payees, “Mitter and Sons.” There was a further endorsement upon it, as follows: “Mitter and Sons, Managing Agents, Lister Antiseptic Co., Ltd.”

The suit was brought by the Plaintiffs on the allegation that the Plaintiffs were holders in the ordinary course for valuable consideration: that the notes were endorsed by Mitter and Sons to the Defendant Company and that the latter endorsed them to the Plaintiffs: they relied upon the second endorsement, which I have read, as an endorsement by the “Lister Antiseptic Co., Ltd.”

The learned Judge came to the conclusion that the documents were not endorsed by or on behalf of the Company: and, he held that the words “Managing Agents, Lister Antiseptic Co., Ltd.” were descriptive or decorative and that “they do not indicate that the instrument was made or endorsed by or on behalf of the Company.”

The material section of the Indian Companies Act, 1913, is sec. 89 which provides as follows:—“A bill of exchange,

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hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a Company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the Company by any person acting under its authority, express or implied."

In this case it has not been suggested that the promissory note was endorsed in the name of the Company. The allegation put forward on behalf of the Plaintiffs was that it had been endorsed by Mitter and Sons on behalf or on account of the Company.

The principle upon which this case must be decided, in my judgment, was stated by Lord Justice Kennedy in the case of *Chapman v. Smethurst* (1), which is as follows:—"The proper test to apply in such cases is laid down in Lindley on Companies, 6th Ed., Vol. I at p. 280, where it is said: 'The question is in every case one of construction: is the bill or note the bill or note of the Company or not? Does it really purport so to be? For, although given for the purposes of the Company, the bill or note may not even purport to bind it. If on the true construction of the instrument the bill or note is the bill or note of the Company, the Company will be liable upon it, and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the Company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not.'"

The principle was also stated by Lord Buckmaster in the case of *Sadasuk Janki Das v. Maharaja Sir Kishan Pershad* (2). Lord Buckmaster is reported to have said

as follows: "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand." The learned Lord proceeded to say, "The statement, to which reference has been made, which appears on p. 99 of Messrs. Iyenger and Adiga's book on Negotiable Instruments, that 'outside evidence is inadmissible on any person as a principal party unless his—the principal party's—name is in some way disclosed in the instrument itself,' is not in itself an adequate statement of the law. It is not sufficient that the principal's name should be 'in some way' disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill."

It is, therefore, a question of construction whether the Company has been made liable by the endorsement which appears on the back of these promissory notes and which is as follows: "Mitter and Sons, Managing Agents, Lister Antiseptic Co., Ltd."

In my judgment it is possible that any one taking these promissory notes might infer that the words which appear after the endorsement "Mitter and Sons" were merely descriptive of "the firm of Mitter and Sons," and it is not clear that the responsibility of the Company would be recognized by any one to whom the documents were transferred.

The only point which, in my judgment, was of any substance was that these documents bore the endorsement "Mitter and Sons" twice: and, it was urged that if the words "Managing Agents, Lister Antiseptic Co., Ltd." were merely

(1) [1909] 1 K. B. 927.

(2) L. R. 46 I. A. 36; s. c. I. L. R. 46 Cal. 663; 28 O. W. N. 937 (1918).

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descriptive of the firm of Mitter and Sons there would be no reason for "Mitter and Sons" endorsing the documents twice. It was urged that if the words, to which I have referred, were intended to be merely descriptive they might have been inserted after the first endorsement which appears upon the promissory notes.

I am unable to accede to that argument. It seems to me that it would not be clear to any one, who took the documents, that the responsibility of the Company was intended to be involved. It might be that upon consideration of the documents one person might come to the conclusion that the responsibility of the Company was intended to be involved; on the other hand, another person, taking these documents, might come to the opposite conclusion, viz., that it was intended that the personal liability of Messrs. Mitter and Sons only was involved. The endorsement on the documents does not comply with the test laid down by the learned Lord that the "responsibility is made plain and can be instantly recognized as the document passes from hand to hand."

For these reasons, in my judgment, the learned Judge's judgment was correct.

An application was made to the Court for leave to amend the plaint in order to include a claim for money which it was alleged the Plaintiffs had advanced to the Company. There was no application at the trial for such an amendment and it is sufficient to say that, in my judgment, it is too late now for the Plaintiffs to make that application. There is a further reason that there is not in the plaint sufficient indication as to what, if any, the consideration was. Therefore, in my opinion, the application for amendment should be refused.

The result is that this appeal must be dismissed with costs.

RANKIN, J.—I agree.

Messrs. Khaitan & Co., Solicitors for the Appellants.

Messrs. Dutt & Sons, Solicitors for the Respondents.

P. D.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

PRIVY COUNCIL APPLICATIONS

Nos. 4 AND 5 OF 1925.

SANDERSON, C. J.
RANKIN, J.
1925,
11, February.

SOURENDRA NATH
MITTER and ors., Plain-
tiffs, Respondents,
Petitioners to England,
v
SM. TARUB LA DASFI,
Defendant, Appellant,
Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 109, cls (a) and (c)—Leave to appeal to Privy Council—"Decree or final order passed on appeal"—Order of remand—Interlocutory order—Or. 23, r. 3, recording of compromise under—Preliminary decree—Appeal to High Court against order recording compromise and against preliminary decree—Order by High Court holding compromise not made out and remanding case to lower Court for trial, if interlocutory order.

Where the trial Court recorded a compromise and passed a preliminary decree in accordance therewith, and on appeal, a Division Bench of the High Court holding that the compromise had not been made out set aside the order recording the compromise and the decree based thereon, and remanded the case to the lower Court for trial, and against this decision of the Division Bench application was made for leave to appeal to His Majesty in Council:

Held—That the order of the Division Bench remanding the case to the trial Court for trial must be regarded as an interlocutory order and it was not a "decree" or "final order" passed on appeal

SOURENDRA NATH MITTER v. SM. TARU BALA DASSI.

within sec. 109, cl. (a) of the Code of Civil Procedure.

ALEXANDER JOHN FORBES v. AMMEER-
OONISSA BEGUM (1) and MAHARAJA
MAHESHUR SINGH v. THE BENGAL GOVERN-
MENT (2) referred to.

Held further—*That this was not a case in which the High Court should grant a certificate under cl. (c) of sec. 109 of the Code of Civil Procedure.*

Per RANKIN, J.—*Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court.*

SECRETARY OF STATE FOR INDIA IN COUN-
CIL v. BRITISH INDIA STEAM NAVIGATION
COMPANY (3) referred to.

The mere dismissal of an application for recording an adjustment coupled with an order that it is therefore necessary for the case to be tried in the ordinary way does not stand in such a relation to the proceeding before the Court as to entitle it to be regarded as something which conclusively adjudicates upon the rights of the parties which were really the subject-matter of the litigation. It merely negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of. The contention that the order must be final because it set aside a decree cannot be sustained.

This was an application for leave to appeal to His Majesty in Council against the order of a Division Bench of this Court (Walmsley and B. B. Ghose, JJ.), dated the 18th December 1924, made in R. A. No. 94 of 1924 and Miscellaneous Appeal No. 136 of 1924.

The facts of the case will appear from the judgment.

Mr. S. C. Bose and Babu Nanda Gopal Banerji for the Petitioners.

Mr. B. L. Mitter, Sir Provash Chandra Mitra, Babus Hemendra Ch. Sen and Surendra Nath Basu for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an application by the Plaintiffs in the suit for a certificate that the case is a fit one for appeal to His Majesty in Council.

The suit was brought by the Plaintiffs for partition by metes and bounds of the properties described in the plaint. During the course of the trial it was alleged that a compromise between the parties had been arrived at and an application was made on behalf of the Plaintiffs to the learned Subordinate Judge for recording the compromise and for a decree in accordance with the terms of the compromise. The Defendant Srimati Tarubala Dassi objected to the compromise being recorded and to a decree being passed on the ground that the compromise had not been made with her authority. The learned Subordinate Judge heard evidence—both oral and documentary—and came to the conclusion that the compromise had been arrived at and was binding upon the parties. The learned Judge ordered the compromise to be recorded and made a preliminary decree in accordance therewith so far as it related to the suit.

The Defendant then preferred an appeal to the High Court against the order recording the compromise and against the decree and the appeal was heard by my learned brother Mr. Justice Walmsley and Mr. Justice Bepin Behary Ghose. These two learned Judges allowed the appeal

(1) 10 Moo. I. A. 340 (1865).

(2) 7 Moo. I. A. 283 (1859).

(3) 13 C. L. J. 90 (1911).

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and remanded the case to the trial Court in order that it might be heard from the stage at which it had reached on the 3rd September 1923.

It was argued on behalf of the Plaintiffs that the decision of the Division Bench of this Court was a "decree" or a "final order" passed on appeal within the meaning of sec. 109, cl. (a) of the Code of Civil Procedure and that inasmuch as it reversed the decision of the Court immediately below and as there was no doubt that the value of the subject-matter in dispute in the suit and in the appeal was more than Rs. 10,000 the Plaintiffs were entitled to a certificate. On the other hand, it was argued on behalf of the Defendant that the order of the Division Bench was no more than an interlocutory order and did not decide the questions which were in dispute in the suit between the parties. There is no doubt that the decision of the Division Bench of this Court may be said to be a "final order" in the sense that it decided that the alleged compromise should not be recorded and that no decree should be made in accordance with the terms of the compromise. On the other hand, it is clear that the decision of the Division Bench of this Court did not decide any of the matters in controversy between the parties in the suit.

I have come to the conclusion that the order of the Division Bench of this Court remanding the case to the trial Court must be regarded as an interlocutory order.

I refer to the case of *Alexander John Forbes v. Ammeeroonissa Begum* (1). In that case a suit was brought by the Plaintiff, who was a mortgagee, for possession of a taluk and other real estates, which had been mortgaged to him by

(1) 10 Moo. I. A. 340 (1865).

deeds of absolute sale and defeasance, constituting a Bye-bil-wuffa, or conditional sale in the nature of a mortgage. The case was tried by the Civil Judge of Purneah who made a decree for possession with the mesne profits which were claimed. The Defendant appealed to the Saddar Dewani Adalat and that Court by its order, which was dated the 22nd January 1857, held that the Civil Judge had been wrong in decreeing *wasilat* or mesne profits, and, further, that as the Plaintiff had been found to have been in possession, he was bound, before he was entitled to have his conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and the Court remanded the case in order that the Judge might call upon the Plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case accordingly went back to the trial Court and the Acting Judge held that the accounts were insufficient and by his decree he dismissed the suit. Thereupon there was an appeal by the Plaintiff to the Saddar Dewani Adalat and the appeal Court dismissed the appeal. An application for review was made which, again, was dismissed, and there was an appeal by the Plaintiff to the Judicial Committee of the Privy Council against the decree dismissing the suit.

The part of the judgment which is material to the present case is with reference to the order of the 22nd January 1857 by which the Saddar Dewani Adalat remanded the suit for the purpose of a fresh trial. The judgment of Sir James Colville on this part of the case is at p. 359 as follows:—"Upon the question whether the Appellant is so bound by the order of the 22nd of January 1857, against

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which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of *Maharaja Maheshur Singh v. The Bengal Government* (2), upon which their Lordships have very recently acted in a case from Oudh, the Appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts."

On the principles which are there stated I am of opinion that the order of the Division Bench of this Court, remanding the case to the trial Court for trial, must be regarded as an interlocutory order and it was not a "decree" or a "final order" passed on appeal within sec. 109, cl. (a) of the Code of Civil Procedure.

It was further argued by the learned Counsel on behalf of the Plaintiffs that this Court should give a certificate under cl. (c) of sec. 109 of the Code of Civil Procedure. I have read the judgment of the Division Bench of this Court and I have no doubt that this is not a case in which this Court should grant a certificate under cl. (c) of sec. 109 of the Code of Civil Procedure.

For these reasons in my judgment this application must be dismissed. This decision governs the other application, so that both the applications are dismissed, with costs, five gold mohurs to cover both the cases.

RANKIN, J.—I agree. In this case the Plaintiffs sued for an ordinary partition decree. After written statement had been

filed and at a time when the Defendant was moving the Court to appoint a Receiver it is alleged that a settlement took place between the parties. The question of the shares of the parties seems to have given rise to no controversy, and the character of the alleged settlement seems to have been that the Plaintiffs would take over all the liabilities shown in the books, that the Defendant would give up all rights to certain moveables, that she would have a right of residence in a certain house and that the jewellery would be divided in a certain way. The order from which it is proposed to appeal to His Majesty in Council is an order which merely holds that that settlement or adjustment has not been made out.

Now, an application to record an adjustment under Or. 23, r. 3, is in some ways a very special matter, because it is a matter as to which a party is allowed to stand upon and to enforce an agreement which was not in existence at the date of the suit. It is a method whereby for convenience a party is allowed to enforce what is really a new cause of action altogether and this is done in order to avoid the necessity of abandoning one suit and starting another. The question, therefore, whether a decision that the adjustment is invalid, is a final order or not is rather different from the question which can arise with regard to any other of the stages of the suit.

We have to decide whether in this case the order from which it is proposed to appeal should be regarded as merely negating one way of deciding a controversy in the case or should be regarded as a decision upon a substantive cause of action negating the cause of action and, therefore, in part finally determining the rights of the parties. We have to decide whether the order is a final order for the pur-

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pose of saying whether, under the Code the right of a party is to appeal at once. It seems quite clear that if he has no right to appeal at once, the only consequence is that when this Court had determined the rights of the parties in the suit the present Petitioner will be able to raise the question of the validity of the order which negatives the adjustment. I think the first principle to be kept in mind is what has been laid down by the late Mr. Justice Mookerjee in the very well-known case of *Secretary of State for India in Council v. British India Steam Navigation Company* (3): "Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court." In my judgment, the mere dismissal of an application for recording an adjustment coupled with an order that it is therefore necessary for the case to be tried in the ordinary way does not stand in such a relation to the proceeding before the Court as to entitle it to be regarded as something which conclusively adjudicates upon the rights of the parties which were really the subject-matter of the litigation. It merely negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of.

The contention that the order must be final because it set aside a decree cannot be sustained.

I therefore think that the present application does not come within the phrase "final order" in sec. 109 and I agree that there is no special case for giving a certificate on the principles applicable under cl. (c).

Applications dismissed with costs.

H. C. S.

(3) 13 C. L. J. 80 (1911).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 39 of 1923.

GREAVES, J.

GRAHAM, J.

1924,

Heard, 19, June.

Judgment, 20, June.

ALKAMA BIBI and
ors., Plaintiffs,
Appellants,

v.

SYED ISTAK HOSSAIN
and ors., Defendants,
Respondents.

Civil Procedure Code (Act V of 1908), Or. 40, r. 2—Receiver, appointment of—Mahomedan law—Matwali of a wakf estate—Claimant for the office—Right to apply for such appointment—Prima facie title, to be proved—Expediency of appointing a Receiver, where no party in possession.

An order appointing a Receiver will not be made ordinarily at the instance of a Plaintiff having merely a shadowy claim where it has the effect of depriving a Defendant of de facto possession, since that might cause irreparable wrong. It is sufficient if a prima facie title to the property over which the Receiver is sought to be appointed is made out.

Where property is shown to be in medio, i.e., in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble and as no one seems to be in actual lawful enjoyment of the property, no harm can be done to any one by taking it and preserving it for the benefit of the litigant who may prove successful.

This was an appeal preferred on the 20th December 1923 against the order of J. MacNair, Esq., District Judge of Zillah Birbhum, dated the 31st October 1923.

The facts of the case will appear from the judgment.

Babus Jyotis Chandra Sircar and Haradhone Chatterjee for the Appellants.

Dr. Jadu Nath Kanjilal for the Respondents.

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The JUDGMENT OF THE COURT was as follows :—

GRAHAM, J.—This appeal is directed against an order of the District Judge of Birbhum refusing to appoint a Receiver pending the disposal of a suit brought by the Plaintiffs, now Appellants, for the appointment of Plaintiff No. 1 as *matwalli* of a certain *wakf* estate, or in the alternative, for the appointment of both the Plaintiffs as *matwallis*.

The facts, so far as they are material for present purposes, may be shortly stated.

In the year 1304 B. S. one Molajim Hossain Khan made a disposition of all his properties for religious and pious purposes, and on the 12th Falgun 1304 executed a deed of *wakf* whereby he appointed himself as *matwalli* for his own life-time and made provision for succession to the office after his death. His wife Mataharannessa Bibi was to succeed him as *matwalli*. On the 3rd Kartik 1309 B. S. Hossain Khan died, his wife having predeceased him on the 28th Bhadra of the same year. The *wakfnama* contained a provision to the following effect : " In the absence of my two wives and children the Collector of the District shall be competent to appoint whomsoever of my line (*amar bongsher madhye*) he considers competent and pious as the *matwalli*," and according to this provision the last *matwalli* Mostak Hossain Khan was appointed as such.

Mostak Hossain, who succeeded as *matwalli* on the death of Hossain Khan, died in Chaitra 1328 B. S. and the dispute then arose which has led to the institution of this suit. The Plaintiffs-Appellants claim that under the terms of the *wakf* deed, the person who of the settlor's line or family is fit to be appointed as *matwalli*, should be so appointed. Plaintiff claimed that she is possessed of the necessary

qualifications, and in the alternative, asked that both she and the Plaintiff No. 2 might be appointed, the Plaintiff No. 2 being stated to be an agnatic relation of Molajim Hossain Khan.

It appears that after the death of Mostak Hossain an application was made to the Collector of Birbhum to appoint a *matwalli* in accordance with the provisions of the *wakfnama*, but the Collector held that he had no jurisdiction and referred the parties to the Civil Court. The Plaintiffs thereupon filed their plaint on the 23rd May 1922. The 1st, 2nd and 3rd Defendants are the widows of Mostak Hossain and the 4th Defendant is a minor, Syed Istak Hossain, grandson of Mostak Hossain, represented by his grandfather, next friend and guardian Syed Hossain Ali.

On the 7th June 1923 an application was made by the Plaintiffs for the appointment of a Receiver and orders were passed *ex parte* appointing as Receiver a pleader named Moulvi Nurul Absar. Objection was subsequently taken on behalf of Defendant No. 4 to the appointment and the order was stayed. Eventually on the 31st October 1922 after hearing the parties the District Judge cancelled the *ex parte* order previously passed and declined to appoint a Receiver. The Plaintiffs then filed this appeal.

The sole question is whether in the particular circumstances of this case it is just and convenient that a Receiver should be appointed. The main principles upon which the discretion of the Court should be exercised in making such an appointment are well settled. Such an order will not ordinarily be made at the instance of a Plaintiff having merely a shadowy claim where it has the effect of depriving a Defendant of *de facto* possession, since that might cause irreparable wrong. It ap-

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pears to be extremely doubtful here, however, whether the property in dispute is in the exclusive possession of any one of the parties. Syed Hossain Ali, the grandfather and guardian of the Defendant No. 4, in his petition dated the 16th June 1922 claims to be in possession of the *wakf* estate on behalf of the minor Istak Hossain, but he has not ventured in his affidavit of the 21st July 1922 to affirm that he is in such possession, and the omission is significant. Then the Defendant No. 7 Syed Hossain Tahid in a petition filed on the 31st October 1922 also claims to be in possession of the *wakf* estate.

It is by no means clear therefore who is in actual possession, and in the meanwhile something like a scramble seems to be going on between those who have claims, or fancied claims to the office of *matwalli*. Such a state of affairs cannot but be prejudicial to the interests of the *wakf* estate. Government revenue has to be paid, rents collected, suits instituted or defended and pious and religious acts performed in accordance with the provisions of the *wakf* deed. None of these things can be done or properly done while a state of confusion prevails. The main object of appointing a Receiver is to protect the properties pending litigation and to preserve them for the benefit of the party lawfully entitled thereto. It is not necessary at the present stage to consider the question whether the Plaintiffs can legally be and ought to be appointed as *matwallis*. That is a matter which will have to be decided in the suit. In an application for the appointment of a Receiver it is sufficient if a *prima facie* title to the property over which the Receiver is sought to be appointed is made out. Having regard to the terms of the *wakf-nama* it can hardly be disputed that a

prima facie claim has been made out by the Plaintiffs. It cannot at all events be said that their claim is a mere pretence. On the contrary it appears to be a *bond fide* claim and that being so, and regard being had to the state of affairs which has been disclosed, the case seems to be a fit one for the appointment of a Receiver. Where property is shown to be *in medio*, i.e., in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble, and as no one seems to be in actual lawful enjoyment of the property no harm can be done to any one by taking it and preserving it for the benefit of the litigant who may prove successful.

It is to be observed that the learned District Judge, while holding that the necessity or propriety of appointing a Receiver has not been made out to his satisfaction, has given no reasons for his conclusion. If he had found that any one of the parties was in exclusive possession of the *wakf* estate and was duly administering it, the position would have been different. On the particular facts of the case it appears to me to be expedient that a Receiver should be appointed. In the result therefore the appeal must be allowed, the order of the District Judge set aside, and a Receiver will be appointed, it being left to the discretion of the Court below to select a suitable person for such appointment. The costs of this appeal will abide the result of the suit. The hearing fee is assessed at two gold mohurs.

GREAVES, J.—I confess that I felt considerable doubt in the course of the argument addressed to us as to whether the Plaintiff putting forward the claim which she puts in this case is entitled to ask the Court in an interlocutory application to appoint a Receiver. Apart from the

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Rs. 12 a month to which she is entitled by virtue of the *wakfnama* itself and which, it is not suggested to us, is in arrear her interest seems to be merely a claim that she is entitled to a preferential consideration when the Court appoints a *matwalli*. As I have already stated I felt considerable doubt yesterday as to whether a claim of this nature was sufficient to justify a Court in appointing a Receiver in an interlocutory application and I confess that my doubts are not entirely dispelled.* The grounds upon which a Court in England and a Court in this country appoint Receivers are practically the same. Under the Judicature Act of 1873 a Court can make such an appointment where it considers it just and convenient to do so, that is to say, you have the same words as appear in the Civil Procedure Code in this country. I took the opportunity last night and this morning of consulting "Daniel's Chancery Practice" which deals exhaustively with the appointment of Receivers by a Chancery Court and also "Kerr on Receivers." I have not been able to discover any case in which a Receiver has been appointed in an interlocutory application under circumstances in any way resembling the circumstances of this case, I mean where the interest is of so shadowy a nature as in this case. There always seems to have been some actual interest in the property to be protected to support such an appointment but my learned brother feels that in the circumstances of this case it is desirable that a Receiver should be appointed and as the learned District Judge in the Court below has left the matter in doubt as to whether the *wakf* property is without a custodian or not I think that we are justified under these circumstances in making the appointment simply for the protection of the property. Although still

feeling the doubt which I do having regard to the nature of the Plaintiff's claim I am not prepared to say that a Receiver should not be appointed in this case and I concur in the order that has been made.

H. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 143 OF 1923.

SUHWARDY, J.
DUVAL, J.

1925,
13, May.

SIR WASIF ALI MIRZA,
NAWAB BAHADUR OF
MURSHIDABAD, Defendant,
Appellant,

v.

SARADINDU NARAIN RAI
and ors., Plaintiffs,
Respondents.

Estates Partition Act (V, B. C., of 1897), secs. 119, 94—Partition of mouzahs jointly held—Order of Collector refusing to make over possession to one party of chuck regarding which dispute arose subsequent to partition—Suit for declaration of title and recovery of possession, if barred—Limitation Act (IX of 1908), Art 14, if applied to the case.

After a partition under the *Estates Partition Act* of certain mouzahs held by the Plaintiffs and the Defendant jointly the Defendant secured a rent decree against the tenants of a certain chuck in spite of the Plaintiffs' objection and the Plaintiffs applied to the Collector to give effect to the partition and to give them possession of the disputed chuck. This was refused and the Plaintiffs then sued for declaration of title and recovery of possession more than one year after the Collector's order:

Held—That the order of the Collector on the Plaintiffs' application was not one under sec. 94 of the *Estates Partition Act* and the suit was not barred under sec. 119 of the Act nor was it barred under Art. 14 of the *Limitation Act*, for an order under Art. 14 must be such an order as the officer is empowered under the law to pass

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and would be effective unless set aside. The order in the present case was one for which there was no provision of the law.

This was an appeal against the decree of J. W. Nelson, Esq., District Judge of Zillah Murshidabad, dated the 12th of August 1922, affirming the decree of Babu Satchidananda Mukherjee, Munsif, 1st Court at Kandi, dated the 10th of June 1921.

The Plaintiffs were proprietors of Touzi No. 254 and the Defendant was the proprietor of Touzi No. 253. There were formerly a number of mouzahs which belonged jointly to these two Touzis. In 1907 a record-of-rights was prepared of the lands of Touzi No. 253 including the joint mouzahs. After the preparation of the record-of-rights Defendant applied to the Collector for a partition of the *ijmali* mouzahs. The partition proceedings ended in a *solenama* which was confirmed by Government. Mouzahs Mahadia and Santoshpur which were, formerly *ijmali* were included in the Plaintiffs' share. The appeal related to certain lands which were included in the record-of-rights in Mouzahs Mahadia and Santoshpur. The Plaintiffs claimed those lands as having fallen to their share by the *solenama*. The Defendant's case was that these lands were really resumed Chowkidari Chakran lands of Mouzah Bistupur and were exclusively in the possession of the Defendant from before the partition. It appeared that after the partition proceedings both parties attempted to realise rent from the tenants. In 1917 the Defendant, the Nawab Bahadur of Murshidabad, obtained a decree for rent in spite of the contention of the tenants that they held the lands under the Jamua Raj (Plaintiffs). In 1916 the Plaintiffs applied to the Collector to be put in possession of these lands as belonging to their share in the parti-

tion proceedings. The Collector refused the application by an order, dated 16th May 1917, holding that the lands in question were not included in the partition proceedings. In 1921 the Plaintiffs brought the present suit for a declaration of their title on the basis of the partition *solenama*. The first Court decreed the suit. There was an appeal by the Defendant which was dismissed by the lower Appellate Court. The Defendant preferred a second appeal to the High Court.

Mr. Amarendra Nath Bose and Babu Sures Chandra Mukherjee for the Appellant.

Mr. Gunada Charan Sen (for Babu Jogesh Chandra Roy) and Babu Anilendra Nath Roy Chowdhury for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This appeal is by the Defendant. It arises out of a suit brought for declaration of the Plaintiffs' title to the *chuck* in suit and for recovery of possession thereof. Both the Courts below have found against the Defendant and in this appeal three points have been raised. The first is that on a proper construction of the *solenama* between the parties it ought to have been held that this land was outside the partition and was the property of the Defendant. The *chuck* in question appears to be resumed Chakran land appertaining to Mouzah Bistupur, a mouzah held separately by the Defendant. But in the finally published record-of-rights it was recorded as a part of the joint mouzahs. In 1910 the Defendant applied to the Collector for partition of the mouzahs held joint under Touzis Nos. 253 and 254 under the Estates Partition Act. In 1915 a *solenama* was filed settling the terms of the partition between the parties

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and under that partition the mouzah containing the *chuck* in suit fell to the Plaintiffs. The *solenama* was in these terms: "The *chucks* within the mouzahs which the Opposite Party shall get under the terms of this *solenama*, as appertaining to Touzi No. 254 definitely included within Touzi No. 253 under the Survey and Settlement of the record-of-right shall remain included within Touzi No. 253 and the Petitioner, the Nawab Bahadur of Murshidabad, shall remain in the ownership and possession thereof as before and the *chucks* within the mouzahs, which the Petitioner Nawab Bahadur of Murshidabad is to get as appertaining to Touzi No. 253, which have been definitely included by the Survey and Settlement in the record-of-rights in Touzi No. 254, shall be owned and possessed by the Opposite Party and they shall remain included within Touzi No. 254." On this the Plaintiffs' case is that whatever may be the origin of this *chuck*, it being included in settlement and record-of-rights in Mouzahs Santoshpur and Mahadia it will fall into their share even though it strictly belongs as Chakran land to Mouzah Bistupur, a mouzah even before partition solely possessed by the Nawab Bahadur of Murshidabad. We hold that this is the proper construction of the document. It is perfectly clear for the purpose of partition that the parties recognised the settlement and record-of-rights as final as to the division of land and that may result in a *chuck* appertaining to a mouzah but situated in another, changing ownership by virtue of the partition. We find this point therefore against the Appellant.

The second point is that, the present suit is barred under sec. 119 of the Estates Partition Act (V of 1897). It is argued that the order is based on the fact that in

1916 after the Defendant secured a rent decree against the tenants in spite of the Plaintiffs' objection, the Plaintiffs applied to the Collector to give effect to the partition made by him and to give them possession of the disputed *chuck*. The Collector, however, refused the Plaintiffs' application. It is argued that this order of the Collector was passed under sec. 94 of the Estates Partition Act and therefore under sec. 119 no suit lies to challenge it. In our judgment the order was not passed under sec. 94 which contemplates the procedure to be followed by the Collector in giving possession of separate estates allotted to several proprietors after the proposed partition has been confirmed by higher authorities. It is difficult to discover under what provision of the law the order of the Collector was passed, because the partition proceedings came to an end in 1915. In 1916 the Plaintiffs went to the Collector as the officer who had made the partition and asked for possession and for giving effect to the partition. There is nothing in law which takes away the ordinary right of a person to institute a suit in the Civil Court to recover what was allotted to him on partition.

The third point urged is that the suit is barred under Art. 14 of the Limitation Act. The order of the Collector was passed in 1915 and the present suit having been instituted in 1921, it is contended that the suit is barred as being brought more than one year after the order of the Collector. This contention also is not sound. The order under Art. 14 must be such an order which the officer is empowered under the law to pass and which would be effective unless set aside, and which further is an order which under the ordinary law is liable to be set aside by a suit in the Civil Court. Reference in this connection may be made to the cases of

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Maqbul Ahmad v. Hara Gobinda Kalal (1) and *Balwant Ram Chandra v. Secretary of State* (2). The learned Advocate for the Appellant is not consistent in arguing this point for he originally contended that the order of the Collector was not assailable in the Civil Court. As we have observed the order passed by the Collector is not under any special provision of the law and is not such an order which cannot be questioned in a Civil Court.

All the points having failed, this appeal is dismissed with costs.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 6 OF 1925.

SANDERSON, C. J.	} THE KING-EMPEROR v. MOFIZEL PEADA.
PANTON, J.	
1925,	
Heard, 30, April	
and 1, May.	
Judgment,	
1, May.	

Criminal Procedure Code (Act V of 1898), sec. 307—Reference to High Court on disagreement between Judge and jury—Duty of High Court—Verdict, if should be disturbed when it is not perverse—Maps in criminal cases, how to be prepared—Indian Penal Code (Act XLV of 1960), secs 302, 304 (A)—Trial on a charge under sec. 302—Conviction under sec. 304 (A), if legal.

In a Reference under sec. 307, Cr. P. C., it is the duty of the High Court not only to consider the entire evidence but to give due weight to the verdict of the jury and the opinion of the Judge and where it appears that the jury might come to the conclusion at which they arrived and their verdict could not be said to be perverse the High Court ought not to interfere.

A person who makes a map in a criminal case ought not to put upon it

anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted in the body of the map but in a separate sheet of paper annexed to the map as an index thereto.

The evidence justifying, an accused person tried under sec. 302 of the Indian Penal Code may be found guilty of an offence under sec. 304 (A) of the Code.

This was a Reference under sec. 307, Cr. P. C., by the 2nd Additional Sessions Judge of 24-Pergannahs (D. Vaughan Stevens, Esq.), made on the 3rd February 1925, recommending that the verdict of the jury, convicting Mofizel Peada under sec. 304 (A), I. P. C., be set aside as perverse and contrary to the weight of evidence.

The facts of the case will appear from the judgment.

Mr. Langford James and Babu Gopendra Krishna Banerjee for the Accused.

Mr. Monnier for the Crown.

Babu Debendra Narain Bhattacharja for the Complainant.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a Reference by the learned second Additional Sessions Judge of the 24-Pergannahs in the case of Mofizel Peada : and the learned Judge has recommended that he should be convicted under sec. 302 of the Indian Penal Code.

There were 13 persons involved in the charge, all of whom, with the exception of Fazal Zamadar, were convicted of an offence under sec. 147, I. P. C. Mofizel Peada was found not guilty under secs. 302 and 342 read with sec. 109, but the jury found him guilty of an offence under sec. 147 and also of an offence under sec. 304 (A).

Dhanu Peada was found not guilty of an offence under sec. 302 read with sec.

(1) 8 C. L. J. 470 (1908).

(2) I. L. R. 29 Bom. 480 (1905).

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109 and also of an offence under sec. 342 read with sec. 109 : but, as I have already said, he was found guilty under sec. 147, I. P. C.

That there was a riot on the 28th June 1924, there can be no doubt, between the party of the accused on the one hand and the party to which Momtaz Molla, the man who was killed, belonged. I do not think it necessary to deal in any detail with the allegations of enmity which existed between these two parties. There is evidence that enmity existed, at all events, between certain individuals of the one party with certain individuals of the other party. It is clear that on the 28th of June there was some incident which caused both parties to assemble—Momtaz's party near the *bari* of Dhanu Peada and the accused's party partly inside and partly outside the premises of Dhanu. There was undoubtedly abusive language : and I think the verdict of the jury involves the finding that there was throwing of bricks by the accused's party at Momtaz Molla and his companions.

Momtaz Molla was killed by a bullet entering his body in the neighbourhood of the heart and penetrating his lungs and coming out at the back at the tenth intercostal space about an inch in the left of the spine : he must have died very shortly after he had received that wound. There is no doubt that the bullet which killed him was fired from a gun by Mofizel Peada.

The prosecution story, in short, is that the gun was fired by Mofizel Peada, that he was standing behind the wall which adjoins the road which passes the premises of Dhanu Peada, that Momtaz was in the field on the opposite side of the road on a rather lower level and that Mofizel took a deliberate aim at Momtaz and killed him.

The written statement made by the

Defendant Mofizel Peada was to the effect that it was true that he had fired the gun but that he was standing on the west of the verandah—the verandah of the house and not behind the wall adjoining the road—that he fired the shot towards the field with a view to threaten the opposite party and that it was a pure accident that the bullet struck Momtaz, that he fired the shot towards the field thinking that there was no one there and that he had no intention to kill Momtaz or any one else.

It was part of the prosecution case that Dhanu had incited Mofizel to shoot Momtaz. Some of the witnesses said that they had heard Dhanu ask Mofizel to fetch Dhanu's gun and shoot Momtaz.

It seems to me that the learned Judge made a very significant observation with regard to that part of the case when he said : “ The gun and license were in his name, but if there were such a shooting and hullabaloo, who would hear him give an order in the terms that we have given here? Besides that does not agree with the F. I. R. statement that the gun was taken by Mofizel from the house. The evidence now given looks like an inference drawn by angry and prejudiced men.”

It seems to me that it would be difficult, having regard to the distance which separated some of the witnesses and Dhanu Peada and the noise and shouts which apparently were going on, for those witnesses to have heard what is alleged to have been said, namely, that Dhanu had asked Mofizel to fetch his gun and shoot Momtaz.

With regard to the witnesses who were called on behalf of the prosecution, the learned Judge summarised his criticisms in the following manner :—“ Thus it may be said generally that none of the wit-

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nesses can really be said to be disinterested except the Doctor who is not an actual eye-witness, and there is no eye-witness who has not apparently made statements which conflict with his evidence before the committing Magistrate or the statements recorded by the Sub-Inspector."

There are other matters to which the learned Judge referred which the jury were entitled to take into consideration: but it is not necessary for me to deal with them in detail. It is sufficient for me to say that this was a case in which the jury might come to the conclusion that they could not accept the evidence of the prosecution witnesses as being reliable in all respects.

If I understand the learned Judge's summing up and his Reference, it seems to me that he has based his conclusion that the accused deliberately shot Momtaz on certain facts and inferences which are to a certain extent independent of the evidence of the witnesses for the prosecution who are alleged to have been present at the time of the occurrence.

He pointed out that the course of the bullet was in a downward direction and that it went through the body of the man. He was of opinion that there was an important corroboration of the case which was put forward by the prosecution, because it was alleged—and apparently it was a fact—that the ground behind the wall over which the accused is alleged to have fired the gun was on a higher level than the road and that the road again was on a higher level than the field on which the deceased man was standing and the learned Judge came to the conclusion that if the gun had been fired by the accused from that position and the deceased man was standing in the position which I have stated, the course of the bullet would be downward from the front to the back.

I agree with the learned Judge that that is a matter which is material for consideration. At the same time I feel that it would be dangerous for us to rely to any large extent upon that, especially in the absence of any expert evidence as to the exact level of the ground and the angle in which the gun would have had to be held in order to inflict such a wound upon the deceased man if he had been standing in the position which I have stated.

It is, therefore, possible, in my opinion, that the jury may have come to the conclusion that it would not be safe to accept the case for the prosecution.

The jury then had to consider the statement which had been made by the accused person. The learned Judge seems to have formed the opinion that that statement could not possibly be true, for, amongst other reasons, that if the shot had been fired in the direction and in the manner described by the accused, the bullet must have gone over the head of the deceased person. I am inclined to agree with the learned Judge that the statement made by the accused person as it stands cannot be accepted and the jury may have been of the same opinion.

The jury, however, may have come to a further opinion, *viz.*, that the case for the prosecution was not in every respect accurate, and that the statement of the accused in every respect was not accurate, but that he may have fired the gun with a view to threaten the deceased man or some of his companions, although he did not fire it from the place in which he said he did and in the direction in which he said he did.

At the same time they may have concluded that he had no intention to hit anybody. In other words, the jury may have rejected both the prosecution story and the story told by the accused and may

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have come to a conclusion relying only upon those facts which they thought had been proved.

When a learned Judge makes a Reference to this Court under sec. 307, it is the duty of this Court not only to consider the entire evidence, but also to give due weight to the opinion of the learned Judge and the jury and in the circumstances of this case, in my judgment, it would not be right for this Court to hold that the verdict of the jury was perverse.

The result is that, in my opinion, this Reference ought not to be accepted.

It was open, in my opinion, to the jury to convict Mofizel Peada under sec. 304 (A) having regard to the fact that there was a charge against him under sec. 302. Therefore the verdict of the jury as regards this accused, namely, that he was guilty under sec. 147 and also of one offence under sec. 304 (A) ought to be accepted.

Before leaving this case, I regret to say that I find it necessary once more to refer to the way in which the map in this case was prepared.

It is many years since this Court drew attention to the way in which plans were prepared: and the matter was expressly dealt with in the case of *Emperor v. Abinash Chandra Bose* (1), the head-note of which runs as follows:—

“A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto:” and this Court drew attention to the fact that the Police Regulation dealing with the preparation of

maps had been amended so long ago as 1920 in consequence of a representation which had been made by this Court. The Police Regulation as amended in this respect (r. 173) is set out in the report.

I should have thought that a sufficient time has elapsed to enable those who have the conduct of criminal cases in subordinate Courts to see that the directions of this Court and of the Government of Bengal are carried out.

In this case the map which, we were informed by the learned Counsel who appeared for the Crown, was placed before the jury, is a glaring instance of what ought not to be done. In this case there was a dispute between the prosecution and the defence as to the exact position in which the accused was standing, when he fired the gun. The prosecution said that he was standing behind the wall near the road. The accused said that he was standing on the verandah of the house at some distance away. In spite of this I find on the map, a place marked near the wall with the following note: “From this place the accused Mofizel Peada fired his gun.”

This is the place alleged by the prosecution. Anything more improper it is difficult to imagine. This I find in another part of the map, “The deceased Momtaz Molla was standing here when he was met with the gun-shot.” These are two things which the Sub-Inspector of Police who, we were told, prepared the map, could not possibly have seen, because he was not there at the time and he must have made those insertions in the map relying upon information which he received from the witnesses.

There is one thing which it was most important for the person who made the map to note but which he did not mark on the map: that is, the place where he

(1) I. L. R. 52 Cal. 172: a. c. 28 C. W. N 995 (1934).

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found the body of the deceased man. The Sub-Inspector said that he found the body lying in the field. He ought to have taken careful measurements so as to identify the exact spot. That is a thing which he saw but which he did not note on the map.

I do not think it necessary for me to say anything more upon this point, as the matter has already been dealt with so frequently by this Court. In my judgment, the map in its present state ought not to have been allowed to be placed before the jury. If it was necessary for the map to be placed before the jury, the proper thing to be done was to have a clean copy made with these entries omitted, so that the jury would have a map before them which would not have prejudiced their minds in any way.

We now have to consider what sentence should be passed upon the accused Mofizel Peada. He was convicted by the jury under sec. 304 (A). There is no doubt that Mofizel Peada caused the death of Momtaz Molla by doing a very rash and negligent act, which did not amount to culpable homicide. In my opinion, there was no justification for the accused person taking out the gun and firing it specially with a ball cartridge in view of the situation which existed. A person who goes into a riot with a gun loaded with a ball cartridge is apt to cause serious injuries to some one person or persons; and it is a practice which cannot be looked upon lightly by a Court of justice. In this case, the unfortunate result was that the accused caused the death of Momtaz Molla.

The trial in this case concluded at the end of January this year and the Reference was made by the learned Judge on the 3rd of February, so that Mofizel Peada has been in jail for three months

already expired which, but for the Reference, would have been served as part of his sentence. The result therefore is that we take that into consideration and pass a sentence on Mofizel Peada under sec. 304 (A), of fifteen months' rigorous imprisonment to commence from to-day and we pass a similar sentence for the offence under sec. 147—the two sentences to run concurrently.

PANTON, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SUMNER.	} PALANI AMMAL, Appellant, v. MUTHUVENKATA- CHALA MONIAGAR and ors., Respondents.
LORD PHILLIMORE.	
SIR JOHN EDGE.	
SIR LAWRENCE JENKINS.	
1924, Heard, 27, October. Judgment, 20, November.	

Hindu law—Mitakshara—Partition, how effected—Suit instituted but withdrawn or abandoned effect of—Mere ascertainment of shares, if sufficient—Parties in partition suit—Decree in such a suit—Document, construction of—Intention of parties to it, a question of fact—Primogeniture, if may be established in modern family.

A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. The coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family and on separation are entitled to partition the joint family property amongst themselves. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated, for there may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be.

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A member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him; and the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. Also, if a joint Hindu family separates, the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved.

The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed, the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. But no severance of the joint family results when a member of the joint Hindu family having filed a plaint claiming a partition afterwards withdraws it, though such withdrawal, unless explained, affords evidence that an intention to separate had been entertained.

In a suit for partition which proceeds to a decree, the decree for a partition is the evidence to show whether the separation is only a separation of the Plaintiff from his coparceners or a separation of all the members of the joint family from each other.

In a suit for partition no effective decree

can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit and it is the decree alone which can be evidence of what was decreed.

In construing documents according to their legal effects, the Courts are entitled to draw all legitimate inferences as to the intentions of the parties to them, and the inferences so drawn are findings of fact.

A joint family with an impartible estate descending according to a rule of lineal primogeniture with rights of maintenance and other privileges for the junior members cannot be established in modern times.

This was an appeal from a decree, dated the 29th August 1917, of the High Court at Madras which affirmed a decree, dated the 23rd April 1909, of the District Judge of Madura.

The appeal arose out of a suit for the partition of the Vadmitta estate.

That estate was purchased by Peraiyar Kumaraswami, a Hindu governed by the Mitakshara, who died in 1834.

In 1842 a suit for partition was filed against the eldest son of Kumaraswami by other members of his family and a decree was made by the District Court to the effect that the zamindari was divisible according to Patnivagha.

In appeal the Court of Sudder Adalat at Madras held that the suit had been brought for division of the estate under a Will that had been rejected and considered that there was no question of subdivision before them according to the laws of inheritance.

In a later suit the Zillah Court held that the estate was divisible and decreed the Plaintiff's claim to one-fifth and in 1843 that decision was upheld by the Sudder Adalat.

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In 1870 the widow of the Plaintiff in that suit sold her deceased husband's interest to the father of the present Appellant's brother. The latter died without issue. The Plaintiffs in the present suit represented the branch of the second son of the original zamindar.

The Appellant, who was Defendant No. 21, in her written statement urged that the members of the family had separated many years previously, and claimed that the zamindari in dispute was the separate property of her deceased brother.

The District Judge found that the zamindari was joint and undivided and made a decree for partition which was affirmed by the High Court on appeal.

Mr. Dubé for the Appellant contended that the institution of suits for partition had effected a severance of interest and a disruption of the joint family. The onus was then upon the Respondents to show that there had been a re-union and that onus they had failed to discharge.

[In addition to the authorities cited in the judgment of the Board he referred to *Jatti v. Bunwari Lal* (6).]

Mr. Wallach for the Respondents was not called upon.

THEIR LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by Palani Ammal, a Hindu lady, who is one of several Defendants, from a decree, dated the 29th August 1917, of the High Court at Madras, which affirmed a decree for partition of the Vadimitta estate, dated the 23rd April 1909, of the District Judge of Madura.

The estate in question, which appears to be a large zamindari, was purchased by Peraiyar Muthukumaraswami, who died

in 1834. He was a Hindu Sudra, who and his descendants were governed by the law of the Mitakshara. His descendants, unless they separated, constituted a Mitakshara joint family, the property of which was in law joint property unless the contrary was proved. For the sake of brevity he will hereafter be referred to as the propositus. The propositus had two wives; by the senior wife he had six sons, most of whom married and left male issue, by his junior wife he had one son, who left male issue. It is stated in the judgment of Sastri, J., in this case, and doubtless correctly, that "the property admittedly continued to be in the possession and enjoyment of the descendants of the first son of the propositus." As the family was not an ancient family, the property, which was acquired in quite modern times, was in the possession of the senior son and his descendants as managers of the joint family and not as the senior male member of a joint family.

There are two questions in this suit and in this appeal upon which there are concurrent findings of the District Judge and the High Court. Those questions are whether the principal parties to the suit are bound by an award which was made by some arbitrators, who have been made Defendants to the suit, and if they are not bound by the award, then the question arises whether the joint family which descended from the propositus ever separated.

The question relating to the award may be disposed of at once. The District Judge and the High Court found, for reasons which their Lordships consider to have fully justified their findings, that the award was not binding upon any of the parties. No argument has been addressed to their Lordships in this appeal in support of the award, and they accept the concurrent findings that it is not binding

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as correct. The sole Appellant, Palani Ammal, claimed that some of the estate sought to be partitioned had vested under the award in her. Her claim under the award fails, but as she appears, when suit for partition was brought, to have been in possession of part of the estate, the right of the Plaintiffs to a decree for partition must be established, and it is necessary to consider whether the joint family had ever separated.

It is beyond question that the estate which the propositus had purchased vested on his death, in 1834, if not on the purchase, in the joint family, and was held jointly by the male members of the joint family as coparceners. Their Lordships do not know whether the estate was purchased with joint family money or with self-acquired funds of the propositus, but for the purposes of this judgment they will assume that the estate did not vest in the joint family until the death of the propositus.

In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law. An authority for that proposition is the judgment of the Board in *Appovier v. Rama Subba Aiyar* (1), which applies to joint families, such as, the joint family which descended from the propositus. But the mere fact that the shares of the co-

parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Ladhuram v. Rukhmabai* (2).

The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In

(1) 11 Moo. I. A. 75 (1866).

(2) L. R. 80 I. A. 130; s. c. I. L. R. 30 Cal. 725; 7 O. W. N. 642 (1903).

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Kedar Nath v. Ratan Singh (3), a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it, and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although such a plaint, even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained [see *Girja Bai v. Sudashir Dhandiraj* (4) and *Kawal Nain v. Prabhu Lal* (5)]. In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the Plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit, and that it is the decree alone which can be evidence of what was decreed.

With the observations which their Lordships have already made, they will proceed to consider whether the joint family which descended from the propositus ever separated. It will be necessary for their Lordships in referring to evidence to refer only to such evidence as they consider is material. In this present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated, and that the property sought to be partitioned is partible. The onus of proving that there had been an effective

separation was upon the Defendants. The Courts below were, as their Lordships are, obliged to construe documents according to their legal effect, but the Courts below were, and their Lordships are, entitled to draw all legitimate inferences as to the intentions of the parties to them, and the inferences so drawn are findings of facts.

As was pointed out by Sastri, J., in his judgment in this case, that so far as division or non-division of the estate is concerned, "there has been no formal partition deed between the various members of the family, and it is not alleged that the estate was at any time divided by metes and bounds." The Defendants, whose case is that the estate, of which partition is claimed, is not now partible, rely upon certain decrees and documents as showing that the estate was divided and partitioned between descendants of the propositus and that the joint family had ceased to remain joint.

In 1842 a suit was filed in the District Court of Tinnevely by some of the sons of the propositus against his eldest son claiming that the estate should be divided according to his Will. The District Judge in 1846 found rightly that the division made by the propositus was invalid in law, but he made an equally invalid decree declaring that the sons of the first wife were entitled to one half of the estate and the son of the second wife to the other half of the estate. On the 23rd July 1849, the Sudder Adalat Court in appeal held that all the sons were entitled to equal shares, but held that the Court was not called upon to sub-divide the estate in accordance with the law of inheritance, no such question being before the Court and decided—"37. It is, therefore, left for the heirs, or for such of them as may be dissatisfied with the management of the

(3) L. R. 37 I. A. 161; s. c. 14 C. W. N. 985 (1910).

(4) L. R. 43 I. A. 151; s. c. I. L. R. 43 Cal. 1031; 20 C. W. N. 1085 (1916).

(5) L. R. 44 I. A. 159; s. c. I. L. R. 39 All. 95; 21 C. W. N. 986 (1917).

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joint estate by the head of the family, to adopt such a course of proceeding as they may see fit to obtain the surrender to them of their respective portion or portions of the estate." A *razinama* had been filed in that suit on the 1st June 1846 by the great-grandfather of the Plaintiffs in this suit stating that he no longer wished to press the eldest son for a partition of the family estate.

After the decree of the Sudder Adalat of 1849 a son of the fifth son of the propositus brought a suit in the Zilla Court of Tinnevely in 1849 against the eldest son of the propositus for a fifth share in the estate, and the Defendant in that suit pleaded that the then Plaintiff's father had in a previous suit admitted that the estate ought to be held according to the law of primogeniture and had renounced all claim to a division of the estate. The Zilla Court on 22nd January 1852, holding that the Sudder Adalat in 1849 had held that the estate was divisible gave the then Plaintiff a decree for a one-fifth share in the estate. On the 31st October 1870, the widow of the Plaintiff of the suit in the Zilla Court sold her deceased husband's interest in the estate to the son of the first son of the propositus, who was the father of Ponnusami Moniagar who was the brother, deceased without issue, of the Appellant, Palani Ammal.

Their Lordships have in considering the facts in this appeal had the great advantage of the very careful and elaborate judgments which were delivered in the appeal to the High Court by Sir John Wallis, C. J., and Sastri, J., and they agree with their conclusions as to the facts. Their Lordships have no doubt that this joint family never did separate.

Their Lordships think that so far from the members of that joint family intending to separate, their object probably was

to establish themselves, if possible, as a joint family with an impartible estate descending according to a rule of lineal primogeniture with rights of maintenance and other privileges for the junior members. Such a joint family could not be established in modern times.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor: *Mr. H. S. L. Polak* for the Appellant.

Solicitor: *Mr. E. Delgado* for the Respondents Nos. 1, 2 and 3.

G. D. M.

[CIVIL REVISIONAL JURISDICTION.]

Full Bench Reference

No. 4 of 1924

IN

REF. NO. 7 OF 1924.

WALMSLEY, J.

GREAVES, J.

C. C. GHOSE, J.

B. B. GHOSE, J.

MUKERJI, J.

1925,

Heard, 4, May.

Judgment,

20, June.

Re: REFERENCE FROM
THE MUNSIF, 4th Court,
Habiganj.

Court Fees Act (VII of 1870), Sch. II, Art. 6-- Security furnished under the provisions of the Civil Procedure Code (Act V of 1908), e.g., under Or. 32, r. 6 (2), how to be stamped—Indian Stamp Act (II of 1899), Arts. 40 and 57, if and when applicable—Art. 15, effect of.

Security bonds executed in pursuance, of an order of the Court under Or. 32, r. 6 (2) or any other rule or section of the Civil Procedure Code must have a court-fee stamp as required by Art. 6 of Sch. II of the Court Fees Act, and they will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or Art. 57, but they will not be chargeable under

Re: REFERENCE FROM THE MUNSIF, 4TH COURT, HABIGANJ.

the Stamp Act if they fall under the residuary Art. 15.

DWARKA NATH DEY *v.* SAILAJA KANTA MULLICK (1) *dissented from.*

SARBO MUSALMANI *v.* SAFAR MANDAL (2) *referred to.*

The following Reference, dated the 20th August 1924, was made under sec. 113 read with Or. 46 of the Civil Procedure Code, by Babu Debendra Nath Sen Gupta, Munsif, 4th Court, Habiganj :—

“ Decretal amount in Money Execution Case No. 209 of 1924 was deposited in Court to the credit of the minor decree-holders. The next friend of the minor applied for payment order and was required under r. 6 (2), Or. 32, C. P. C., to furnish security.

A security bond was therefore filed, stamped with a court-fee stamp of 8 annas, under Art. 6, Sch. II of the Court Fees Act. The point then arose whether this document should be stamped under the Court Fees Act or under the Stamp Act (Art. 15, Sch. I).

It appears that formerly the practice at Habiganj was to accept such security bonds stamped under the Court Fees Act. Some years ago the practice was altered in the 4th Court here in accordance with the decision of Holmwood and Teunon, JJ., dated 3rd March 1916, in the case of *Dwarka Nath v. Sailaja Kanta* (1) in which it was held that security bonds given in pursuance of the order of the Court for stay of execution require stamp duty under the Stamp Act. I understand that in the other three Courts here such bonds are still stamped under the Court Fees Act.

It has since been held by Newbould and Panton, JJ., on 28th February 1922, in the case of *Sarbo v. Safar* (2), that a security bond executed by a person for the

release of attached animals is governed by Art. 6, Sch. II, Court Fees Act.

The ground for the decision of the first mentioned case is as follows :—

“ . . . The parties can furnish them or not as they please. If they do furnish them, the stay of execution becomes a matter of indulgence.”

This ground is obviously applicable to the other case also and in fact to all security bonds executed in civil cases. The Court cannot compel any one to execute a security bond and in every case the person interested furnishes such a bond in order to get a relief which he wants. The Court grants him the relief conditionally on the execution of a security bond and the party has always the right to decline to furnish the security bond if he does not want the relief any longer. The two reported cases mentioned above cannot therefore be reconciled on principle and the point needs the decision of the High Court.

In my opinion the distinction should be between security bonds ordered to be executed under some provisions of the Civil Procedure Code [such as, r. 6 (2), Or. 32, r. 5 (3) (c), Or. 41, etc.] and bonds required under other enactments [such as sec. 9 (1) of the Succession Certificate Act, sec. 17 (1) of the Provincial Small Cause Court Act, etc.]. The words used in Art. 6, Sch. II, Court Fees Act, are ‘ Bail-bond or other instrument of obligation given in pursuance of an order made by a Court . . . under . . . the Code of Civil Procedure.’

In this view I am of opinion that the case of *Sarbo Musalmani v. Safar Mandal* (2) lays down the correct law on the point and that security bonds of the nature of those in the reported cases and in the case under Reference come under

(1) 21 C. W. N. 1150 (1916).

(2) 1. L. R. 49 Cal. 997 (1922).

(2) 1. L. R. 49 Cal. 997 (1922).

Re: REFERENCE FROM THE MUNSIF, 4TH COURT, HABIGANJ.

the Court Fees Act. I had therefore accepted the security bond in Execution Case No. 209 of 1924 with a court-fee stamp of 8 annas contingent upon the decision of the High Court on this Reference.

The point referred to is as follows:—

Whether a security bond executed under the order of the Court passed under r. 6 (2), Or. 32, or under any other rule or section of the Civil Procedure Code, should be stamped under the Court Fees Act or under the Stamp Act."

The Reference coming on for hearing before Greaves and Chakravarti, JJ., on 25th December 1924, their Lordships made the following Reference to the Full Bench:—

GREAVES AND CHAKRAVARTI, JJ.—The Munsif of the 4th Court, Habiganj, District Sylhet, has under the provisions of the above section and order referred to the Court the question whether a security bond executed under the order of the Court passed under Or. 32, r. 6 (2) or under any other section or rule of the Civil Procedure Code should be stamped under the Court Fees Act or under the Stamp Act. Holmwood and Teunon, JJ., held in the case of *Dwarka Nath Dey v. Sailaja Kanta Mullick* (1) that security bonds given in pursuance of an order of the Court for stay of execution should be stamped under the Stamp Act. Newbould and Panton, JJ., have recently held in *Sarbo Musalmani v. Safar Mandal* (2) that a security bond executed by a person for the release of attached animals should be stamped under Art. 6, Sch. II of the Court Fees Act.

It would therefore appear that there is a conflict between the decisions of two Division Benches of this Court on the

question which arises on this Reference. Under these circumstances we refer for the decision of a Full Bench of the Court the question whether a security bond executed under the order of the Court passed under Or. 32, r. 6 (2) or under any other order or section of the Code of Civil Procedure should be stamped under the Court Fees Act or under the Stamp Act.

There was no appearance before us on the Reference.

Babu Surendra Nath Guha for the Government.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—The circumstances which have given rise to this Reference are as follows:—In an execution case at Habiganj, the next friend of a minor decree-holder was directed to furnish security under Or. 32, r. 6 (2) of the Civil Procedure Code before receiving certain money on behalf of the minor. He filed a security bond, and then a question arose as to whether the bond was to be stamped under the Court Fees Act, or under the Stamp Act. The learned Munsif found that there were two conflicting decisions on the point, *viz.*, the case of *Dwarka Nath Dey v. Sailaja Kanta Mullick* (1) and that of *Sarbo Musalmani v. Safar Mandal* (2) and he referred the question to this Court under the provisions of Or. 46, r. 1 of the Civil Procedure Code.

A Division Bench finding the two decisions to be directly opposed to one another has referred for the decision of a Full Bench the question whether a security bond executed under the order of the Court passed under Or. 32, r. 6 (2) or under any other order or section of the Civil Procedure Code should be stamped

(1) 21 O. W. N. 1150 (1916).

(2) I. L. R. 49 Cal. 997 (1922).

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Re: REFERENCE FROM THE MUNSIF, 4TH COURT, HABIGANJ,

under the Court Fees Act or under the Stamp Act.

The learned Government pleader has appeared before us, and has suggested that our answer should be to this effect, that such security bonds should be stamped under Art. 6, Sch. II of the Court Fees Act, unless they are of such a nature as to attract the operation of Art. 40 or Art. 57 of the Stamp Act.

Art. 6 of Sch. II of the Court Fees Act now runs: "Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure or the Code of Civil Procedure."

I feel no hesitation in holding that a security bond of the kind mentioned in the Munsif's letter comes within this description. With all deference to the learned Judges who decided the case of *Dwarka Nath Dey v. Sailaja Kanta Mullick* (1), I think they placed too narrow a meaning on the words "in pursuance of." Compliance with a condition imposed by a Court is, in my opinion, an act done in pursuance of the Court's order; and I think that the narrow construction proposed in the judgment mentioned would render Art. 6 nugatory.

It does not follow, however, that because a security bond falls within the scope of Art. 6, Sch. II of the Court Fees Act, it is free from the provisions of the Stamp Act. This Act contains a clause—sec. 2 (5)—which enumerates three kinds of instruments which are to be regarded as bonds. Then in Sch. I there are three articles which have a bearing on the question before us, *viz.*, Arts. 15, 40 and 57. They are as follows:—

Art. 15. [Bond as defined by sec. 2 (5)] not being a Debenture (No. 27) and not

being otherwise provided for by this Act, or by the Court Fees Act, 1870.

Art. 40. Mortgage deed, not being an agreement relating to deposit of title deeds, Pawn or Pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a Crop (No. 41), Respondentia Bond (No. 56) or Security Bond (No. 57).

Art. 57. Security bond or mortgage deed executed by way of security for the due execution of an office or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.

A comparison of these articles shows that Art. 15 is of a residuary character intended for bonds which cannot be assigned to any other of the articles of the Stamp Act and are not provided for by the Court Fees Act. It is the only article in which reference is made to the Court Fees Act. It follows therefore that a bond which finds its proper place in one of the other articles is not exempt from duty under the Stamp Act, and, at the same time, as being given in pursuance of the Court's order, it is liable under Art. 6 of Sch. II of the Court Fees Act.

The answer that I propose to the Reference is that security bonds executed in pursuance of an order of the Court under Or. 32, r. 6 (2) or any other rule or section of the Civil Procedure Code must bear a court-fee stamp as required by Art. 6 of Sch. II of the Court Fees Act, 1870; and they will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or Art. 57, but they will not be chargeable under the Stamp Act if they fall under the residuary Art. 15.

GREAVES, J.—I agree.

C. C. GHOSE, J.—I agree.

B. B. GHOSE, J.—I agree.

MUKERJI, J.—I agree.

N. G.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM ORIGINAL DECREE****No. 57 OF 1924.**

) DWIJENDRA NATH
MULLICK and anr.,

WALMSLEY, J.

MUKERJI, J.

1925,

Heard, 2 & 3, April.

Judgment, 15, May.

GOPIRAM GOBINDA-
RAM, Plaintiff,
Respondent.

v.

Indian Contract Act (IX of 1872), sec. 23, ill. (h)—Agreement to drop prosecution for breach of trust on receipt of part of the embezzled money in cash and in the shape of a mortgage by accused and his brother—Prosecution dropped by Police upon representation by the complainant—Suit to enforce registration of mortgage—Consideration, if valid—Agreement, if to stifle prosecution—Public policy.

The Defendant No. 1 whilst undergoing trial for an offence of criminal breach of trust in respect of Rs. 30,000 belonging to the Plaintiff firm pressed the Plaintiff firm to drop the prosecution upon receipt of Rs. 15,000 in cash and a mortgage for Rs. 5,000 to be executed by Defendant No. 1 and his brother Defendant No. 2. The Plaintiff firm agreeing, laid all the facts before the Commissioner of Police and representing to him that they could not afford to lose the whole sum and that it would be to their advantage to get a portion, asked his permission to withdraw the case against Defendant No. 1, and it was with the permission of the Commissioner of Police that the case was withdrawn. In a suit to enforce the registration of the mortgage bond:

Held—That the consideration and object of the agreement was not illegal within the meaning of sec. 23 of the Indian Contract Act. The Plaintiffs were not making "a trade of felony," nor did they take the administration of justice out of the hands of the authorities and themselves determine what should be done.

Per MUKERJI, J.—The withdrawal of the prosecution was the motive, but not the object or the consideration of the agreement, so as to render the agreement illegal under the section.

Held—That the agreement was also not without valid consideration for the purpose of binding Defendant No. 2.

This was an appeal preferred on the 3rd March 1924 against the judgment and decree of the Subordinate Judge, 2nd Court of Zillah Howrah (Babu Atul Chandra Banerjee), dated 21st December 1923.

The facts of the case sufficiently appear from the judgment.

Babus Rupendra Kumar Mitter and Pashupati Ghose for the Appellants.

Sir B. C. Mitter and Babu Jagat Chandra Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—This appeal is preferred by the Defendants and the question that it raises is whether the agreement on which the suit is based was opposed to public policy.

The first Defendant Dwijendra was employed by the Plaintiff firm, and on 3rd March 1919, he was sent to the Bank to cash a cheque for Rs. 30,000. He cashed the cheque and then went to the Police with the story that the money had been stolen from him. This story was found to be untrue and he was arrested. Friends of the family went to a Solicitor Mr. Akhoy Kumar Bose, and through his efforts it was arranged that the Plaintiff firm would agree to the prosecution being given up, if they received Rs. 15,000 in cash and a mortgage for a sum of Rs. 5,000. This mortgage was executed by Dwijendra and his brother Rajendra and it is the document upon which the suit is based. The Plaintiffs on their side carried out the terms of the arrangement:

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they signed a petition to the Commissioner of Police asking that the prosecution should not be continued, and the Commissioner gave his consent. The Presidency Magistrate afterwards wrote "file" on the petition: whether he passed a formal order of discharge or not, we do not know, but I do not think it is of any importance.

None of these facts has been challenged before us, and the arguments have been confined to legal points. It is urged that the consideration of the agreement was unlawful as offending against the principle laid down in sec. 23 of the Contract Act. A second argument was that the Plaintiff cannot fall back upon the debt, but that argument need not be considered because Sir Benode Chandra Mitter for the Respondent said he had no intention of doing so. A third argument is that at any rate the second Defendant cannot be held liable.

The first argument, shortly stated, is that the agreement was one for stifling a prosecution. If that is a correct description of it, then it cannot be enforced, but the learned Judge has found to the contrary and has given his reasons for his conclusions.

The statute law of this country on the subject is to be found in sec. 23 of the Contract Act. It is as follows:—"The consideration or object of an agreement is lawful unless . . . the Court regards it as immoral or opposed to public policy" . . . Illus. (h)—"A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful." The illustration unfortunately does not throw much light on a difficult matter.

In the present instance there is no room

for the suggestion that the Plaintiffs are making "a trade of felony." On the contrary they assented to such generous terms that the defence set up by the Appellants wears a most repulsive appearance. If, however, the agreement was contrary to public policy as explained in the Contract Act and in English decisions then we shall have no alternative but to dismiss the suit, however repugnant to our feelings such a course may be.

The offence with which Defendant Dwijendra was charged was not compoundable under the provisions of the Criminal Procedure Code, and if the negotiations are to be regarded as a composition of such a non-compoundable offence then the conclusion must be that the object of the agreement was contrary to public policy. It is necessary therefore to see what the arrangement was. It is fully described by Mr. Bose, the solicitor, and he says that so far from pressure coming from the Plaintiffs it was brought about at the request and entreaties of the Defendants. In cross-examination he speaks about the case being withdrawn, and about the Plaintiffs agreeing to drop the proceedings, but we must look at what the Plaintiffs actually did to determine whether those expressions are correct.

The first thing they did was to write a letter or petition to the Deputy Commissioner: it was returned and another petition was written addressed to the Commissioner of Police. The Plaintiffs had the assistance of the Public Prosecutor Rai Bahadur Tarak Nath Sadhu who was conducting the prosecution, and of their own attorneys in preparing these petitions. The terms of the two petitions are substantially the same: the Plaintiffs said that they could not afford to lose the whole sum, and that it was to their advantage to get a portion, and they hoped

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that permission would be given for the case to be withdrawn. The Plaintiffs did nothing further. It was the Defendants who engaged Mr. Pugh, a solicitor, to go to the Commissioner and urge him to allow the case to be withdrawn. He was successful, and the Commissioner wrote, "No objection to withdrawal of the case" and the Magistrate wrote "file," after which no further steps were taken in connection with the prosecution.

This is to be noted that the Plaintiffs did not at any stage abate any part of their charge against the accused, and they did not suggest that they would withhold their evidence if the case proceeded. They laid all the facts before the Police and left it to the Commissioner of Police to decide whether the case should go on or not, and it was his decision that in the circumstances the charge might be withdrawn. I cannot find in the conduct of the Plaintiffs any reason for supposing that if the Commissioner's decision had been different, the Plaintiffs would have rendered the criminal proceedings abortive.

On this statement of the facts it must be allowed that the case comes very near the line, but on the whole I think that, whether we use the rhetorical expression of stifling a prosecution or the more homely words of the Contract Act, the action of the Plaintiffs ought not to be regarded as contrary to public policy, because they did not take the administration of justice out of the hands of the authorities and themselves determine what should be done.

The first ground taken by the Appellants fails.

There remains the third ground, namely, that the second Defendant, Rajendra, is not liable. In his case it is said that there was no consideration. That seems a strange argument for any

brother, perhaps I should say particularly for any Hindu brother, to put forward, and I regard the consideration as real and ample.

My conclusion is that the appeal should be dismissed with costs.

MUKERJI, J.—The Defendant No. 1 was a servant in the Plaintiff firm. On the 3rd March 1919 the Plaintiff firm handed over to the Defendant No. 1 two cheques, one for Rs. 30,000 to be cashed at the International Banking Corporation, and the other a crossed cheque for Rs. 7,384-9-9 p. to be paid in the same Bank. The Defendant No. 1 cashed the cheque for Rs. 30,000 but did not pay in the other cheque for Rs. 7,384-9-9 p. He then telephoned to the Plaintiff firm that the money had been lost, and at about 4-45 P.M. appeared at the Police Station and gave an information to the effect that 30 G. C. notes for Rs. 1,000 each, one Chalan Book, and the cheque for Rs. 7,384-9-9 p. had been stolen from his right shirt-pocket. Thereupon he was arrested by the Police on suspicion. Immediately after the Plaintiffs' man arrived at the Police Station and laid a charge of criminal breach of trust against the Defendant No. 1. The Police took up the investigation, in the course of which the Defendant No. 1 was let out on bail. He was eventually sent up for trial before the Chief Presidency Magistrate of Calcutta.

On the 7th March 1919 the Defendant No. 2, brother of the Defendant No. 1, arrived from Jhargram, where he had been from before. On the 14th March 1919 the two brothers and some other persons saw an attorney Mr. A. C. Bose and took his advice. The attorney advised them that there was no defence, and that the case would in all probability end in a conviction. The brothers then requested the attorney to bring about a settlement.

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The attorney sent for the Plaintiffs. After some conferences an agreement was reached.

The settlement, as far as it can be ascertained from the evidence, was in this form : The Plaintiffs were to give up Rs. 10,000 out of their claim and accept Rs. 15,000 in cash and a mortgage executed by the Defendants Nos. 1 and 2 securing the balance of Rs. 5,000. The money would remain with a third party, one Manik Chand. The Plaintiffs would then apply for withdrawal of the criminal proceedings and after they were withdrawn, would get the money and the mortgage bond. On the 20th March 1919 a mortgage bond was duly executed by the two brothers, for a sum of Rs. 5,000 hypothecating their 2/7th share in their joint family properties.

On the 1st April 1919 a petition signed by the informant on behalf of the Plaintiffs was put in before the Deputy Commissioner on whose order the Defendant No. 1 had been sent up for trial. The petition was in these words : " The complainants having recently suffered heavy loss owing to the fall in the piece-goods market and not being in a position to give up such an amount in their present state and the relations of the accused Dwijendra Nath Mullick having promised without prejudice to the pending criminal proceedings to make good a substantial portion of the loss of the complainant firm, if the criminal case aforesaid now pending be withdrawn and all terms having been settled, complainants pray that the aforesaid criminal case be withdrawn." Nothing much came out of this petition, presumably because the Deputy Commissioner could not interfere in the matter, the case having already gone before the Court. On the 16th April 1919 a petition purporting to have been filed on behalf of

the complainant was filed before the Chief Presidency Magistrate. It stated that the accused (meaning the Defendant No. 1) had approached complainant and offered to make good, as far as possible, the loss suffered by him, without prejudice to the case, that the financial condition of the firm would not allow them to refuse the offer and that under the circumstances the complainant did not wish to proceed with the charge against the accused. The prayer was that the accused might be discharged, if necessary, with the permission of the Court. The Chief Presidency Magistrate forwarded the petition to the Commissioner of Police with the remark : " To Commissioner of Police for favour of disposal." The latter reported that he had no objection to the withdrawal of the case and the Chief Presidency Magistrate on the 5th May 1919 passed the order " file " on the petition. Some days later the sum of Rs. 15,000 which was held by Manik Chand as aforesaid was received by the Plaintiff firm. Thereafter, as is usual in such cases, the two Defendants were not very anxious to register the mortgage deed. Consequently, it appears, a letter was written to them by the Plaintiffs' solicitor Mr. M. N. Sen calling upon them to register the document and intimating to them that if they failed to do so he would present the mortgage at the Registry Office and apply for warrant for a compulsory registration. The letter also contained a threat that in case of such failure the Plaintiff firm would also withdraw the petition which they had filed in Court for withdrawal of the case. It was also stated in the letter that a copy of it was being sent to Rai Bahadur Tarak Nath Sadhu for his information. This gentleman, it should be stated, was the Public Prosecutor of Calcutta. Thereafter on the 1st May 1919 the document

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was registered, both the Defendants admitting execution thereof.

On the 15th July 1922 the suit was filed for enforcement of the mortgage. The Court below decreed the suit, and hence the present appeal.

At the hearing of the appeal the facts alleged on behalf of the Plaintiffs were mostly not disputed. It was no longer disputed that the information of theft was false or that the Defendants approached Mr. A. C. Bose and on his advice sought his assistance to get a settlement effected with a view to have the case withdrawn. It was no longer asserted that Rs. 15,000 had not been paid by the Defendants as alleged on behalf of the Plaintiffs, nor was it disputed that the mortgage bond was duly attested in accordance with the provisions of the law. The findings of the Court below to the effect that the Defendant No. 1 did actually commit the offence in respect of the sum of Rs. 30,000 and that Rs. 15,000 was paid back in some of the identical notes that had been misappropriated were not challenged. In fairness to the learned vakil for the Appellants, however, it should be said, that in the face of the evidence on the record it is hardly possible to dispute or challenge any of the aforesaid facts or findings.

The Appellants' arguments give rise to three questions:—First, as to whether the agreement embodied in the deed is enforceable in view of the provisions of sec. 23 of the Indian Contract Act: second, as to whether the contract was vitiated for want of free consent; and third, whether it may be enforced as against the Defendant No. 2 as evidently he was not a party to the offence and there was no liability on him for which he need have executed the mortgage.

In order to deal with the first question,

the nature of the agreement has first of all to be ascertained with precision. As I have stated, it was to the effect that the Plaintiffs were willing to accept Rs. 15,000 in cash and a mortgage from Defendants Nos. 1 and 2 for Rs. 5,000 in satisfaction of their claim for Rs. 30,000. The Defendants Nos. 1 and 2 were willing that the Plaintiffs should have what they wanted, but not if the criminal proceedings against the Defendant No. 1 were not withdrawn and the Plaintiffs in their turn were willing to abandon the prosecution if they got the cash and the bond. To give effect to this intention Rs. 15,000 was kept with a third party, the bond though executed remained unregistered, the Plaintiffs put in the two petitions referred to above, the Defendants engaged Counsel to explain matters to the Commissioner of Police and eventually got the necessary permission from him which practically ended the prosecution, and it was only after the proceedings had been "filed" that the Plaintiffs received the money and the Defendants got the deed registered.

The Appellants' contention is that the agreement is void as the consideration or object of the agreement is opposed to public policy, and that it was in effect an agreement to stifle a prosecution. The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice. An agreement to stifle a prosecution is of course distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy.

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If the effect of an agreement is to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, it is opposed to public policy. [*Collins v. Blanton* (1), *Keir v. Leeman* (2) and *Williams v. Bayley* (3).] On the other hand, there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute: *Flower v. Sadler* (4).

The Respondent's contention is that the prosecution was not in the hands of the Plaintiffs, but in the hands of the Police and the Public Prosecutor was in charge of it, and that the Plaintiffs did not institute it, there was no agreement to withdraw the case and in fact no withdrawal thereof, the only order proved in the case being one of "file;" and it is urged that for these reasons the case is not covered by illus. (h) to sec. 23.

Now, I am prepared to concede that the Defendants would not have parted with the sum of Rs. 15,000 or completed the execution of the bond for Rs. 5,000, unless and until the criminal case against the Defendant No. 1 was withdrawn, but I am not at all sure that the consideration or object of the agreement was the withdrawal of the said case. The motive for the execution of the bond and the payment of the money was the withdrawal; but there is a good deal of difference between the motive for the act and the consideration or object of the agreement. It is necessary to keep this dis-

inction in view all the more in a case where there is a civil liability already existing which is discharged or remitted by the agreement. Even if all the principles of English Common Law relating to agreements for stifling prosecution be held to be applicable to all kinds of non-compoundable offences in this country—a question about which I entertain some doubt in view of the fact that the offence of criminal breach of trust though declared non-compoundable by law is very often treated by the Courts as otherwise—then if the principle of the doctrine be that "you shall not make a trade of felony" [*per* Lord Westbury in *Williams v. Bayley* (3)], then it is difficult to see how the Plaintiffs can be said to have acted improperly in entering into the arrangement to get what they were justly entitled to or rather much less than what they were so entitled, when they brought the whole matter to the notice of the authorities responsible for the conduct of the prosecution and left it to them to decide whether they should proceed or not. My learned brother does not find anything culpable or wrong in the conduct on the part of the Plaintiffs and what they did does not also offend against my sense of fairness and propriety. Illus. (h), though not exhaustive, but only illustrative of the section, gives only a very gross and extreme instance. I am therefore not prepared to say that upon the peculiar facts of the present case the contract between the parties was one opposed to public policy or that in any way tended to prejudice the state or hamper the administration of justice.

As regards the second ground, namely, whether the contract is vitiated for want of free consent, there is scarcely any material which may bring the case within

(1) [1767] 1 Sm. L. C., 11th Edn., 369.

(2) 9 Q. B. 371 (1844).

(3) L. R. 1 H. L. 200 (1866).

(4) [1898] 10 Q. B. D. 572.

(5) L. R. 1 H. L. 200 at p. 220 (1866).

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any of the clauses of sec. 14 of the Contract Act. The parties had ample independent advice and it seems that the Defendants not only did all that was necessary to be done willingly and out of their own accord but also on their own initiative. I attach no importance to the letter of Mr. M. N. Sen referred to above, because the threat contained therein was merely for compelling the registration of the bond and as the registration thereof could be enforced by other means as well, the registration of the document by whatever means it was effected could not affect the character of the agreement which was already complete and the registration would give effect to the document from the date of its execution. The question of validity of the document is not affected so long as the registration is not held to have been without jurisdiction.

The Appellants' last contention has not much substance. If the agreement was a valid one, and the Appellant No. 2 voluntarily offered to give in the bond with his brother in whom he was interested, it must be presumed that there was a lawful consideration for the transaction. In the case of *Kessowji v. Hurjiwan* (5), it was held that a guarantee for the payment to creditors of debts due to them in consideration of the creditors' abstaining from taking criminal proceedings is void, as being against public policy, but a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute, but he must not by stifling a prosecution obtain a guarantee from third parties.

(5) I. L. R. 11 Bom. 506 (1887).

This principle has been followed in the case of *Jai Kumar v. Gouri Nath* (6), where it has been held that where a *bond fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor and a third party as security for the debt is not void under sec. 23 of the Contract Act.

For these reasons in my judgment the decision of the Court below is correct and the appeal must be dismissed with costs.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2386 of 1920.

CHATTERJEA, J.

CUMING, J.

1923,

Heard, 2, 9 and

10, January.

Judgment,

15, January.

NRIPENDRA NATH

BHOWMIK and ors.,

Plaintiffs,

Appellants,

v.

BASANTA KUMAR

LAHIRI, Defendant,

Respondent.

Civil Procedure Code (Act V of 1908), sec. 11—Second suit by same Plaintiff claiming under different title—Previous decision upheld in the High Court on ground of limitation, but not on question of title—Declaration of title refused in a suit for possession which was dismissed as time-barred—Decision, if bars further enquiry into title—Sec. 11, Expl V—Estoppel—Change of position.

A previous suit for recovery of a leasehold interest, claimed by the Plaintiffs as heirs of their father, was dismissed by the High Court as barred by limitation, in view of the finding of the lower Appellate Court that the dispossession took place more than 12 years before the suit. The present suit for recovery of the proprietary interest claimed by the Plaintiffs as reversionary heirs of the last full owners on the death of two Hindu widows, was resisted

(6) I. L. R. 28 All. 718 (1906).

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on the ground of *res judicata* as also of *estoppel*.

Held—That the suit was not barred by the principle of *res judicata*, because (i) the Plaintiffs were not litigating under the same title, and (ii) any decision of the lower Appellate Court in the previous suit, as to the title of the widows by adverse possession, could not be conclusive in the present suit inasmuch as the appeal to the High Court destroyed the finality of such decision; and the final judgment in the case, having proceeded on the ground of limitation only, had the effect of leaving all other questions open between the parties.

SHEOSAGAR SINGH v. SITARAM SINGH (2) and CHUNDER COOMAR MITTER v. SIB SUNDARI DASSEE (1) followed.

GANGABISHEN BHUGUT v. ROGHONATH OJHA (3), GHURPHEKNI v. PURMESHAH DOYAL DUBEY (4), ABDULLA ASHGAR ALI KHAN v. GANESH DAS (5) and NILVARU v. NILVARU (6) referred to.

Held also—That the refusal of the prayer, in the previous suit, for a declaration that the Defendants had no title, was no bar, under sec. 11, Expl. V of the Civil Procedure Code, to the present claim inasmuch as the declaration sought was not one under sec. 42 of the Specific Relief Act, but only leading up to the main relief, namely, possession.

WALIHAN v. JAGESWAR NARAYAN (7) referred to.

Held further—That there was no *estoppel*, because as regards the inconsistent statements of the Plaintiffs themselves, there had been no change in the position of the Defendants by reason thereof, nor were the Plaintiffs bound by the statements of their father through whom they did not claim the property in suit.

BAHADUR SINGH v. MOHAR SINGH (8) and RANGASWAMI GOUNDEN v. NACHIAPPA GOUNDEN (9) followed.

This was an appeal preferred on the 8th of October 1920 against the decree of Babu Nalini Kanta Bose, Subordinate Judge, 1st Court of Zillah Faridpur, dated the 13th of August 1920, reversing the decree of Babu Kumud Bandhu Sen, Munsif, 2nd Court at Goalundo, dated the 20th of August 1919.

The facts of the case will appear from the judgment.

Babus Tarak Chandra Chakravarty, Phanindra Lal Moitra and Profulla Chandra Chakravarty for the Appellants.

Babus Surendra Chandra Sen and Hemendra Chandra Sen for the Respondent.

Babu Biraj Mohon Mazumdar for the Deputy Registrar.

THE JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for establishment of the right of the Plaintiffs to, and recovery of possession of, two taluks and five *jotes* as reversionary heirs of two ladies, Bhabani and Padmamani. The Defendants are the lessees under the widows, who are now dead.

It appears that the Plaintiffs' father

(8) L. R. 29 I. A. 1; s. c. I. L. R. 24 All. 94; 6 C. W. N. 189 (1901).

(9) I. L. R. 42 Mad. 528; s. c. 38 C. W. N. 777 (P. C.) (1915).

(1) I. L. R. 8 Cal. 631 (1883).

(2) I. L. R. 24 Cal. 616; s. c. 1 C. W. N. 297 (P. C.) (1897).

(3) I. L. R. 7 Cal. 381 (1881).

(4) 5 C. L. J. 653 (1907).

(5) I. L. R. 45 Cal. 442; s. c. 22 C. W. N. 121 (P. C.) (1917).

(6) I. L. R. 6 Bom. 110 (1891).

(7) I. L. R. 35 Cal. 189; s. c. 12 C. W. N. 227 (P. C.) (1907).

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Prasanna executed a mortgage in respect of the taluks and the *jotes* in favour of one Raj Kumar, the Defendants' father, on the 12th November 1880, evidently treating the properties as belonging to him alone. Three ladies of the family (including the two named above) however got their names registered, each in respect of her 4 annas share as heirs by right of succession to the last five owners respectively in 1882. In 1883, Raj Kumar, the mortgagee, obtained a lease from the three ladies in respect of 12 annas share in the name of his grandson Basanta. In 1891, Raj Kumar brought a suit for foreclosure upon the mortgage, which resulted in a compromise. It was agreed that there would be a decree for foreclosure in respect of 16 annas against Prasanna, but that the mortgagee would grant a lease thereof to him, that Basanta would surrender the lease, which he had obtained from the three ladies and that Prasanna would be the lessee under Raj Kumar. A decree was made accordingly. The lease taken by Basanta from the ladies was surrendered by him notwithstanding objections raised by the ladies.

In 1903, a suit was instituted by the Plaintiffs against the Defendants (the two ladies being joined as parties Defendants) for recovery of the leasehold interest, in respect of which the Plaintiffs had been dispossessed by the Defendants in 1895. There were certain other properties included in that suit, which were not the subject-matter of the compromise.

In that suit the Plaintiffs alleged that the widows Bhabani and Padmamani did not inherit the shares from the last full owners. The suit was decreed in part by the Subordinate Judge but the decree was reversed by the District Judge who held that the dispossession had taken place in 1868 when the lease was granted

and that the suit, therefore, was barred by limitation. There was a second appeal to this Court and it was disposed of on the ground that the Plaintiffs' suit was barred by limitation as the Plaintiffs' possession within 12 years was not proved.

Bhabani and Padmamani having died within 12 years of the suit, the Plaintiffs instituted this suit for recovery of possession of the properties on the allegations that those ladies held only the estate of a Hindu widow and that the alienation in favour of the Defendants was fraudulent and not for legal necessity and, therefore, not binding upon the Plaintiffs.

The main defence was that the decision in the suit of 1903 operated as *res judicata*, and that the Plaintiffs were estopped from making the allegation which was made in the plaint in the present suit and which was contrary to the statements made in the previous suit of 1903. The Defendants also pleaded that there was legal necessity for the leases which were executed by the ladies.

The Court of first instance held that the decision in the suit of 1903 did not operate as *res judicata*, nor were the Plaintiffs estopped and that legal necessity was not proved. That Court accordingly held that the Plaintiffs were entitled to succeed in respect of the two taluks, but not with respect to the five *jotes*, as the properties had not been sufficiently specified in the plaint, nor were the Plaintiffs entitled to claim mesne profits.

On appeal, the learned Subordinate Judge held that the decision in the suit of 1903 operated as *res judicata* and that the Plaintiffs could not be allowed to take up inconsistent positions and were precluded by the principle of estoppel. In the result, the suit was dismissed.

The Plaintiffs have appealed to this Court.

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The first question raised is whether the decision in the suit of 1908 operates as *res judicata*.

It is contended by the learned Pleader for the Appellants that in the lower Appellate Court there was no decision on the question of adverse possession on behalf of the ladies. But assuming that there was, the next contention is that having regard to the judgment of the High Court which proceeded merely upon the finding that the Plaintiffs were not in possession within 12 years, the question of title based upon adverse possession could not be held to have been heard and finally decided by the High Court.

We think that this contention is correct.

Assuming that the learned District Judge had found that the ladies were in adverse possession, that was not the ground upon which the High Court proceeded to dispose of the case. The decision of the lower Appellate Court became *sub judice*, a second appeal having been preferred to this Court; and this Court, as stated above, did not express any opinion upon the question of adverse possession. The principle is enunciated in several cases and we need only refer to some of them.

In the case of *Chunder Coomar Mitter v. Sib Sundari Dassee* (1), it was pointed out that "when the decision of a lower Court is appealed to a superior tribunal and that tribunal for any reason does not think fit to decide the matter, it is left an open question. We have held so here over and over again, and it is not because in point of form the appeal in the first suit was dismissed, that the decision of the Munsif can be considered as confirmed."

In the case of *Sheosagar Singh v. Sita-*

(1) I. L. R. 8 Cal. 631 at p. 634 (1882).

ram Singh (2) the Judicial Committee observed as follows:—"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been heard and finally decided. If there had been no appeal in the first suit, the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was, no decision ought to have been pronounced on the merits." See also *Gangabishen Bhugut v. Roghoo-nath Ojha* (3), *Ghurphekní v. Purmes-har Doyal Dubey* (4), *Abdulla Ashgar Ali v. Ganesh Das* (5) and *Nilvaru v. Nilvaru* (6).

It has, however, been contended by the learned pleader for the Respondent in the first place that the learned District Judge in the suit of 1903 having considered the question of limitation along with the question whether the ladies inherited the properties, the High Court must be taken to have accepted the finding on the question of possession as it was mixed up with the question of title.

We do not see, however, that the High Court did any such thing. The judgment of the High Court on the point runs as follows:—"As regards the other 12 annas share, the ladies, two of whom are Defendants, claim those shares and say as regards those shares that the Plain-

(2) I. L. R. 24 Cal. 616, 626, 627; s. c. 1 C. W. N. 297 (P. C.) (1897).

(3) I. L. R. 7 Cal. 381 (1881).

(4) 5 C. L. J. 658 (1897).

(5) I. L. R. 45 Cal. 442; s. c. 33 C. W. N. 121 (P. C.) (1917).

(6) I. L. R. 6 Bom. 110 (1881).

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tiffs were dispossessed in 1883 and have continued out of possession ever since. This has been found as a fact by the lower Appellate Court and that as regards those shares the suit is barred by limitation. On the findings of fact, this conclusion appears to be correct."

The judgment of the High Court, therefore, was based on the fact that the Plaintiffs were not in possession within 12 years of the suit. The question of title cannot be said to have been mixed up with the question of possession in such a way that the question of limitation could not be decided apart from the question of title.

In the next place, it has been contended that the Exp. 5 of sec. 11 should be taken into consideration. It is urged that there was a prayer in the plaint in the suit of 1903 for a declaration that the Defendants had no title to the properties, and that that declaration not having been granted must be taken to have been refused, having regard to the express provisions of Exp. 5 of sec. 11, C. P. C.

But we think that the declaration which was claimed by the Plaintiffs in the prayer was not a declaration under sec. 42 of the Specific Relief Act but a declaration which led up to the main relief claimed in the suit, namely, possession. In the words of the Judicial Committee in the case of *Walihan v. Jogeswar Narayan* (7), that was "merely an argumentative step towards the only decree sought, *viz.*, possession:" and the Court was not entitled to make a declaration with regard to the third prayer in the plaint after the failure of the sole cause of action, namely, the Plaintiffs' dispossession within 12 years.

In the third place, it has been contended that in the cases cited above the Appellate Court expressly declined to go into the other questions decided by the lower Court.

But in the case of *Nilvaru v. Nilvaru* (6), there was no such express reservation and yet it was held that the question was not finally decided. We think that upon the express terms of the section (sec. 11 of the Civil Procedure Code) it cannot be said that a matter is finally heard and finally decided by the Court of Appeal when for any reason it does not think fit to go into the question. In the present case the High Court having disposed of the case merely upon the ground of limitation must be taken not to have decided any other question.

Then, it is to be observed that the Plaintiffs claim the taluki right in the present suit under a title different from that under which they claimed the leasehold interest in the suit of 1903. That was a right inherited by them from their father. The title upon which the Plaintiffs have instituted the present suit is a title not derived from their father but a title which they claim as having devolved upon them as reversionary heirs of the last full owners—Swarup and Bepimadhab. That being so, the principle of *res judicata* cannot apply as the two suits were not litigated under the same title.

The next point is whether the Plaintiffs are estopped by reason of the statements made by them in the suit of 1903.

In the previous suit the Plaintiffs' case was that Bhabani and Padmamani did not inherit, and that the Plaintiffs' grandfather had inherited those shares. In the present suit the Plaintiffs' case is that the widows had inherited those shares. The learned Subordinate Judge

(7) I. L. R. 35 Cal. 182, 193: s. c. 12 C. W. N. 337 (P. C.) (1907).

(6) I. L. R. 6 Bom. 100 (1881).

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also refers to the statements of the Plaintiffs' father in the mortgage bond and also in the suit for foreclosure on the mortgage, in which he asserted the right to the property to the exclusion of the widows. But these statements cannot bind the Plaintiffs, because, as already stated, the Plaintiffs claim the properties not as heirs of their father but as reversionary heirs of Swarup and Benimadhab. An eventual reversioner does not claim through any one who goes before him. As pointed out in the case of *Bahadur Singh v. Mohar Singh* (8), "The then claimants were only expectant heirs with a *spes successionis*. The Plaintiffs claimed in their own right as heirs of Mohar when the succession opened and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent." [See also *Rangaswami Gounden v. Nachiappa Gounden* (9)].

So far as the Plaintiffs themselves are concerned, there is no doubt that the present statements are inconsistent with what was stated in the suit of 1903.

But there has been no change of position by reason of the statements made by the Plaintiffs in the suit of 1903. The leases upon which the Defendants base their right were granted by the widows in 1883—about 20 years before the suit of 1903. They could not have been affected in the matter of taking the leases by any statements made by the Plaintiffs 20 years subsequently. As a matter of fact, the lessors had registered their names and had granted the leases to the Defendants on the footing

that they had inherited the estate from the last full owners.

It is contended by the learned Pleader for the Respondents that had the Plaintiffs set up the right, they now set up, in the suit of 1903, the Defendants might have taken steps for preservation of evidence on the point.

There is no evidence to show, however, that any evidence bearing on the point has, since 1903, been destroyed.

We are accordingly of opinion that the Plaintiffs are not precluded by the principle of estoppel, and that the Plaintiffs would be entitled to the shares of the two taluks provided the other questions raised in the case are decided in their favour. But the question of legal necessity, as also the main question whether the Plaintiffs inherited the property as reversionary heirs of Swarup and Benimadhab, or whether the widows Bhabani and Padmamani held the properties by right of adverse possession and any other question that might be necessary to be decided in the case, have not been gone into by the lower Appellate Court, as its decision proceeded only upon the questions of *res judicata* and estoppel.

The case must, therefore, go back to the lower Appellate Court for a decision upon the other points raised in the case.

Then the next question is whether the Plaintiffs are entitled to get a decree for the five *jotes*.

Upon that point, both the Courts below have come to the conclusion that they are not so entitled because the properties have not been sufficiently specified in the plaint.

The learned pleader for the Appellants has contended that as the prayer was not for actual possession, the description given in the plaint was sufficient as it

(8) L. R. 29 I. A. 1: s. c. I. L. R. 24, All. 84; 6 O. W. N. 169 (1901).

(9) I. L. R. 42 Mad. 523 at p. 536: s. c. 23 C. W. N. 777 (P. C.) (1913).

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would be necessary only to notify to the tenants that the rent was to be paid to the Plaintiffs.

But the land with respect to which the rent is to be paid must be specified in the decree, and the question whether the lands have been sufficiently specified, is a question which we cannot go into in second appeal. The Court of first instance says : " There is no doubt of the fact that the description as given in the schedule is not sufficient for identification of the holding." Then after stating certain reasons, the learned Munsif says : " There is no other description of the *jotes* except by schedule to the plaint. Defendants have therefore raised a valid plea when they say that the suit will fail for want of proper description. The learned Pleader for the Plaintiff argues that Defendant had no difficulty in identifying the lands as the very same description appears in Defendant's documents of title. This argument has no force as before passing the decree the Court ought to be satisfied whether the decree, if passed, will be capable of execution. I could not therefore agree with the learned Pleader for the Plaintiff in leaving the matter open for the Execution Department." The claim with regard to the five *jotes* accordingly was disallowed by the Court of first instance on the ground of indefiniteness. The learned Subordinate Judge also finds that the description as given in the schedule is not sufficient for the identification of the lands. As already stated, the question whether they are or are not sufficient for identification is one for the Court dealing with facts to decide and we cannot go into the question. The claim with regard to the five *jotes*, therefore, must be dismissed.

The last question is whether the Plain-

tiffs are entitled to mesne profits with regard to the shares of the two taluks.

It appears that a claim was made in the plaint for mesne profits and the claim was valued at Rs. 100 but it was disallowed by the Court of first instance on the ground that no evidence had been adduced before it and no application had been made for the hearing of the matter in further proceedings.

We do not see, however, why the claim should not be gone into after the decree. That is what is usually done. Formerly the claim for mesne profits used to be investigated in the Execution Department and now in further proceedings after the decree. The Plaintiffs could not be blamed for not adducing evidence as to the amount of mesne profits before the decree had fixed the period for which the mesne profits would be payable. In these circumstances, if the Plaintiffs get a decree in respect of the taluks, the Court should decide whether the Plaintiffs are entitled to any mesne profits and if so, for what period, the actual amount of the mesne profits being left to be determined in further proceedings.

The result is that the claim with regard to the five *jotes* is dismissed with half costs in all Courts.

With regard to the claim for the two taluks, the case is remanded to the lower Appellate Court to be dealt with in accordance with the observations made above. Costs (one-half) * to abide the result.

P. C.

[CRIMINAL APPELLATE JURISDICTION]

APP. No. 325 OF 1924.

WALMSLEY, J.

MUKERJI, J.

1924,

Heard, 8 and

14, August.

Judgment,

14, August.

A. H. TURNER, Accused,
Appellant,

v.

THE KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), secs. 471/465—Using as genuine a forged document—Sec. 30—Counterfoil of paying-in slip of Bank, if valuable security.

The Appellant was tried and convicted by the Chief Presidency Magistrate of Calcutta under secs. 471/465, I. P. C., in respect of a counterfoil of a paying-in slip purporting to be an acknowledgment of receipt of a sum of money by the Bank:

Held—That the document in question came within the definition of valuable security as laid down in sec. 30, I. P. C., and the case was therefore triable exclusively by the Court of Sessions.

This was an appeal preferred on the 5th June 1924 against the order of the Chief Presidency Magistrate, Calcutta (Mr. T. Ruxburgh), dated 2nd June 1924, convicting the Appellant under secs. 471/465, I. P. C., and under secs. 420/511, I. P. C., and sentencing him to rigorous imprisonment for six months on each count, the sentences to run consecutively.

The facts of the case material to this report will appear from the judgment.

Mr. K. N. Chowdhury and Babus Mritunjoy Chottopadhyaya and Bhupendra Nath Das for the Appellant.

Babu Tarakeswar Pal Chowdhury for the Crown.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—The Appellant was tried by the Chief Presidency Magistrate

of Calcutta on charges under sec. 468, I. P. C., sec. 471, read with sec. 465, I. P. C., and sec. 420, read with sec. 511, I. P. C., or in the alternative under sec. 385, I. P. C. He has been acquitted of the charge under sec. 468, I. P. C., and convicted on the other charges. The learned Magistrate sentenced him to six months' rigorous imprisonment on the charge under sec. 471, read with sec. 465, I. P. C., and to six months' rigorous imprisonment under sec. 420, read with sec. 511, I. P. C., or in the alternative under sec. 385, I. P. C., the two sentences to run consecutively. It is not necessary for us in the present appeal to deal with the facts of the case inasmuch as at the very outset we are met with a difficulty which arises by reason of the fact that the document which the Appellant is said to have used and in consequence of which the charge under sec. 471, read with sec. 465, I. P. C., was framed is really one which is a valuable security within the definition of that expression as contained in sec. 30 of the Indian Penal Code. The document in question is a counterfoil of a 'paying-in slip which purports to be an acknowledgment of receipt of a sum of rupees 55,000 by the Bank at whose instance the proceedings in this case were instituted. It bears the impression of a rubber stamp put upon it by the Bank officials stating that the amount mentioned in the counterfoil had been received by the Bank. On the face of the document, it purports to be an acknowledgment in respect of that amount and, therefore, purports to be an acknowledgment that the Bank is under a legal liability to hold the amount in deposit on behalf of the Appellant and to pay it to him or at his requisition. It does not matter that it is not a stamped document. It is clear therefore that it comes within the definition of valuable

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security as laid down in sec. 30, I. P. C. The case was, therefore, one which was triable exclusively by the Court of Sessions and the learned Magistrate had no jurisdiction to deal with it in the way that he did.

We have been asked by the learned Counsel appearing on behalf of the Appellant to go into the facts in order to determine whether there should or should not be a commitment in this case. Regard being had, however, to the fact that the Appellant was convicted in respect of the offences mentioned above I think that a *prima facie* case has, as a matter of fact, been made out against him and, therefore, we should refrain from going into the merits.

In my opinion, the conviction and sentence passed on the Appellant should be set aside and the case should be sent back to the learned Chief Presidency Magistrate. He will make a proper order committing the case for trial to this Court in the exercise of its Original Criminal Jurisdiction. Pending his trial the Appellant may be released on bail to the satisfaction of the Chief Presidency Magistrate.

WALMSLEY, J.—I agree.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

Full Bench Reference

No. 2 of 1924

IN

M. A. Nos. 199 AND 269 OF 1923.

WALMSLEY, J.

C. O. GHOSE, J.

SUHRAWARDY, J.

B. B. GHOSE, J.

DUVAL, J.

1925,

Heard, 11, May.

Judgment,

15, June.

BIDYADHAR BACHAR and
ors, Appellants,

v.

MANINDRA NATH DAS
and ors, Respondents.

Civil Courts Act (XII of 1887), sec. 19—Munsif, pecuniary limits of jurisdiction of—Suit for possession and mesne profits properly brought in Munsif's Court and decreed—Civil Procedure Code (Act V of 1908), secs. 6 and 15—Or. 20, r. 12, application under, to assess mesne profits pendente lite and after decree, if lies in Munsif's Court where they exceed Munsif's pecuniary jurisdiction—Appeal, forum of, where amount assessed exceeds Rs 5,000.

Per CURIAM (WALMSLEY, J., dissentiente)—Where a suit is properly brought in the Court of a Munsif for recovery of possession of land, and mesne profits pendente lite are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction.

The value of such a suit for purposes of jurisdiction is the value of the immoveable property (plus mesne profits up to the date of the suit where such profits are claimed).

If a suit is rightly entertained as within the jurisdiction of the Munsif and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit.

The forum of appeal is determined

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by the value of the suit and not by the amount decreed.

Per WALMSLEY, J.—Mesne profits pendente lite are not to be considered in determining the value of the suit for purposes of jurisdiction.

A Munsif, upon an application under Or. 20, r. 12 of the Civil Procedure Code, by a person who has recovered a decree for possession in his Court, may pass a decree for mesne profits pendente lite up to the limits of his pecuniary jurisdiction.

Such a person forsakes his right to ask for an enquiry under r. 12 (1) (c) of Or. 20 and the final decree under r. 12 (2), if the amount claimed by him makes a resort to a Court of superior jurisdiction necessary, in which case he must institute a fresh suit subject to the ordinary law of limitation.

This Reference arose out of appeals from Original Orders Nos. 199 and 269 of 1923 preferred against the decision of Babu Pashupati Bose, Subordinate Judge of Khulna, dated the 21st March 1923.

The facts of the case material for the report will fully appear from the ORDER OF REFERENCE which was as follows :—

SUHWARWADY AND DUVAL, JJ.—These two appeals arise out of two suits instituted by the Plaintiffs-Appellants in the Court of the Munsif for recovery of possession of certain lands with mesne profits. An order was passed against the Plaintiff under sec. 145, Criminal Procedure Code, and the suits were instituted on 12th September 1911, for declaration of title. On the 20th February 1914, the suits were decreed. The appeals to the lower Appellate Court were dismissed on 12th June 1915. There were second appeals to this Court by the Defendant, which were also dismissed on the 21st August 1918. In the meantime, i.e., on 2nd December 1915, Plain-

tiff took possession of the decreed lands and after the appeal to this Court was disposed of, on the 27th February 1919, applied to the Court of the Munsif which had passed the decree to ascertain mesne profits from the date of institution of the suit to the date of delivery of possession and to pass a decree for such amount as may be found due on enquiry. The Plaintiff's applications really related to the ascertainment of mesne profits *pendente lite*, for he subsequently gave up his claim for antecedent mesne profits which was very small. In his applications the Plaintiff valued his claim for mesne profits in one case at over Rs. 3,000 and in another case at Rs. 12,000. The amounts claimed being beyond the jurisdiction of the Munsif, he returned them for presentation to the proper Court. The Plaintiff then filed the applications before the Subordinate Judge of Khulna, but the learned Judge following a certain decision of this Court registered the applications as new suits. In an elaborate judgment the Subordinate Judge held that the Munsif had jurisdiction to ascertain the mesne profits and pass a decree for any sum so ascertained, even though it might be beyond his pecuniary jurisdiction. The learned Subordinate Judge held that the proceedings before him could not be considered as continuation of the proceedings in the suit before the Munsif, and therefore the applications must be taken to have initiated fresh suits for the purpose of recovery of mesne profits. In that view he was of opinion that the statute of limitation would apply, whereas if the Munsif was to try the applications, no question of limitation could arise. The learned Subordinate Judge thereupon ordered that the plaints for ascertainment of mesne profits be returned to the Plaintiff's pleader for being filed

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in the Munsif's Court within 30 days for disposal under Or. 20, r. 12, Civil Procedure Code. Against this order the Plaintiff has appealed to this Court and it is argued that the Subordinate Judge has erred in holding that the Munsif's Court was the proper Court for ascertainment of the mesne profits and that the applications before the Subordinate Judge were affected by the law of limitation.

On the first question raised there has been divergence of opinion in this Court, and it is necessary to refer to the authorities briefly. In *Bhupendra Kumar Chakravarti v. Purna Chandra Bose* (1), it was held by Mookerjee and Teunon, JJ., that a Munsif cannot entertain an application for investigation of mesne profits *pendente lite* when the claim is laid at over Rs. 1,000 and that the proper course for him to follow is to direct the return of the plaint, so far as it embodies a prayer for assessment of mesne profits from the date of institution of the suit to the date of delivery of possession, for presentation to the proper Court. A similar view was taken in the case of *Baikuntha Nath Kundu v. Mohananda Baral* (2). The facts of that case are similar to those of the present case. The suit there, as here, was instituted in the Court of the Munsif and subsequently after the final decision by the High Court the Plaintiff applied for ascertainment of mesne profits which he assessed at over Rs. 5,000. The Munsif thereupon returned the plaint for presentation before the Subordinate Judge. On the Defendant raising the plea of limitation, the Subordinate Judge held that under sec. 14 of the Limitation Act the claim was not barred. Against that decision the Defendant appealed to this

Court and the learned Judges decided that the order of the Subordinate Judge was correct in substance, as they were of opinion that the proceedings before the Subordinate Judge were in continuation of the suit before the Munsif and were not affected by the statute of limitation. The question argued in the present cases was not pointedly raised in that case but the learned Judges seem to be of opinion that the procedure followed was correct. A contrary view was taken in *Rameswar Mahton v. Dilu Mahton* (3). There the suit valued at Rs. 950 was brought in the Munsif's Court to recover possession of certain lands and for a decree for such mesne profits from the date of the institution of the suit to the date of the delivery of possession, as might be assessed in execution of the decree. The Munsif made a decree in accordance with the prayer in the plaint. The Plaintiff then asked that the mesne profits might be assessed and in his petition he roughly estimated them at Rs. 1,595. On an appeal the District Judge held that the Court of the Munsif had no authority to determine the amount of mesne profits beyond its pecuniary jurisdiction and that the Plaintiff could not recover more than Rs. 50 as mesne profits being the difference between the limit of the Munsif's jurisdiction and the value of the lands as given in the plaint. On an appeal to this Court Ghose and Rampini, JJ., held that the view taken by the lower Appellate Court was erroneous and that the Munsif had jurisdiction to ascertain the mesne profits and give effect to the order made in his decree in the suit notwithstanding that the amount of such mesne profits added to the value of the suit might come to a sum in excess of the pecuniary jurisdiction of his Court. This case was followed by

(1) I. L. R. 43 Cal. 650 : s. c. 13 O. L. J. 182 (1910).

(2) 24 O. W. N. 342 (1919).

(3) I. L. R. 21 Cal. 550 (1894).

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Brett and Sharfuddin, JJ., in *Pachuram*, v. *Kinu* (4). In that case the amount of mesne profits ascertained by the Munsif was Rs. 1,630 in execution. On an objection taken by the judgment-debtor that the executing Court being a Munsif was not entitled to award mesne profits of a higher amount than Rs. 1,000, it was held that such Court had jurisdiction to award the mesne profits ascertained. The learned Judges tried to distinguish the case of *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (1) on the ground that the amount of mesne profits was ascertained in the case before them in the execution proceedings by a commissioner, but we fail to recognise how the principles of law laid down in these two cases can be reconciled. We are conscious of the alteration in the law made by the Civil Procedure Code of 1908, namely, that under the present Code mesne profits have to be ascertained in the suit whereas in the Code of 1882 the investigation was relegated to the execution department. We do not think that this difference in the procedure materially affects the principles of law underlying these decisions. The latter view has been accepted by the High Court of Madras in the Full Bench case of *Putta Kannyya* v. *Rudra Bhatta* (5) and by the Patna High Court in *Dinanath Sahai* v. *Mussammat Mayawati Kuer* (6). In the last case, much stress has been laid on Or. 20, r. 12, Civil Procedure Code, 1908, which is construed as empowering the Court which passes the decree for recovery of land to make a decree for mesne profits irrespective of the amount being within or beyond its jurisdiction.

(1) I. L. R. 43 Cal. 650: s. c. 13 O. L. J. 132 (1910).

(4) I. L. R. 40 Cal. 56 (1912).

(5) I. L. R. 40 Mad. 1 (1916).

(6) 6 P. L. J. 54 (1921).

We have been unable to reconcile on principle the decisions of this Court in the cases to which we have referred and the result of these conflicting decisions is patent from the opposite courses adopted in this case by the Courts below, the Munsif choosing to follow the case of *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (1) and the Subordinate Judge preferring to follow the case of *Pachuram* v. *Kinu* (4).

There is also apparent conflict of views on the second point raised by the Appellant. In *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (1), the learned Judges ordered that the plaint, in so far as it embodies a claim for mesne profits from the institution of the suit to the delivery of possession, would be returned to the Plaintiff for presentation to the proper Court. In pursuance of this direction the Plaintiff presented the plaint in the Court of the Subordinate Judge. The Defendant took the plea of limitation and the matter came up again to the High Court and was heard by a Bench composed of Mookerjee and Beachcroft, JJ., [*Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (7)]. It was there held that the presentation of the plaint in the Court of the Subordinate Judge was tantamount to institution of a fresh suit which is affected by the law of limitation. A contrary view has been held without discussion in *Baikuntha Nath Kundu* v. *Mohananda Barat* (2).

The question raised in these cases is one of general importance and not infrequently comes up for decision before the Mofussil Courts which in the unsettled

(1) I. L. R. 43 Cal. 650: s. c. 13 O. L. J. 132 (1910).

(2) 24 C. W. N. 842 (1919).

(4) I. L. R. 40 Cal. 56 (1912).

(7) M. A. No. 118 of 1913, decided on 25th February 1914. Unreported.

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state of the law may come to different conclusions, as has been done in the present cases. We, therefore, think it desirable that the law on the points raised should be settled by a Full Bench. We accordingly refer the following questions for the decision of a Full Bench :—

(1) Where a suit is brought in the Court of a Munsif for recovery of possession of land, and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, has the Munsif jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction?

(2) If the above question is answered in the negative, does the presentation of the plaint, so far as it relates to the ascertainment of mesne profits, in the Court of the Subordinate Judge, amount to the institution of a fresh suit which is affected by the law of limitation?

Babu Mukunda Behari Mullick for the Appellants.

Dr. J. N. Kanjilal (with Babu Benode Lal Mukherjee) for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The facts which have given rise to this Reference have been fully set out by the learned Judges who made the Reference. It is only necessary to mention the more important of those facts: They are that the two suits were instituted in the Munsif's Court on 12th September 1911, and decreed on 20th February 1914: and that possession was delivered to the Plaintiffs on 2nd December 1915. The suits were for recovery of possession on declaration of title, and the relief was valued at a sum within the Munsif's pecuniary jurisdiction. After the Defendants had exhausted their rights of appeal without success the Plaintiffs

applied to the Munsif for the ascertainment of mesne profits, claiming Rs. 3,000 in one suit and Rs. 12,000 in the other. The applications as first presented were for mesne profits *ante litem motam* and *pendente lite*, but the former were withdrawn, so that the applications are for mesne profits *pendente lite*, that is to say, for a period a little over four years.

The Munsif held that he had no jurisdiction to entertain the applications. The Subordinate Judge held that the Munsif had jurisdiction, and that in his own Court the applications must be treated as new suits affected by the law of limitation.

The questions referred to us are these :—

(1) Where a suit is brought in the Court of a Munsif for recovery of possession of land, and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, has the Munsif jurisdiction to fix such mesne profits and pass a decree beyond his pecuniary jurisdiction?

(2) If the above question is answered in the negative, does the presentation of the plaint, so far as it relates to the ascertainment of mesne profits, in the Court of the Subordinate Judge, amount to the institution of a fresh suit which is affected by the law of limitation?

It is unfortunate that the learned vakils who appeared before us were agreed in proposing a negative answer to the first question: they have, however, assisted us by placing before us all the leading decisions on the matter.

Act XII of 1887 is the statute which defines the powers of Civil Courts in Bengal. In sec. 19 the jurisdiction of a Munsif is set out in these words, "Save as aforesaid (*i.e.*, otherwise provided by any enactment for the time being in force) the jurisdiction of a Munsif extends

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to all like suits (*i.e.*, originally suits for the time being cognizable by Civil Courts) of which the value does not exceed one thousand rupees." Then follow provisions about the forum of appeal. These rules are supplemented by the Civil Procedure Code, of which the fifteenth section enacts that every suit shall be instituted in the Court of lowest grade competent to try it. The sixth section may also be quoted: "Save in so far as is otherwise expressly provided nothing herein contained shall operate to give any Court jurisdiction over suits, the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

If it were not for the views that have been expressed in various decisions, I should have thought that the problem presented no difficulty. The pecuniary limits of a Munsif's jurisdiction are stated definitely, and there is no suggestion that circumstances may arise which will not merely enlarge those limits but even withdraw them altogether. Moreover the scheme of appeals is complete and coherent if the limitations to a Munsif's jurisdiction are invariable but it becomes full of inconsistencies if the proposition is admitted that the Munsif can in certain circumstances exceed his ordinary pecuniary limits.

In my opinion the Munsif's jurisdiction in dealing with an application for the ascertainment of mesne profits *pendente lite* remains subject to the pecuniary limitations contained in sec. 19 of Act XII of 1887. I should like to add that there is no harshness in this view, for a Plaintiff who values the land for which he sues at less than Rs. 1,000, and the mesne profits derived from it during four years and a quarter at Rs. 12,000 stands self-convicted

of either undervaluing the one or exaggerating the other.

There remains the question whether in determining the question of jurisdiction, the mesne profits *pendente lite* are to be added to the rest of the Plaintiff's claim or treated separately. It is obvious that it is impossible for a Plaintiff to make even an approximate guess at the mesne profits that may accrue before his suit is determined. Further those prospective mesne profits are not part of the cause of action on which his suit is brought. I hold therefore that they are not to be considered in determining the value of the suit, and deciding whether it has been brought before the right Court. If mesne profits *pendente lite* are not to be considered for those purposes it follows, I think, that when they are ascertained, the Munsif will have jurisdiction to pass a decree to the full extent of his pecuniary limits for mesne profits *pendente lite* over and above the decree already passed for the property and mesne profits prior to institution. This view, I think, is in accordance with the provisions of Or. 20, r. 12 which clearly contemplates two decrees. It does not assist the Plaintiffs in these cases, however, and I have mentioned it only to provide against misunderstanding.

My answer to the first question therefore is in the negative.

Next we have to consider what is the result, if a Plaintiff after winning a decree for the land in the Munsif's Court thereafter applies to a higher Court for the ascertainment of mesne profits on the footing that the amount exceeds the Munsif's pecuniary jurisdiction, it appears to me that the question admits of a very simple answer. If a Plaintiff forsakes the Court which passed the original decree for possession, he deliberately gives up his right to ask for the enquiry

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mentioned in sub-cl. (c) of cl. (1) of r. 12 of Or. 20, and the final decree mentioned in cl. (2) and giving up his right to those special forms of relief he must bring a fresh suit, entirely independent of the first suit, and that suit must be liable to the ordinary law of limitation.

My answer to the second question is therefore in the affirmative.

C. C. GHOSE, J.—I have had the advantage of reading the judgment which my learned brother Mr. Justice B. B. Ghose has prepared and I agree with him in the view which he has taken.

SUHWARDY, J.—I also agree in the judgment about to be delivered by my learned brother Mr. Justice B. B. Ghose.

B. B. GHOSE, J.—Two questions have been referred to us by the Divisional Court. The second question arises only if the first is answered in the negative. The first question is therefore the more important of the two. It runs thus :—

“Where a suit is brought in the Court of a Munsif for recovery of possession of land, and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, has the Munsif jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction?”

The facts of the cases which have given rise to the question are fully stated in the Order of Reference and it is unnecessary to recapitulate them here.

It is somewhat to be regretted that we have not received much assistance in this matter from the arguments at the Bar, as both sides agreed in the contention that the first question should be answered in the negative. They only addressed us on the question of limitation with reference to the second question. The agreement, however, of the parties is not deci-

sive of the question, and we have to arrive at our own conclusion.

I do not propose to deal with the several cases having a bearing on the question as there is clearly a divergence of opinion. I shall endeavour to approach the matter with reference to the relevant sections of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887) and sections and rules and orders of the Civil Procedure Code.

Sec. 19 (1) of Act XII of 1887 provides :—“Save as aforesaid, the jurisdiction of a Munsif extends to all like suits of which the value does not exceed one thousand rupees.” For the present purpose it is not necessary to refer to sec. 18 or to sub-sec. (2) of sec. 19 which extends the jurisdiction of some Munsifs to Rs. 2,000 and I shall assume that the jurisdiction of the Munsif is limited to suits of the value of Rs. 1,000. The first inquiry is, what is the value of a suit in which the Plaintiff claims recovery of possession of immoveable property and also asks for mesne profits *pendente lite*? It must obviously be the value of the property. The Plaintiff is not required nor is it possible for him to value even approximately the amount of mesne profits *pendente lite* which must vary according to the period of time the Defendant retains possession of the property. Moreover, the Plaintiff has no right to such mesne profits at the date of suit and he is only allowed such profits in his suit by virtue of a special provision in the Civil Procedure Code. This provision has evidently been made with the object of prevention of a multiplicity of suits. When, therefore, the value of the property is one thousand rupees or less the Plaintiff must bring his suit in the Munsif's Court under the provisions of sec. 15 of the Civil Pro-

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cedure Code, and he cannot resort to a Court of higher grade with reference to any prospective mesne profits. The Munsif has then full jurisdiction to entertain the suit having regard to its value, under sec. 19 of Act XII of 1887. The next question is, whether such jurisdiction is limited or affected in any way by any subsequent event. Under Or. 20, r. 12 (1), cl. (a) of the Civil Procedure Code, the Court may pass a decree in such a suit as this for possession of the property and under cl. (c), a decree directing an enquiry as to mesne profits from the institution of the suit to a specified date which I need not reproduce here. Sub-r. (2) of r. 12 provides that where an inquiry is directed under cl. (c) a final decree in respect of the mesne profits shall be passed in accordance with the result of such inquiry. Where the Munsif has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits, he must, I think, be held to have jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit.

The final decree for mesne profits must therefore be passed for the amount found on enquiry. It seems to me that sec. 19 of Act XII of 1887 and sec. 6 of the Civil Procedure Code have reference to the value of the suit for the purpose of entertaining jurisdiction, and if the value of the suit is in excess of his jurisdiction he cannot entertain it nor pass any decree in the suit. If a suit is rightly entertained as within the jurisdiction of the Munsif and a decree passed, his power to grant the proper and adequate relief is not affected

by any event which increases the value of the relief during the pendency of the suit. To hold that jurisdiction should depend on the amount for which the final decree should be passed would have this effect, that after the Munsif passes a preliminary decree and it is found after accounts taken that the final decree must be for an amount exceeding the pecuniary limit of his jurisdiction, the entire proceedings before him including the decree passed should be considered as being without jurisdiction. It would also lead to many other anomalies apart from the serious question that the Plaintiff would be denied his proper remedy for no fault of his. If the Munsif's jurisdiction to pass a decree is limited to the value of the suit he can entertain, he cannot pass any decree for mesne profits, the amount of which being added to the value of the property would exceed his pecuniary jurisdiction. Thus, where the property was valued at, say Rs. 1,000, the Munsif will not be able to pass a decree for mesne profits for any further amount. I venture to think that it would not be a proper solution to hold that the Munsif could pass a decree for mesne profits for a further sum of Rs. 1,000 for although there must be two decrees in such a case, there is only one suit, and the Munsif would then have power to pass a decree of the value of Rs. 2,000 in the same suit. Moreover, if the amount of the mesne profits were taken into account in determining the value of the suit and the Munsif's jurisdiction, then, in the case I have stated, he should be considered to have no jurisdiction to entertain the suit or pass any decree, and therefore the decree for possession as well as the preliminary decree for mesne profits should be held to have been passed without jurisdiction. This result however cannot at all be contemplated.

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Nor can it be said that the Plaintiff must be considered to have abandoned a part of his claim by bringing his suit in a Court of limited jurisdiction. I have already shown that the Plaintiff had no option in the matter and he had no right to bring his suit in a Court of higher grade with reference to prospective mesne profits, and it would be manifestly wrong not to allow him a decree for what he would be entitled to. The Court must have jurisdiction either to grant the relief a party is entitled to, or not, and in the latter case it must stay its hand and cannot grant only a partial relief by assuming jurisdiction. I am therefore of opinion that if a suit is rightly entertained by a Munsif he has the power to pass a decree for the proper relief even where the amount of the decree exceeds the value of the suit and his pecuniary jurisdiction.

Several instances may be cited where the decree of the Munsif may exceed the limit of his pecuniary jurisdiction as to the value of the suit he may entertain. A suit on a mortgage, where the mortgage money does not exceed Rs. 1,000 at the date of suit must be brought in the Munsif's Court. He passes a decree for subsequent interest from the date of suit until realization at the bond rate. The amount due on taking accounts may be found to exceed Rs. 1,000. I do not think that it has ever been doubted that the Munsif could pass a final decree for the amount due to the Plaintiff on taking such accounts. Again, where a successful party seeks for relief by way of restitution he is prevented from bringing a suit under sec. 144 (2) of the Civil Procedure Code. But the costs, interest, damages, compensation and mesne profits allowed under sec. 144 (1) may well be conceived to exceed Rs. 1,000 and it can hardly be held that the relief must be restricted to that

amount, being the pecuniary limits of the jurisdiction of the Munsif. Such instances may be multiplied.

The only difficulty suggested in accepting the view I have stated is with regard to the forum of appeal if the Munsif passes a decree exceeding Rs. 5,000. An appeal from the decree of a Munsif lies in all cases under sec. 21 (2) of Act XII of 1887 to the District Judge. But where the value of the original suit exceeds Rs. 5,000 the appeal from a decree of the Subordinate Judge lies to the High Court. The forum of appeal is determined with reference to the value of the suit, and not the amount decreed. It may be that the legislature did not contemplate the circumstance that a decree by a Munsif might exceed Rs. 5,000 in value. But I do not think that the determination of the forum of appeal affects the question before us. For practical purposes this is negligible, as the instances where the Munsif would pass a decree for mesne profits exceeding Rs. 5,000, much in excess of the capitalized value of the property, must be very rare.

I have refrained from making any allusion to the fact of Plaintiff's claiming mesne profits in his application for an inquiry at a figure in excess of the Munsif's pecuniary jurisdiction. I consider the matter to be entirely irrelevant as the Plaintiff is neither required nor bound to state any amount in his application. The figure stated in his application need not be taken into consideration at all in this connection. The application is not a plaint, and the contention of both parties that the plaint should be returned for presentation to a higher Court, as was held in some of the decided cases, cannot be accepted for the reason that a preliminary decree has already been passed in the case by the

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Munsif on the original plaint, and the only thing that remains to be done is to give effect to the preliminary decree by a final decree. There is no provision in the law for the return of a plaint after a preliminary decree has been passed. To direct one suit to be converted into two suits would also cause the mischief which Or. 20, r. 12 of the Code seeks to prevent.

On the grounds stated I would answer the first question in the affirmative. The second question does not therefore arise.

DUVAL, J.—I agree with the judgment and conclusions of my learned brother Mr. Justice B. B. Ghose and wish only to add a few observations. In the absence of any rules to the contrary—rules which the Bengal Government is competent to make under sec. 3 (1) of the Suits Valuation Act—a suit for recovery of *khas* possession of immoveable property must be valued for the purpose of jurisdiction under sec. 7 (v), (a)—(e) or sec. 7 (xi) (cc) of the Court Fees Act. The valuations may be, and in Bengal usually is, the market value of the property but it is not necessarily so; and in cases falling under sub-cl. (v) (a) to (c) and (xi) (cc) may be far less. But whatever may be the actual annual income of the property, a Plaintiff cannot value his suit for jurisdictions at a higher value than is allowable by law, *i.e.*, the value of the land as calculated under sec. 7 of the Court Fees Act plus the value of mesne profits claimed up to the date of the institution of the suit. He cannot value subsequent mesne profits in advance as he cannot tell when he will get his decree or when he will recover possession. The Plaintiff must then bring his suit in the Munsif's Court if its valuation does not exceed one thousand rupees. In my opinion once the Court of the Munsif has

jurisdiction to entertain a suit it must also have jurisdiction to give all the reliefs in that suit (including mesne profits and interest accruing after decree) which the law allows. Thus in a suit for money, sec. 34 of the Code provides that the Court may decree interest up to the date of realization and I do not think that it has ever been disputed that a Munsif can give a decree for Rs. 1,000 with costs and interest in addition, *i.e.*, his jurisdiction is not limited in passing his decree to Rs. 1,000 only. My learned brother has referred to a similar position in regard to mortgage suits.

It appears to me that Or. 20, r. 12 of the Code, taken as a whole and not split up into parts can only be interpreted to mean that the Court which has jurisdiction in the suit has power to give all the reliefs specified in that rule, independent of what in the first instance is its pecuniary jurisdiction for entertaining the suit, and the fact that mesne profits, subsequent to the decree, of over Rs. 1,000 are claimed can make no difference.

Nor do I find anything in the Bengal, Agra and Assam Civil Courts Act against this view. That Act limits the jurisdiction (usually) of Munsifs to suits of the value of Rs. 1,000, all suits above that value being triable by the Subordinate Judges. The District Judges hear all first appeals from decisions of Munsifs and certain first appeals from the decisions of Subordinate Judges, the High Court hearing other first appeals from the latter. But the respective jurisdictions of the High Courts, the District Judges, the Subordinate Judges and the Munsifs are determined not by the value of the decree, but by the value of the suit, and that value to my mind can only

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be the value of the suit as defined in the Suits Valuation Act read with the Court Fees Act. Both sec. 19 and sec. 21 of the Bengal, Agra and Assam Civil Courts Act speak only of the value of the suit and not of the value of the decree—a value made up of what the Court finds due out of the claim and what under the Code of Civil Procedure are legal additions thereto, *c.g.*, costs, pleaders' fees and other subsequent reliefs such as mesne profits allowed by it.

Per CURIAM.—As the appeals out of which this reference has arisen are appeals from original orders they are remitted to the Division Court to be disposed of in accordance with the opinion of the majority of this Bench. That Court will also pass orders as to the costs of the hearing before this Bench.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 18 of 1925.*

SANDERSON, C. J.

RANKIN, J.

1925,

Heard, 19 and

24, March.

Judgment,

6, April.

In the goods of
BHUBANESWAR

TRIGUNAIT, deceased,

MUKTESWAR TRIGUNAIT,
and ors., Appellants.

Letters of Administration, duty on, on the Original Side—Court Fees Act (VII of 1870), secs. 5, 19 (D) and 19 (I)—Item No. 4 in Annexure B, Sch. III—Exemption from ad valorem duty of the estate of a deceased Hindu governed by the Mitakshara law—Taxing Officer's decision, when final.

A Hindu father and his brother and two sons lived together in a joint Mitakshara family. The father died intestate leaving certain money in a Bank. The brother and the two sons applied for Letters of Administration with a certi-

ficate from the Registrar who as the Taxing Officer (under r. 4 of Chap. XXXV of the Rules and Orders of the Calcutta High Court) certified the exemption of the court-fees as "the property was held in trust not beneficially or with general power to confer a beneficial interest." On reference to GHOSE, J., exemption was refused, but on appeal:

Held—That the decision of the Taxing Officer under r. 4 of Chap. XXXV is final by virtue of sec. 5 of the Court Fees Act. It cannot be reviewed under sec. 19 (I).

The jurisdiction of the Taxing Officer does not arise upon a difference of opinion between an Office clerk and a suitor and upon some sort of a formal reference to decide that dispute. It is enough that the Taxing Officer has brought his mind to bear on the question and has decided it.

IN THE GOODS OF OMDA BIBEE (1), KASTURI GHETTI v. DEPUTY COLLECTOR, BELLARY (2) and IN THE GOODS OF POKURMUL AUGURWALLAH (3) referred to.

This was an appeal against the order of Ghosh, J., dismissing the application of Mukteswar, Sarat Chandra and Kalipoda Trigunait for Letters of Administration on the ground that they did not comply with sec. 19 (I) of the Court Fees Act.

The deceased, being a *karta* of a family governed by the Mitakshara school of Hindu law, died intestate on 22nd August 1924, leaving Mukteswar, his undivided younger brother, and two sons Sarat Chandra and Kalipoda. They were all members of a joint Mitakshara family. The deceased (during his life-time) and Mukteswar received rupees two lacs

(1) I. L. R. 26 Cal. 407 (1899).

(2) I. L. R. 21 Mad. 269 (1898).

(3) I. L. R. 23 Cal. 980 (1896).

* The case appears in 29 C. W. N. 372.

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from the Receiver in a Purulia suit representing bonus in respect of a joint ancestral colliery and the deceased paid the sum to the Allahabad Bank. There was a balance in the Bank, the Bank refused to pay the same, unless Letters of Administration or a succession certificate was obtained by the heirs. The deceased was the sole trustee of the said sum standing to the credit of the current account in the Allahabad Bank.

The Appellants Trigunait applied for Letters of Administration, in order to collect the said sum from the said Bank, claiming exemption from the payment of any duty as it was "held in trust not beneficially or with general power to confer a beneficial interest." The Appellants before filing their petition obtained a certificate from the Registrar who, as the Taxing Officer, (under r. 4 of Chap. XXXV of the Rules and Orders of the Calcutta High Court) exempted them from paying the *ad valorem* duty as "the property was held by the deceased in his lifetime in trust not beneficially or with general power to confer a beneficial interest."

Mr. S. C. Bose on behalf of the Appellants argued that the money in the Bank was held by the deceased as trustee for the coparceners. They were all members of a joint Mitakshara family, no share was defined and accordingly no duty was payable, being property held in trust not beneficially or with general power to confer a beneficial interest. Cited *Keshar-lal v. Collector of Ahmedabad* (17) and *Collector of Kaira v. Chunilal* (15).

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—This is an appeal from an order dated 2nd February 1925 by which

(15) 1. L. R. 29 Bom. 161 (1904).

(17) 1. L. R. 48 Bom. 75 at pp. 82, 85 (1923).

an application for Letters of Administration has been dismissed. The deceased Bhubaneswar Trigunait, a Hindu governed by the Mitakshara school of Hindu law, died intestate on the 22nd August 1924. The applicants are his younger brother and his two sons. The deceased at the time of his death was a member and the *karta* of a joint Hindu family consisting of himself and the present applicants. In May 1924 a sum exceeding two lacs of rupees was received in respect of a joint ancestral colliery and the deceased opened a current account in his own individual name with the Calcutta branch of the Allahabad Bank, Limited, and paid the said sum to the credit of that account. At the date of his death there was a sum of Rs. 39,261 at credit in the said account.

The applicants allege that the Bank have refused to pay this sum unless Letters of Administration or a succession certificate are obtained, on the ground that the money is payable to the legal representative of their customer.

They accordingly apply for a grant of Letters of Administration limited to this particular asset. They base their claim on the view that the deceased was a sole trustee and they maintain that no sum is payable under Act II of the First Schedule of the Court Fees Act. The affidavit of assets or valuation of the property in the form set forth by Sch. III of the said Act is made out as follows : *viz.*, the only asset entered in Annexure A is the sum of Rs. 39,261 already mentioned and in Annexure B this sum is entered as an item which the applicants are by law allowed to deduct as being "property held in trust not beneficially or with general power to confer a beneficial interest."

This affidavit of assets having been

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sworn on the 19th January 1925, the applicants on the 21st January 1925 obtained a certificate from Mr. Maurice Remfry as Taxing Officer within the meaning of sec. 5 of the Court Fees Act, 1870, to the effect that "the fee prescribed by Art. 11 of Sch. I is not payable in this case, it appearing from the affidavit that the property mentioned therein was held by the deceased in his life-time not beneficially or with general power to confer a beneficial interest."

When the application for the grant was laid before the Judge in chambers in the ordinary course of non-contentious business his attention was very properly drawn by the officer acting as Registrar to the terms of sec. 19 (1) of the Court Fees Act and to the question whether the *ad valorem* fee is legally payable. The learned Judge dismissed the application for a grant of letters, being of opinion that a fee under Art. 11 of Sch. I was chargeable.

On this appeal the first question which arises is a question of procedure. For the sake of brevity the *ad valorem* fee prescribed by Art. 11 of Sch. I of the Court Fees Act may be referred to as probate duty. Chap. II of the Court Fees Act consists of three sections only (3-5) and deals with High Courts and Presidency Small Cause Courts. Sec. 3 provides that in High Courts the fees levied under sec. 107, cl. (e) of the Government of India Act and certain other fees are to be collected in a certain manner detailed in Chap. V. Among the other fees express mention is made of probate duty (No. 11 of Sch. I) and of the fixed fee leviable on caveats (No. 12 of Sch. II). No doubt has at any time been felt either in this Court or in Bombay that sec. 5 applies to probate duty [see note (a)]. That section assumes that a Court collecting

fees will have some officer or Court clerk whose duty it is to see that the fees in any particular case are paid. It provides that if a difference arises between such officer and any suitor or attorney as to the necessity of paying any fee or the amount thereof the question shall be referred (in a High Court) to the Taxing Officer, *i.e.*, to the officer appointed by the Chief Justice in that behalf. The Taxing Officer is to do one of two things.

He is to make up his mind whether the question is one of general importance. If he thinks it is, he is to refer it to the Chief Justice, or a Judge appointed by the Chief Justice for final decision. If he does not think it is, he is to decide it himself and his decision is to be final. Bearing in mind that probate duty is thus put upon the same footing in a High Court as ordinary court-fees (levied in this Court under Chap. XXXVI of Original Side Rules), one may ask what is to happen if no difference arises between the suitor and the Court clerk with the result that sec. 5 does not come into play. In the case of ordinary court-fees sec. 28 invalidates the document if not properly stamped but provides for an opportunity to be given in proper cases to remedy the defect. Sec. 28, however, does not apply to probate duty (sec. 19-K) since it would be highly impracticable to make the validity of testamentary grants depend on questions as to the sufficiency of the stamp. By sec. 19-H notice of every application for probate or Letters of Administration has to be given to the chief controlling revenue authority and means are provided whereby the revenue authorities may check valuations and recover the proper fees. Sec. 19-I under which the learned Judge in this case has purported to act, means that an order for a grant shall not be made until payment of the duty.

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The applicant must have filed what the section calls a "valuation of the property in the form set forth in the Third Schedule." The Court is not required to satisfy itself that the "valuation" is correct but only that the fee mentioned in No. 11 of the First Schedule has been paid "on such valuation." The question is (1) whether sec. 19-I imposes on the Court a duty to see that deductions entered in Annexure B are rightly so entered. If so, a further question arises in a High Court, namely, (2) whether this duty is to be discharged independently of sec. 5.

Now *In the goods of Omda Bibee* (1) an application was made to Sale, J., for a testamentary grant with a claim to complete exemption from duty. As no certificate from the Taxing Officer was produced, that learned Judge after citing the provision made by sec. 5 and the provision for notice to the chief controlling revenue authority returned the petition to the applicant in order that it might be re-submitted with a certificate from the Taxing Officer. By r. 4 of Chap. XXXV every application for a grant has now to be accompanied by a certificate of the Registrar as to duty having been paid or a certificate of the Taxing Officer that no duty is payable. Now apart from sec. 5 of the Court Fees Act, it does not appear that there is such a person as a Taxing Officer nor does it appear that the Taxing Officer has as such any duties save those imposed by sec. 5 or duties incidental thereto. It would appear that in a matter so important as a claim to exemption from probate duty the ordinary Court clerk or officer whose duty it is to see that court-fees are paid is not authorised in this Court to allow such claims on his own responsibility and that all such

claims are required to be queried and referred to the Taxing Officer. I think this involves that the Taxing Officer's decision is a final decision under sec. 5 and that in this case the learned Judge had no authority to review it under sec. 19-I. Having regard to the purpose and subject-matter of the section it would be in the least degree unreasonable to regard the Taxing Officer as a person whose jurisdiction arises solely upon a difference between the Court's officer and the suitor. At this stage there is only one party; the Court's officer is not a party. The section is not intended to confer on suitors or attorneys a right to take first the opinion of the Court clerk as though he were a judicial officer and a right that the matter shall go no further at that stage if that opinion is in their favour. If it did mean this then no doubt r. 4 of Chap. XXXV would conflict with this intention and in testamentary matters would impose upon the Taxing Officer duties which are not imposed upon him by the Act. The rule however is quite in harmony with the true meaning of the section and with correct practice thereunder. It appears to have been made in 1912-13, when it crystallized the practice, which may be traced back doubtless to the judgment of Sale, J., already cited, which called attention to the matter.

In the case of *Kasturi Chetti v. Deputy Collector, Bellary* (2), there appears to have been an insufficient stamp and it does not appear that the matter had, at any time, come before the Taxing Officer for his consideration. The judgment in that case contained the following observations: "In the present case there was no such difference or reference, nor was there any decision by the Taxing Officer

(1) 1. L. R. 26 Cal. 407 (1889).

(2) 1. L. R. 21 Mad. 269 (1898).

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except such as might be implied from the admission of the appeal. That, in our opinion, is not such a 'decision' as the section requires. We think that, unless the question was raised before the Taxing Officer and unless he brought his mind to bear on the question and decided it, sec. 5 of the Court Fees Act had no application." Speaking for myself I entirely agree with the test laid down in the last sentence which I have cited from the judgment, but I entirely disagree with the proposition that the jurisdiction of the Taxing Officer arises like the jurisdiction of an arbitrator upon a difference of opinion between a Court clerk and a suitor and upon some sort of formal reference to decide that dispute. For the reasons I have already given I consider that the test ultimately arrived at in that case was correct, and that the intention of sec. 5 is merely to ensure, as the learned Judges of the Madras Court held, that the question should be raised before the Taxing Officer, that he should bring his mind to bear on the question and that he should decide it. He could not decide it finally against a suitor without hearing him.

In my opinion the decision of the Taxing Officer under r. 4 of Chap. XXXV is final by virtue of sec. 5 of the Act. Probate duty being treated in the same manner as any other court-fee a suitor who satisfies the Taxing Officer satisfies the revenue—at least for the time being. It is not necessary to consider here whether his decision hampers the Collector in claiming more money under sec. 19-H. On the other hand, if the suitor does not satisfy the Taxing Officer he must either pay or persuade the Taxing Officer that the question is one of general importance, so as to entitle the suitor to the decision of the Chief Justice or

other Judge. The object of the Act is to secure payment prior to litigation and to afford as little scope as possible for litigation over the payment. In the High Court, sec. 19-I which applies to all Courts invested with testamentary jurisdiction, must be applied with reference to sec. 5. In this High Court questions as to the necessity of paying probate duty or as to the amount thereof cannot arise independently of sec. 5.

On this appeal we thought it necessary to order notice to the Government solicitor and Mr. Advocate-General appeared and argued the matter on its merits. Upon fuller consideration it appears to me that one of the main objects of sec. 5 and of other provisions of the Court Fees Act is to obviate the necessity of an appearance by the revenue authorities prior to the issue of a grant.

Several questions of difficulty and importance arise upon the merits of the present application. Notwithstanding the decision *In the goods of Pokurmul Augurwallah* (3) upon a reference by the Taxing Officer under sec. 5 of the Act, it will be for the Taxing Officer in any future case similar to the present to consider whether in view of the difficulties and divergence of opinion disclosed by subsequent decisions of other Courts [see note (b)] he should refer it to the Chief Justice. There has been and there is likely to be a continuous increase in the number of cases in which shares, Government securities and Bank accounts belonging to Mitakshara joint families stand in the name of one member. It is plain that further provision by the legislature is imperatively required to solve the difficulties which arise in making title to such property upon the death of the holder. Decisions given upon re-

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ferences made under sec. 5 of the Act or in appeals from District Courts acting under sec. 19—I, cannot be expected to put this important matter on a proper basis.

Note (a).

In the goods of Gladstone (4), *In re Gasper* (5), *In the goods of Murch* (6), *In the goods of Froeschman* (7), *In the goods of Abdool Aziz* (8), *In the goods of Pokurmul Augurwallah* (3), *In the goods of Ram Chunder Ghose* (9), *In re Ezekiel Joshua Abraham* (10), *In the goods of Sir Albert A. D. Sasson* (11). See also *In the goods of Manavalla Chetty* (12).

Note (b).

Bank of Bombay v. Ambalal Sarabhai (13), *Collector of Ahmedabad v. Sarchand* (14), *Collector of Kaira v. Chunilal* (15), *In the goods of Manavalla Chetty* (12), *Kashinath v. Gouravabai* (16) and *Kesharlal v. Collector of Ahmedabad* (17).

SANDERSON, C. J.—I agree.

It is to be noted that the case of *In the goods of Pokurmul Augurwallah* (3) apparently was not argued before the learned Judges who decided it, and it may be that the points, which were raised on the merits in this case, were not brought to the notice of the Court. In view of the decision at which we have arrived upon

the question of procedure, it is not necessary for the Court to express any opinion as to the correctness of the above-mentioned decision.

I agree with my learned brother that it is eminently desirable that the matter should be dealt with by the legislature not only because of the various decisions of the Courts with respect thereto, but also because of the importance of the matter to members of joint Mitakshara families.

We, therefore, direct that a copy of our judgment be sent to the Government of India.

The result of our decision is that the appeal is allowed, and we direct that Letters of Administration do issue as prayed. We make no order as to costs.

Mr. J. N. Mitra, Solicitor for the Appellants.

P. D.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 40 OF 1925.

GREAVES, J.	}	KHEMKARANDAS
B. B. GHOSE, J.		KHEMKA
1925,		v.
13, July.		HURIBUX FATEHPUNIA.

Appeal against order of adjudication—Notice on the Official Assignee—English practice followed.

In appeals against an order of adjudication notice of the appeal should be served on the Official Assignee.

IN RE WEBBER v. EX PARTE WEBBER (1)
followed.

The facts of the case will appear from the judgment.

Messrs. J. N. Mazumder and I. P. Mukherji for the Appellant.

Mr. K. P. Khaitan for the Respondent.

- (3) I. L. R. 23 Cal. 980 (1896).
- (4) I. L. R. 1 Cal. 168 (1876).
- (5) I. L. R. 3 Cal. 736 (1878).
- (6) I. L. R. 4 Cal. 725 (1879).
- (7) I. L. R. 20 Cal. 575 (1893).
- (8) I. L. R. 23 Cal. 577 (1896).
- (9) I. L. R. 24 Cal. 567 (1897).
- (10) I. L. R. 21 Bom. 139 (1896).
- (11) I. L. R. 21 Bom. 678 (1897).
- (12) I. L. R. 33 Mad. 93, 95 (1909).
- (13) I. L. R. 24 Bom. 350 (1900).
- (14) I. L. R. 27 Bom. 140 (1902).
- (15) I. L. R. 29 Bom. 161 (1904).
- (16) I. L. R. 39 Bom. 245 (1914).
- (17) I. L. R. 48 Bom. 75 (1923).

KHEMKARANDAS KHEMKA v. HURIBUX PATEHPUNIA.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against an order of adjudication passed on the 17th March 1925 at the instance of a creditor.

A preliminary point has been taken by the creditor on the appeal that the appeal cannot proceed as the Official Assignee has neither been made a party to the appeal nor served with notice of the appeal. We were referred in support of this to the case of *In re Webber v. Ex parte Webber* (1). The head-note runs as follows: "Notice of an appeal against a receiving order, whether to a Division Court in Bankruptcy or to the Court of appeal, must in every case, whether proceedings under the order have or have not been stayed be served on the Official Receiver within the time limited by the rules for service on the petitioning creditor." In that case in the Division Court the learned Judges held that the preliminary objection taken against the appeal on the ground of non-service of notice on the Official Receiver must prevail. Against that order an appeal was preferred to the Appeal Court and Lord Justice Lindley points out the danger of collusive applications to discharge receiving orders unless the Official Assignee were served. It seems to me that similar considerations apply in this country and we think that it is necessary and desirable that in appeals against an order of adjudication notice of the appeal should be served on the Official Assignee. It is true that there is no provision in the Presidency Towns Insolvency Act, so far as I can discover, nor in the rule framed under the Act, which makes such service obligatory; but it seems to me that on general principles such a notice should be given. Apparently, the ground of neces-

sity for such service in England is based on the rules and practice of the Supreme Court, Or. 58, r. 2, which provides that notice of appeal should be served upon all parties directly affected by the appeal and in the notes to that order in the Annual Practice for 1925 at p. 1134 it is stated that notice of appeal from the refusal to annul an adjudication in bankruptcy or against a receiving order must be served on the trustee as well as on the petitioning creditor. There is no provision in the Civil Procedure Code in this country which is identical with the provisions of Or. 58, r. (2) of the Rules of the Supreme Court in England, but we think, as we have already stated, that on general grounds it is necessary that notice should be given to the Official Assignee and we accordingly direct that this matter do stand over for one week in order that notice of the appeal may be served on the Official Assignee. When the Official Assignee has been served it will be for him to decide whether his presence is necessary at the hearing of the appeal.

An objection was made that the time for appealing had expired as the necessary time in which to appeal from the adjudication order had long since expired. But it is open to us in our discretion to extend the time, if necessary, and if such an order is necessary, which is not so in the present case as the Official Assignee was not a party to the petition on which the adjudication order was made, this is eminently a case, having regard to the doubts which have been raised as to the practice, in which we should exercise that power.

The question of costs will be dealt with when the appeal will be heard a week hence.

Mr. H. C. Banerji, Solicitor for the Appellant.

(1) L. R. 24 Q. B. D. 313.

KHEMKARANDAS KHEMKA v. HURIBUX FATEHPUNIA.

Messrs. Khaitan & Co., Solicitors for
the Respondent.
S. N. B.

The facts of the case will sufficiently
appear from the judgment.

Babu Jitendra Kumar Sen Gupta for
the Appellant.

Babus Sarat Chandra Ray Choudhury
and Santi Kumar Ray Choudhury for the
Respondent.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 313 of 1923.

<p>SUHRAWARDY, J. CUMING, J. 1924, Heard, 3 and 4, December. Judgment, 15, December.</p>	}	<p>T. WANG, Decree-holder, Appellant, v. SONA WANGDI, Judgment-debtor, Respondent.</p>
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Civil Procedure Code (Act V of 1908), Sch. II, paras. 1, 15, 16—Execution proceedings, arbitration in—Validity—Objection that proceeding ultra vires overruled by Court—Order, if conclusive.

The Second Schedule of the Code of Civil Procedure does not apply to execution proceedings.

Where a judgment-debtor having claimed to have satisfied the decree by payment out of Court, the executing Court before which the question was raised, with the consent of the parties, referred the question to arbitration which resulted in an award:

Held—That the reference to arbitration was without jurisdiction and ultra vires of the executing Court, and the award in consequence was illegal and unenforceable.

Paras. 15 and 16 of Sch. II of the Code presuppose a valid reference under para. 1 of the Schedule.

The order of the Court overruling the objection as to jurisdiction was therefore not conclusive under those paragraphs.

This was an appeal against the order of C. Baitley, Esq., District Judge of Zillah Darjeeling, dated the 18th of June 1923, affirming the order of Babu N. K. Roy, Subordinate Judge of Darjeeling, dated the 30th of November 1922.

The JUDGMENT OF THE COURT was as follows :—

This appeal raises an interesting question of law, which, so far as we are aware, is not covered by authority. In execution of a money decree obtained by the Appellant against the Respondent, the Respondent contended that the decree had been fully satisfied out of Court and that the Appellant practising fraud on the Respondent did not certify payment in Court. The Appellant contended that the uncertified payment could not be enquired into under Or. 21, r. 2, C. P. C., but the learned Subordinate Judge in the execution Court decided to investigate the allegation of fraud. After he had examined several witnesses, the parties filed an application referring the dispute about payment to two arbitrators and an umpire. The case was thereupon referred to the arbitrators who by their award found a much lesser amount due to the Appellant than he was claiming in execution. Various objections to the legality of the award were raised by the Appellant which were overruled by the Subordinate Judge. The concluding portion of the learned Subordinate Judge's judgment is in these words :—
“ The application of the decree-holder to set aside the award is therefore rejected, the suit is consequently decreed in terms of the award with proportionate costs.”
The meaning of the last clause is not sufficiently clear but it appears that the learned Subordinate Judge was of opinion

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that a proceeding under sec. 47, C. P. C., followed as it is by a judgment is a suit which was decided in accordance with the award. Against this decision the Appellant decree-holder appealed to the District Judge of Darjeeling who held that no appeal lay to him under sec. 16, Sch. II, C. P. C.

The decree-holder has preferred this second appeal on the ground, among others, that the learned District Judge is wrong in holding that no appeal lay to him. A preliminary objection is raised to the competency of this appeal on the ground that as no appeal lay to the Court of appeal below, no second appeal lies to this Court. The preliminary objection really begs the question in this case which is the determination of the nature of the proceedings in the execution Court.

It is contended by the Appellant that the reference to arbitration was invalid in law inasmuch as there was no dispute between the parties within sec. 1, Sch. II, C. P. C., because the Court could not take notice of uncertified payments alleged by the judgment-debtor. There is no force in this argument. Whether or not the Court can legally enquire into it, any question on which the parties join issue is a dispute within the meaning of that section.

The next point urged is one of substance and deserves careful consideration. It is argued that the Second Schedule of the Code of Civil Procedure does not apply to execution proceedings and therefore the reference to arbitration was without jurisdiction and *ultra vires* of the executing Court: the award is accordingly illegal and unenforceable. In our judgment this contention is right and ought to prevail. Sec. 1 of the Second Schedule empowers reference to arbitration of a dispute between parties to a

suit. Sec. 16 provides that a decree should follow the award. The decree must be a decree as is passed in a suit and capable of execution and not merely a judgment as the learned Subordinate Judge seems to think, for by that section the decree is made appealable as a decree where it is not in conformity with the award. It is admitted that all the provisions of the Code of Civil Procedure relating to suits are not applicable in execution proceedings. Or. 9 [*Hari Charan v. Manmotha* (1) and *Bepin Behary Shaha v. Abdul Barik* (2)], Or. 17 [*Tirthasami v. Annappayya* (3)], Or. 22, r. (12), Or. 23, r. (4), and of course such other orders that deal with parties to suits or pleadings do not apply to execution of decree. Nothing has been shown to us to persuade us to hold that there is any speciality in the Second Schedule which makes it applicable to questions arising in the execution of decrees. Sec. 141, C. P. C., is more an authority for the view we take and does not lend countenance to the contention of the Respondent. As has been explained in *Hari Charan v. Manmotha* (1), the law is the same as it was under sec. 647 of the Code of 1882 which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that the special procedures in suits do not apply to execution of decrees is based on the supposition that Or. 21, relating to execution, is self-contained and exhaustive as to the special subject with which it deals.

But the learned Vakil for the Respon-

(1) 1, L. R. 41 Cal. 1: s. c. 18 C. W. N. 343 (1913).

(2) 1, L. R. 44 Cal. 950: s. c. 21 C. W. N. 30 (1916).

(3) 1, L. R. 18 Mad. 131 (1894).

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dent maintains that an order passed under sec. 47, C. P. C., is a decree under sec. 2 and therefore a proceeding under sec. 47 is a suit. This contention is untenable as a proceeding under sec. 47 comes into being after the termination of the suit and in course of execution of the decree which concludes the suit. The second clause of sec. 47 clearly indicates that the proceeding under that section is distinct from a suit.

It is next argued for the Respondent that the execution Court having jurisdiction over the proceeding under sec. 47, the reference to arbitration was not without jurisdiction. We have not been able to follow the reasoning, for the Appellant's objection is directed against the jurisdiction of the execution Court in following a procedure not warranted by law.

It is further argued that the objection with regard to the illegality of the award must be taken to have been made under sec. 15, cl. (c) of the Second Schedule as an award "being otherwise invalid" and even if the reference was without jurisdiction the Appellant's objection having been overruled and the award confirmed, no appeal lay to the lower Appellate Court from the order of the first Court. The answer to this contention is simple. Sec. 15 and sec. 16 of the Second Schedule depend for their operation on a valid reference under sec. 1 of the Schedule. The reference to arbitration by the executing Court being without jurisdiction must be totally ignored and the question that is left for consideration is one relating to the satisfaction and discharge of the decree under sec. 47, C. P. C. The appeal to the lower Appellate Court and a second appeal to this Court are therefore competent.

It is faintly suggested that the Appellant

being a party to the submission to arbitration he should not in equity be allowed to question the validity of the proceedings initiated at his instance. It is also submitted that the Court having jurisdiction over the subject of the litigation, parties can by consent invest it with power to do something not strictly within its jurisdiction. It is an elementary principle of law that parties by consent cannot confer jurisdiction where it does not exist. In *Girijanath Roy Chowdhury v. Kanai Lal Mitra* (4) and *Seth Dooly Chand v. Mamuji Musaji* (5) one of the parties to the submission was permitted to successfully question the validity of an award on the ground that all the parties to the suit had not joined in the reference. These decisions afford complete answer to the other contentions raised by the Respondent.

We are not called upon in this case to consider the question of the validity of an award on a reference to arbitration without the intervention of Court by way of adjustment of the decree under Or. 21, r. 2.

Though we look upon the conduct of the Appellant with disapproval we are constrained in the view we take of the law to uphold his contention that the execution Court had no jurisdiction to refer the dispute between the parties to arbitration under the Second Schedule of the Civil Procedure Code. In this view we are of opinion that an appeal lay to the lower Appellate Court from the order of the first Court giving effect to the award but it is not necessary to remit the case to the Court of appeal below for a re-hearing of the appeal as we have by our judgment decided the sole question raised in that Court.

(4) 27 C. L. J. 889 (1917).

(5) 25 C. L. J. 839 (1916).

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In the result the appeal is allowed and the order of the execution Court upholding the award set aside. The case will be sent back to that Court with a direction to proceed with the execution according to law. We make no order as to costs of this appeal; the order relating to costs passed by the Courts below will stand.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 920 OF 1922.

GREAVES, J.
CHAKRAVARTI, J.
1924,

Heard, 30, July

Judgment,

7, August.

PRAN MOHAN DAS
and ors, Defendants,
Appellants,

v.

HARI MOHAN DAS,
Plaintiff, Respondent.

Antenuptial promise followed by marriage, if ripens into contract which is valid and binding.

Prior to his daughter's marriage the Plaintiff promised to make a gift of a certain house to his daughter and this brought about her marriage, whereupon she was put in possession of the house which she and her husband occupied for a considerable time until the sale of the house by her. The Plaintiff executed an unregistered deed of gift in favour of his daughter sometime after she came to occupy the house:

Held—That there was an antenuptial promise by the Plaintiff which became a binding contract when the marriage followed. Such contracts are valid and binding and the Plaintiff was estopped from urging that the Defendant could not resist his claim for recovery, the transfer not being evidenced by a registered deed.

This was an appeal preferred on the 2nd April 1922 against a decree of the Subordinate Judge of Zillah Maldah (Babu Sirish Chandra Banerjee), dated

the 18th January 1922, reversing a decree of the Munsif at Maldah (Babu Kiran Chandra Mitra), dated the 13th January 1919.

The facts of the case will appear from the judgment

Babus Jogesh Chandra Ray and Rajendra Chandra Guha for the Appellants.

Babus Sarat Chandra Ray Choudhury and Nagendra Nath Bhattacharya for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This second appeal by the Defendants Nos. 1 and 3 to 5 arises out of a suit brought by the Plaintiff for the recovery of possession of a brick-built house. The suit was dismissed by the learned Munsif but has been decreed on appeal by the learned Subordinate Judge. The facts are shortly these :—The house in question admittedly belonged to the Plaintiff and was also admittedly in possession of the Defendant No. 2 and her husband, until it was sold by Defendant No. 2 to the Defendants Nos. 1 and 3 to 5 by a registered *kobala* in 1916. The Plaintiff's case is that he permitted Defendant No. 2, his daughter, and her husband to occupy the house as a matter of favour and their possession was permissive and as they have sold the house to the Defendants Nos. 1, 3 to 5, he has brought this suit for recovery of possession of the house with mesne profits. The defence of the Defendant No. 2 was that the Plaintiff promised to make a gift of the house to the Defendant No. 2 as her dower at the time of her marriage and the husband of Defendant No. 2 agreed to marry her on such a promise having been made by her father; that she obtained the house as a gift from her father in 1907, and she and her husband

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possessed the same in that right, until they sold the house to Defendants Nos. 1 and 3, 4 and 5 for Rs. 431 by a registered *kobala* in the year 1916 executed by Defendant No. 2 and that since then the purchasers are in possession of the house. The defence of the other Defendants is the same and they further pleaded that since their purchase they have made considerable improvements in the house.

It appears that although Defendant No. 2 was put in possession of the house after her father made a gift of it to her, no registered conveyance was executed by the Plaintiff who, it is alleged, executed an unregistered deed of gift in favour of Defendant No. 2 in 1909.

The learned Munsif found that "the Plaintiff agreed to give the house to Charubala (Defendant No. 2) and that this induced the bridegroom's party to agree to this marriage" and, overruling the objection of the Plaintiff that the transfer was invalid as there was no registered deed, gave effect to the transfer and dismissed the suit.

On appeal by the Plaintiff the learned Subordinate Judge did not set aside any of the findings arrived at by the learned Munsif and on the contrary he found from the recital of the unregistered deed of 1909, "that the house was given to the Defendant No. 2 according to a promise made at the time of marriage and also on account of natural love and affection." In spite of these findings, the learned Subordinate Judge held that the Plaintiff was entitled to recover the house from the Defendants. It is difficult to understand the judgment of the learned Subordinate Judge as to what the real ground of his decision is. It seems that he held that the gift was invalid under the provisions of sec. 127 of the Transfer of Property Act,

The learned vakil for the Appellants contended that there was good and valid consideration for the deed, because the transfer was made on the basis of an antenuptial contract and that the donee having been put in possession and having held such possession for a number of years was justified in resisting the claim of the Plaintiff on the principle of the doctrine of part performance of a contract and relied upon the case of *Syam Kishore Dey v. Umesh Chandra Bhattacharya* (1) and the cases cited in that decision.

The learned vakil for the Respondent relied on the cases of *Kalavagunta v. Kalavagunta* (2) and *Gulabchand v. Fulbai* (3) in support of the proposition that the contract set up by the Defendants was not valid and he further contended that the learned Subordinate Judge did not intend to find that there was any consideration except that of natural love and affection.

We are of opinion that there is no doubt that the learned Subordinate Judge did not disturb the findings of the Munsif which have been already set out and the learned Subordinate Judge has accepted the passage which he quotes from the unregistered deed as correct. There is therefore a finding by the Courts below that there was antenuptial promise by the Plaintiff which became a binding contract when the marriage followed. The validity of such contracts are well-established. In the case of *Gobinda Rani v. Radha Ballabh* (4), Mr. Justice Mookerjee held that such contracts are valid and binding.

The cases cited from *Kalavagunta v. Kalavagunta* (2) and *Gulabchand v. Fulbai* (3) are clearly distinguishable on the

(1) 24 C. W. N. 463 (1919).

(2) I. L. R. 32 Mad. 185 (F. R.) (1908).

(3) I. L. R. 33 Bom. 411 (1909).

(4) 15 C. W. N. 205 (1910).

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ground that they are what may be called marriage brokerage contracts for procurement of marriages and are opposed to public policy.

We are therefore of opinion that the contentions of the learned vakil for the Appellants are well-founded and that the contract is valid in law. That being so, the Defendants are entitled to rely on the cases which estop the Plaintiff from urging that the Defendants could not resist Plaintiff's claim as the transfer was not evidenced by a registered deed.

Mr. Justice Mookerjee, after reviewing a number of the earlier cases of this Court, which have been affirmed by the Judicial Committee of the Privy Council in the case of *Md. Musa v. Aghore Kumar* (5), observed in the course of his judgment in the case of *Syam Kishore Dey v. Umesh Chandra Bhattacharya* (1) referred to above that "the decisions are based on the well-known doctrine of equity enunciated in *Walsh v. Lonsdale* (6) that under certain circumstances equity regards that as done which should have been done." The rule thus laid down clearly applies to the present case.

On the whole, we think that this appeal should succeed and the judgment and decree of the learned Subordinate Judge are set aside and those of the Munsif are restored with costs in all Courts.

GREAVES, J.—I agree.

S. C. M.

(1) 24 C. W. N. 463 (1919).

(5) L. R. 42 I. A. 1: s. c. 19 C. W. N. 250 (1914).

(6) L. R. 21 Ch. D. 9 (1882).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 257 OF 1923.

GREAVES, J.

MUKERJI, J.

1925,

4, May.

SRI SRI NEWAL KISHORE

Jew, Plaintiff,

Appellant,

v.

THE SECRETARY OF

STATE FOR INDIA IN

COUNCIL, Defendant,

Respondent.

Shebait, if can be called upon to furnish security before receiving payment of surplus sale proceeds of debutter property.

A touzi mehal belonging to an idol was sold for arrears of Government revenue and in a suit for the establishment of shebaitship and the consequent right to the surplus sale proceeds the lower Court while declaring the Plaintiff's title directed that the shebait should furnish security before the money could be made over to him.

Held—That the lower Court was not justified in imposing this condition. If the property was wasted proceedings could be taken to restrain the waste or recover the property wasted in a proper suit.

That apart from express statutory provisions like those in the Guardians and Wards Act, the Lunacy Act and the Code of Civil Procedure, it was not open to the Court to direct security to be given in a case of this nature.

This was an appeal against a decree of the Subordinate Judge, 2nd Court of Zillah Hooghly (Babu Sarada Prosad Banerjee), dated the 21st August 1923.

The facts of the case will appear from the judgment.

Mr. Debendra Nath Mondal and Babu Narain Chandra Kar for the Appellant.

Babu Surendra Nath Guha and M. Nuruddin Ahmed for the Respondent.

SRI SRI NEWAL KISHORE JEW v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by the Plaintiff in the suit, who is an idol Sri Sri Newal Kishore Jew, appearing by his *shebait* Panchu Gopal Seal, against a decision of the Subordinate Judge of the second Court of Hooghly. On the 27th June 1922 a certain *tonzi* which was the property of the idol was sold for arrears of Government revenue. The arrears amounted to a sum of Rs. 155 and after deduction of this amount a sum of Rs. 9,344 remained as the balance of the sale proceeds of the *tonzi*. Panchu Gopal claiming to be the *shebait* of the idol asked that this amount should be paid over to him on behalf of the idol. This was refused on the ground that Panchu was not registered as a *shebait* of the idol and that his father Dwarika who died in the year 1918 still remained on the register, no mutation having been effected. As a result, this suit was commenced for the establishment of the *shebaitship* of Panchu and of his consequent right to the surplus sale proceeds on behalf of the idol. The learned Judge in the Court below has found that Panchu Gopal is the only son of Dwarika Nath and is *shebait* of the idol in succession to his father but the learned Subordinate Judge imposed, as a condition for the payment of the money to the *shebait* on behalf of the idol, the giving security by the *shebait* for the amount of the surplus sale proceeds and against this portion of the order of the Subordinate Judge the present appeal is directed. The rights of *shebaitship* and of the ownership of the property were declared by a decree of this Court, dated the 30th July 1894, passed in Appeal No. 183 of 1893, whereby this Court declared that the

tonzi was an absolute *debutter* property of the Thakur and directed that the then *shebait* one Khetternath Seal should continue to be the *shebait* and perform the daily and periodical worship out of the income of the properties set apart for the purpose and declared to be *debutter* properties by the said decree. The Court further declared that no *shebait* had any right to alienate or encumber the property or any part thereof that might come to his possession as a *shebait*. In my opinion, the learned Subordinate Judge was not justified in imposing the condition which he did with regard to security. No doubt in the case of an infant security is to be furnished on the payment of money to the guardian on his behalf. But this is under the terms of the Guardians and Wards Act and similarly in the case of a lunatic security is directed by virtue of the provisions of the Lunacy Act.

Again under the express provisions of Or. 32, r. 6 of the Code of Civil Procedure a guardian *ad litem* or a next friend of an infant is to give security as a term of the property of the infant being handed over to him. But we do not think that apart from express statutory provisions of this nature it is open to the Court to direct security to be given in a case of this nature. After all, the idol is the person entitled to the property. He comes to the Court and asks for payment and there is no answer to his demand. Having regard to his disability he can only receive the property and hold it through a *shebait* but it does not seem to me that this justifies a Court in imposing as a term of payment that security should be furnished by the *shebait*. Some such provisions may be very necessary and very desirable with regard to property of this kind. But apart from statute we do not think that it is

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open to the Court to impose as a term of the delivery of the property the furnishing of security by the *shebait*. After all if the property is wasted proceedings can be taken to restrain the waste or recover the property that has been wasted in a proper suit. For the reasons we have indicated we do not think that the learned Subordinate Judge was justified in imposing the condition that he has imposed, namely, that security should be furnished as a term of the money being handed over.

The appeal, accordingly, succeeds and the Plaintiff is entitled to the surplus sale proceeds apart from any condition such as was imposed by the learned Subordinate Judge.

The order of the lower Court as to costs is vacated.

We make no order as to costs in this appeal.

MUKERJI, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SUMNER.	}	SURAJMULL
LORD PHILLIMORF.		NAGOREMULLI,
SIR JOHN EDGE.		Appellants,
SIR LAWRENCE JENKINS.		v.
1924,		THE TRITON
Heard, 3 & 4, November.		INSURANCE CO.,
Judgment, 2, December.		Ld., Respondents.

Indian Stamp Act (II of 1899), sec. 7—Contract of sea insurance not expressed in a sea policy, if enforceable—Point taken at late stage, if may be disregarded—Prohibitory enactment

The enactment in sec. 7 of the Stamp Act, that no contract of sea insurance shall be valid unless the same is expressed in a sea policy, is prohibitory and compliance with it cannot be dispensed with by the consent of the parties or by a failure to plead or to argue the point at the outset.

It is not confined to affording a party a protection of which he may avail himself or not as he pleases, nor is it framed solely for the protection of the revenue or to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement.

REFERENCE UNDER THE STAMP ACT (5) and BHUGWANDAS v. NETHERLANDS INSURANCE CO. (6) distinguished.

This was an appeal (No. 11 of 1924) from a decree, dated the 18th April 1923, of the High Court at Calcutta in its Appellate Jurisdiction which reversed a decree, dated the 25th July 1922, of the said Court in its Original Jurisdiction.

The Appellants instituted the suit and claimed damages amounting to Rs. 24,997 for an alleged breach of contract to insure goods.

The suit was in respect of an alleged agreement between the Plaintiffs and Defendants to insure certain jute and hemp to be carried by the S. S. *Constantinos XII* from Calcutta to Genoa. On the 10th November 1916 the Respondent Company gave the Plaintiffs an open cover, confined to marine risks, in respect of his shipments of jute or hemp from Calcutta to Europe.

The alleged contract for breach of which damages were claimed was in regard to war risks. The Plaintiffs alleged that the contract was made partly verbally, partly by a letter from the Company, dated the 30th November 1916 and partly by a declaration by the Plaintiffs

(5) I. L. R. 30 Cal. 585 (1903).

(6) 14 A. C. 83 (1893).

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on the 5th December. The letter of the 30th November was in the following terms :—

“ Calcutta, 30th November 1916.

“ Messrs. Surajmull Nagoremull,
Calcutta.

“ Dear Sirs,

“ I beg to quote my lowest rate on jute and/or hemp per Constantinos XII to Genoa at $\frac{1}{2}$ per cent. net and war risk at 5 per cent. less 10 per cent. which please note and oblige.

Yours faithfully,

Per Pro. J. Frerichs,

J. H. Hofstadt,
Agent.”

On the 5th December Hofstadt ascertained that the approximate figure of the value of the goods of which the insurance was in contemplation was £16,000.

On the 6th December Hofstadt informed the Appellants that the rate which was altering from day to day would be 10 per cent. if business was to be done. The Appellants contended that they were entitled to the rate of 5 per cent. quoted in the above letter. The sum claimed by the Appellants represented the difference between the rate alleged to have been paid to another insurance Company and the rate specified in Hofstadt's letter of the 30th November.

The trial Judge (Pearson, J.) found that there was a completed contract which was partly fulfilled by the Company, but that there was a breach by them of the remainder and on these findings he passed a decree as prayed. The Appellate Court (Sanderson, C. J. and Richardson, J.) were of opinion that the contract sued on had not been proved, that the letter of 30th November was no more than a quotation of the rates, for the steamer and voyage therein mentioned which could be turned into a contract on the

submission by the Plaintiffs of a definite proposal as to the goods which they wished to insure and on acceptance by the Company of those specific goods.

The facts and arguments are set out in the judgment of the Judicial Committee.

Messrs. Stuart Bevan, K. C. and Kenworthy Brown for Appellants.

Messrs. Dunne, K. C. and Du Parc for the Respondent Company.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—The Appellants, the Plaintiffs below, brought their suit for breach of an alleged contract to “ issue policies of insurance covering war risks on goods ” shipped or to be shipped by them “ at the rate prevailing at the time of the Plaintiff firm's declaration of the steamer, by which goods, as aforesaid, were to be shipped ” (Plaint, para. 3). As developed in further paragraphs, this was founded on (a) a written quotation by the Defendants of their lowest rate on jute per *Constantinos XII* at $\frac{1}{2}$ per cent. and war risk at 5 per cent. less 10 per cent.; (b) an acceptance of this rate by the Plaintiffs; and (c) an arrangement that the Plaintiffs should supply the Defendant Company with a statement of the approximate amount to be covered. Ultimately there was a declaration for an aggregate amount of £10,870, for which sum the Defendants refused to issue a policy, whereon the Plaintiffs insured elsewhere at higher premiums and claimed the excess as their damages in the action. There was no loss of the goods at all.

Pearson, J., who tried the case, found the contract and breach proved and gave the Plaintiffs decree, but the High Court, holding the contract to be insufficiently established, set that decree aside.

On being informed that the alleged

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contract arose on an acceptance by word of mouth of a letter quoting a rate of premium and on a declaration by word of mouth, not of the name of the steamer by which the goods were to be shipped, but of the expected value of the Plaintiffs' goods to be loaded on board of her, and that the breach alleged was the Defendants' refusal to issue a policy, their Lordships struck by the divergence in this case from ordinary underwriting practice as known in this country and by the singularity of an enforceable contract by word of mouth to issue a policy of marine insurance, inquired whether there was no legislation in India corresponding to the Stamp Act, 1891 (54 & 55 Vic., c. 39), sec. 93 (1). Their attention was then drawn by counsel to the Indian Stamp Act, No. 2 of 1899, sec. 7 of which provides that (with exceptions not now material) "no contract for sea insurance shall be valid unless the same is expressed in a sea policy," a provision which re-enacted the original enactment of 1894.

This section had not been pleaded by the Defendants in the suit, for their general plea, No. 10.—"Lastly, the Defendant Company submits that the suit of the Plaintiff firm is not maintainable"—cannot be read as raising a specific statutory answer. Their Lordships were informed that the point was not discussed in either Court below. Certainly it passed unnoticed in the judgments, although Richardson, J., says, "the law has laid it down that agreements of certain kinds shall not be valid at all, unless commemorated in writing with or without formalities. . . . In India apparently it is not fatal to the Plaintiffs' case that there was no contract in writing." Possibly the fact that the High Court's decision was already plainly adverse to the claim may be the explanation

of the circumstance that counsel did not there and then dispel a misapprehension in the learned Judge's mind of such capital importance, but the result, at any rate, has been that the effect of this section was not considered until the case came before their Lordships' Board.

The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset [*Nixon v. Albion Marine Insurance Co.* (1)]. The enactment is prohibitory. It is not confined to affording a party a protection of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of sec. 7 would defeat the provisions of the law laid down therein. In England this is well-settled law [*Fisher v. Liverpool Marine Insurance Co.* (2), *Ionides v. Pacific Insurance Co.* (3) (Blackburn, J.), *Xenos v. Wickham* (4) (Willes, J.)], and there is

(1) L. R. 2 Ex. 338 (1867).

(2) L. R. 8 Q. B. 469 (1873); L. R. 9 Q. B. 418 (1874).

(3) L. R. 6 Q. B. 674 at p. 685 (1871).

(4) L. R. 2 H. L. 297 at p. 314 (1867).

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no ground for construing the Indian Act, expressed in almost identical terms, in any different way. The observations of the High Court in the *Reference under the Stamp Act* (5) distinguishing a contract for sea insurance and a policy of sea insurance, seem to have been directed to another point, and the case of *Bhuwandas v. Netherlands Insurance Co.* (6) was before the Stamp Act. In their Lordships' view, the contract alleged by the Plaintiff was a contract for sea insurance and nothing else, and, not being expressed in a policy, was unenforceable.

The Appellants asked that, in the event of the Respondents succeeding upon this ground, they should not be allowed any costs, since the suit had proceeded throughout on the questions of fact in the case. For such a course there is authority [*Home Marine Insurance Co. v. Smith* (7)]. The Respondents, however, had defended the claim on the merits and not on the failure to satisfy the statute, for obvious business reasons. They were entitled to have their Lordships' judgment on the whole of the case and to ask to have the appeal dismissed with costs, if they could support the judgment of the High Court upon the grounds on which it was given. Their Lordships therefore proceed to examine the facts without re-stating them at length.

The transaction alleged rested on conversations, except for the one letter which quoted a rate of premium against war risk. There is always considerable difficulty when one of a number of mercantile transactions of a type usually recorded in writing has to be proved by word of mouth; for experience shows that in such cases the most honest and careful wit-

nesses, recalling to memory only the result of the conversations, tend to give evidence of what they think they must have heard and said to produce such a result rather than to state from actual memory of them the very words that were used. This difficulty the Appellants themselves deliberately increased, and for no good purpose, by postponing the issue of their writ and the prosecution of the suit in a wholly indefensible manner. It is familiar enough that in country cases all over India claimants intentionally defer the commencement of suits till they are all but time-barred—a practice so deeply rooted that it is useless to protest against it—but it is with equal surprise and regret that their Lordships notice the extension of this evil practice to mercantile transactions in Calcutta. The conversations in question took place in November and December 1916, and the cause of action, if any, was complete before the end of the year; nevertheless, the suit was not begun till the 8th December 1919; the written statement was not delivered till the middle of 1921, and the case was only brought to trial on the 31st July and 1st August 1922. This interval of five years and a half was not, however, allowed to dim the definiteness, with which the partners and employees in the Plaintiffs' firm spoke to conversations in the ordinary course of business, relating to a matter, which had little about it that was out of the common, yet it is on the extent to which these witnesses can be trusted that the success of their claim depends. Witnesses, who speak after such an interval, as a rule remember either too little or too much. Here it is excessive recollection that is the vice of the Plaintiffs' case. The question being whether any contract of insurance relating to war risks ever was agreed at all,

(5) 1 L. R. 30 Cal. 565 ('903).

(6) 14 A. C. 83 (1893).

(7) [1898] 1 Q. B. 896.

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three separate witnesses swore to separate agreements upon the subject; the first when a quotation for a war risks premium was first asked for and before it was given; the second when it was given by word of mouth and before it was put into writing; the third when, for the first time, something approaching a declaration that could give rise to a specific insurance was made to the Defendants. It was this last agreement that was ultimately relied on.

The case was put thus: A letter containing a quotation of a war risks premium having been sent by the Plaintiffs on the 30th November the Defendants' representative, without awaiting the receipt of a declaration of interest, called on the Plaintiffs' senior partner at his private house to ask him "to let them know the approximate amount the insurance would be with regard to the goods of the steamer *Constantinos XII*, because they wanted to reinsure." The enquirer was referred to the office and there "after calculation a Babu handed over a figure in pounds." It was on a slip of paper containing an approximate number of bales and "the approximate amount" in pounds sterling. The amount given was £16,000, but it is impossible to say that this is a specification of "the amount or amounts insured." The Plaintiffs produced a press copy of a letter of the same date, in which they purported to inform the Defendants that they confirmed their war and marine declarations of that date, but neither Court below believed that this letter was genuine. When written declarations were subsequently made a few days later, the actual amounts were only £9,300 and £1,570. The quotation had meantime been withdrawn and the Defendants refused to insure at the rate quoted on the 30th

November, as they had since heard from London that current rates were now much higher, a point vital to the possibility of re-insuring the line. Accordingly, the earlier amount, approximately given, did not satisfy the statutory requirements of a sea policy, and the latter amounts were not an acceptance of the rate of premium offered, for it had in the meantime been withdrawn. It was no longer a "subsisting proposal capable of being accepted," as in the case of *Bhugwandas v. Netherlands Insurance Co.* (6).

It may be conceded that, in the ordinary course, the Plaintiffs would wish to cover the war risk as well as the marine risk on their shipments. Possibly, the war risk cover would not be immediately pressing; it might suffice, if it was effected before the ship cleared the Suez Canal, but, naturally, the covers would both be arranged before the ship sailed from Calcutta and most conveniently with the same insurers. Naturally, also the Plaintiffs would require policies in the ordinary way, that is, documents that could be attached to bills of exchange or transferred to purchasers by separate assignments. On the other hand, it is certain that the Defendants' representative could not really have meant, whatever he might be careless enough to say, that he was willing to cover £16,000 or even £10,870 then and there, without knowing the current rate of premium on that day, since the line, which the Defendant Company could take on war risks, was strictly limited and any excess must be covered in Europe. It is, therefore, in the last degree improbable that the transaction alleged should have been completed without the issue of regular cover notes from the office, and the probability is that the Defendants having withdrawn from the negotiation in

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time, the Plaintiffs' whole endeavour has been to hold them to a quotation which was out of date, and to make up for the absence of ordinary documents by an exaggerated account of quite unimportant inquiries. Their Lordships think that the learned Judges of the High Court were fully warranted in disbelieving the Plaintiffs' case. They do not think it necessary to discuss the question whether the damages claimed could have been said to flow from a breach of the contract alleged, if it had been made and was enforceable, but they express no opinion in favour of that contention. They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: Messrs. Pugh & Co. for the Appellants.

Solicitors: Messrs. Sanderson and Orr Dignams for the Respondents.

G. D. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 235 OF 1925.

<p>SANDERSON, C. J. PANTON, J. 1925, 20, May.</p>	}	<p>RAM GOPAL GOENKA, Petitioner, v. THE CORPORATION OF CALCUTTA, Opposite Party.</p>
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Calcutta Municipal Act (III of 1899, B. C.), sec. 449—Calcutta Municipal Act (III of 1923, B. C.), secs 363, 364—Bengal General Clauses Act (I of 1899, B. C.), sec. 8, saving effect of—Criminal Procedure Code (Act V of 1898), secs 435, 439—Demolition order for building without sanction before the new Calcutta Municipal Act, 1923—General Committee, sanction by, to proceed under sec 449 of the old Municipal Act, re-affirmed by the new Corporation—Demolition order, if valid—Municipal Magistrate High Court's power to revise the order of the Magistrate—Writ of certiorari—Jurisdiction of High Court over inferior Courts.

Where a prosecution had been sanctioned by the General Committee under

sec. 449 of the Calcutta Municipal Act (III, B. C., of 1899) but the case was actually started under the Calcutta Municipal Act (III, B. C., of 1923) by the new Corporation and notice upon the party was issued and an order of demolition passed:

Held—That whether the proceedings were under sec. 363 or 364 of Act III, B. C., of 1923, they were irregular and the order of the Municipal Magistrate could not be allowed to stand as the party had not been heard by the Corporation, as he was entitled to be, before sanction for prosecution was given.

That the proceedings under sec. 449 of the Calcutta Municipal Act (III, B. C., of 1899) could only be initiated by the General Committee and therefore, in respect of unauthorised structures which existed before 1st April 1924, when the Calcutta Municipal Act of 1923 came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under sec. 449 of the Act of 1899.

The Municipal Magistrate appointed under sec. 531 of the Calcutta Municipal Act of 1923 is a Court of inferior Criminal jurisdiction within the meaning of sec. 6 of the Code of Criminal Procedure and orders for demolition passed by such a Magistrate are subject to revision by the High Court under secs. 435 and 439 of the Code of Criminal Procedure.

The order for demolition was a judicial order and whether made in the exercise of the Magistrate's Civil or Criminal jurisdiction was open to revision by the High Court.

BESANT v. ADVOCATE-GENERAL OF MADRAS (1) referred to.

(1) I. L. R. 43 Mad. 146 (P. C.) (1919).

RAM GOPAL GOENKA v. THE CORPORATION OF CALCUTTA.

This was a Rule granted on the 3rd March 1925 against an order of the Municipal Magistrate of Calcutta (Mr. Abu Nasr Md. Ali), dated 28th February 1925, directing demolition of certain unauthorised structures in premises No. 7 Bysack Street in Calcutta at the expense of the owner.

The Rule was obtained by Ram Gopal Goenka calling upon the Municipal Magistrate and on the Chief Executive Officer of the Corporation of Calcutta to show cause why the order of demolition of the structures should not be set aside. The Petitioner alleged that he filed a suit for partition of the joint family properties. The premises No. 7 Bysack Street was awarded to him with a direction to demolish three feet of a portion of the six feet wide *varandah* on the west of the said premises and between the adjoining premises, No. 5 Bysack Street, which was awarded to his father Shermull, his brothers, Ram Kumar Goenka and Narsingdas Goenka. While the partition suit was still pending, on 19th February 1924, the Petitioner was intimated by a notice that a demolition case would be laid before the Roads and Building Committee for applying to the Municipal Magistrate under sec. 449 of the Calcutta Municipal Act of 1899 for an order for demolition of the unauthorised work carried on or completed without sanction, and the said case would be heard on 22nd February 1924. On the 22nd February 1924 the case was not heard and the Petitioner was intimated by a letter, dated 10th March 1924, that the case would be heard by the Demolition Committee on 25th March 1924 at 4.30 P.M. It was alleged that on the 25th March 1924 the Petitioner was late by 10 minutes owing to an accident to his motor car on the way and the case was disposed of in his

absence. On 26th March 1924 he wrote to the Corporation explaining the delay and prayed for a re-hearing of the matter. On 29th March 1924 he was informed to be present when the General Committee would consider his case, on 31st March 1924 at 8 A.M. Attended by an Engineer he was present at the Municipal Office at the appointed hour but neither he nor his Engineer was allowed admittance into the room where the meeting was being held and the order passed for sending the case to the Municipal Magistrate for trial. On 11th April 1924 he was informed that the General Committee at their meeting held on 31st March 1924 resolved that an application be made to the said Magistrate under sec. 119 to remove the unauthorised structures at the expense of the owner. By a notice, dated 26th June 1924, issued by the Magistrate, he was directed to show cause on 5th August 1924 why an order under sec. 363 of the new Calcutta Municipal Act, 1923 (III of 1923), should not be passed. On 26th August he took several objections and prayed that the proceedings might be stayed till the final determination of the partition suit pending in the High Court. It transpired that on 31st March 1924 the General Committee confirmed the recommendation of the Building Demolition Committee dated 25th March 1924 at 8 A.M., and at 4 P.M. on the same day the proceedings of the morning meeting were confirmed. From the copy of the proceedings it appeared that a note had been made that the "party was heard." The defence of the Petitioner was that the building was an old one and he had made no alteration or any unauthorised addition. There was a demolition case with respect to the extension of the structure in the back space, the cons-

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struction of two rooms on the fourth storey, a *varandah* on the western side and the construction of an iron-grated *varandah* on the western side space about 15 years ago but the unauthorised additions complained of were allowed to remain. On 1st April 1924, the new Corporation came into existence under Act III of 1924, and on a subsequent date, the cases sanctioned by the old committee which included that of the Petitioner, were re-affirmed by the new Corporation and the Petitioner was prosecuted under a notice issued by the Municipal Magistrate under sec. 363 or sec. 364 of the new Act which corresponds to sec. 449 of the old Act (Act III of 1899). The Magistrate directed demolition of the structures complained of as they were unauthorised, whereupon the Petitioner obtained this Rule.

Mr. Langford James, with *Babus Probodh Chunder Chatterjee*, *Suresh Chunder Taluqdar* and *Mohendra Kumar Ghose*, for the Petitioner argued that the order of the Magistrate directing demolition was wholly illegal. The notice issued upon the Petitioner was under sec. 364 of the new Act; the judgment is headed "case under sec. 364" whereas the conviction purported to be one under sec. 449 of the old Act. If the prosecution was one under sec. 363 of the new Act the conviction was illegal, because under sec. 363 the owner of a building shall be heard by the Corporation before an order of demolition was passed against him. The Petitioner denied that he had any hearing before the General Committee although there was a remark in the proceedings that "the party was heard." But assuming that was correct, a hearing under sec. 449, to which the Petitioner was not entitled under the section of the old

Act, was not a hearing under sec. 363 of the new Act to which he was entitled. Then again the proceedings of the General Committee were re-affirmed by the new Corporation—there was no General Committee under the new Act—an application was made to the Magistrate and the law set in motion under the new Act. It could not be said now that it was found impossible to contend that the order was made under sec. 363 of the new Act and that the order was passed under sec. 449 of the old Act. The whole procedure was clearly irregular and illegal.

The Advocate-General (Mr. S. R. Das) with *Babu Satindra Nath Mukerjee* for the Corporation argued that the offence was committed under the old Act when the old Corporation was in existence, but before any action could be taken in Court the old Corporation was wiped out and the new Corporation came into being, and fresh sanction was given by the new Corporation to the cases ordered to be prosecuted by the old General Committee. Sec. 8 of the General Clauses Act (Bengal Act I of 1899) kept those offences alive and the right to prosecute remained in spite of the old Act having expired. Under secs. 435 and 439 of the Code of Criminal Procedure no application lies to the High Court for revision of an order of demolition passed by the Municipal Magistrate. The unauthorised erection of a building or any deviation from the sanctioned plan is not an offence. Sec. 5 of the Code defined the scope of the whole Code which applied to all offences under the Indian Penal Code, and all offences under any other law. But it had been held that the erection of an unauthorised structure was not an offence. Therefore the Criminal Procedure Code did not apply and

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the order of the Magistrate was not open to revision under that Code. "Offence" was defined in sec. 40 of the Indian Penal Code to denote "a thing made punishable by the Indian Penal Code or under any special or local law." The unauthorised construction became an offence when the Petitioner having disobeyed the order of the Magistrate was punished with a fine. The Petitioner had not come to that stage and hence the present application was premature. The Municipal Magistrate was appointed under sec. 531 of the Calcutta Municipal Act of 1923 and he was a Presidency Magistrate also but such a Magistrate was not a Court of inferior Criminal jurisdiction, because the Magistrate might have certain civil powers as a police Magistrate under the Workmen's Breach of Contract Act. In the present case jurisdiction had been given to the Magistrate under a special Act and not under the Criminal Procedure Code. There were some cases in which there was neither an offence nor an accused such as a case under sec. 145 of the Code of Criminal Procedure or under sec. 488 of that Code, the former a case of land dispute and the latter a case in which an order for maintenance was passed by Magistrate. But those cases were included in the Criminal Procedure Code itself. The old Corporation had done all that they could to give jurisdiction to the Magistrate, the subsequent acts of the new Corporation were a nullity. The Petitioner had not been prejudiced at all by the mistake in the notice served upon him, he knew exactly what the case against him was and his present application is premature.

Mr. Langford James in reply argued that the Magistrate was appointed under sec. 531 of the Act to deal with offences under the Act, he was permitted to inflict

finer and he could not cease to be a Criminal Court because he did not inflict a fine in the present case. In any case the High Court had jurisdiction to revise any judicial order passed by a Court of inferior jurisdiction either under sec. 435 or 439 of the Code of Criminal Procedure or sec. 115 of the Code of Civil Procedure or by way of a writ of *certiorari*. Cited *Besant v. Advocate-General of Madras* (1).

Mr. K. P. Khaitan with *Babu Profulla Chandra Chakrabarti* appeared for *Narsinghdas Goenka*.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This was a Rule issued by my learned brothers Mr. Justice Newbould and Mr. Justice Bepin Behary Ghose calling upon the Municipal Magistrate and on the Chief Executive Officer of the Corporation of Calcutta to show cause why the order complained of should not be set aside or such other order made as to this Court might seem fit and proper.

The order complained of was an order made by the Municipal Magistrate of Calcutta, dated the 28th of February 1925, by which the Magistrate directed the demolition of certain unauthorized structures by the Corporation of Calcutta at the expense of the owner.

The proceedings in this case present some peculiarities. The alleged, unauthorized structures were made before the 1st of April 1924. The notice which was served upon the Petitioner was headed "sec. 364, Act III (B. C.) of 1923" (i.e., the Calcutta Municipal Act of 1923 which came into force on the 1st of April 1924). The notice was to the effect that the Petitioner was directed to appear to show

(1) I. L. R. 43 Mad. 118 at p. 159 (P. C.) (1919).

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cause before the Municipal Magistrate of Calcutta why an order should not be made under sec. 364 of Act III (B.C.) of 1923, directing that so much of the building as had been unlawfully executed be demolished or altered by the Chairman at the owner's expense.

Although the notice, as I have already said, purported to be under sec. 364, the decision of the Magistrate was headed "under sec. 363 of the Calcutta Municipal Act of 1923," and when the Magistrate gave his decision, he proceeded under sec. 449 of the Calcutta Municipal Act of 1899 which he said corresponded to sec. 363 of the Calcutta Municipal Act of 1923. The Act of 1899 was repealed by the Act of 1923.

In my judgment, it must be taken that these proceedings were, in fact, instituted under the Calcutta Municipal Act of 1923. If that be so, then whether the proceedings were taken under sec. 363 or sec. 364 the proceedings would have to be initiated by the Corporation, which came into being in consequence of the passing of the Calcutta Municipal Act of 1923. The proceedings were in fact headed "*Corporation of Calcutta v. Ram Gopal Goenka*." Sec. 363 provides: "If the Corporation are satisfied that the erection of any new building has been commenced without obtaining the written permission of the Corporation they may after giving the owner of such building an opportunity of being heard, apply to a Magistrate, and such Magistrate may make an order directing that such erection, alteration, addition or other work shall be demolished by the owner thereof or by the Corporation at the expense of the said owner."

Sec. 364 provides: "In any of the following cases" (the various matters are set out) "the Corporation may apply

to a Magistrate and such Magistrate may make an order directing that the building, fixture, additions, etc., be demolished, provided that, before making such application, the Corporation shall give the owner an opportunity of being heard." It is, therefore, clear that, whether the proceedings were under sec. 363 or sec. 364, the Corporation instituted the proceedings, and before making an application to the Magistrate the Corporation was bound to give the person, who was to be proceeded against, an opportunity of being heard. It may be said that the Petitioner was given an opportunity of being heard by the authorities which existed under the Act of 1899, but there is no doubt that the Corporation, constituted by the Act of 1923, did not give the Petitioner an opportunity of being heard before the application by or on behalf of the Corporation was made before the Magistrate.

Consequently, in my judgment, there was a material irregularity in the proceedings in respect of this matter.

But the learned Advocate-General, who appeared for the Corporation, argued that the liability of the Petitioner in respect of the unauthorized structures existed after the repeal of the Calcutta Municipal Act of 1899 by reason of sec. 8 of the Bengal General Clauses Act. That section provides: "Where this Act, or any Bengal Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

It might be that the liability of the Petitioner in respect of the alleged unauthorized structures still remained after

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the repeal of the Calcutta Municipal Act of 1899 but a difficulty arises in this way, that even if the present proceedings could be regarded as having been instituted under the repealed Act of 1899, (which I think is not the case), then such proceedings would have to be initiated by the General Committee, because sec. 449 provides that "if the General Committee are satisfied" as to certain matters therein stated "the General Committee may apply to a Magistrate." The learned Advocate-General informed the Court that the General Committee under the Calcutta Municipal Act of 1899 no longer exists: and, therefore, there is nobody competent to take proceedings under sec. 449 of the 1899 Act.

Therefore, whichever way this matter is looked at, in my judgment, there was a material irregularity in the proceedings and the order, which was made by the Municipal Magistrate, cannot be allowed to stand.

Before leaving this case, it is necessary for me to say one or two words about the preliminary point which was raised by the learned Advocate-General. He argued that this Rule was issued under sec. 435, Cr. P. C., and this Court had no jurisdiction to issue a Rule under sec. 435 or to make it absolute under sec. 439 of the Cr. P. C., on the ground that the Municipal Magistrate, when dealing with this matter, was not acting under the Cr. P. C., and that consequently the provisions of the Cr. P. C. could not be applied by this Court for the purpose of revising the proceedings before the Magistrate.

I am not prepared to accept that argument.

Sec. 531 of the Calcutta Municipal Act of 1923 provides: "The Local Government may appoint one or more Magis-

trates for the trial of offences against this Act, and the rules or by-laws made thereunder."

Primâ facie, therefore, a Magistrate appointed under that power for the trial of offences against the Calcutta Municipal Act would be a Criminal Court within the meaning of sec. 6 of the Code of Criminal Procedure.

As a matter of fact, we were informed that the Municipal Magistrate, who acted in this case, was a Presidency Magistrate, and I have no doubt that he would be a Criminal Court within the meaning of sec. 6, which provides as follows: "Besides the High Court and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, I. Courts of Sessions, II. Presidency Magistrate, &c." I think it may be said that the Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act is a Court constituted under a law other than the Code for the time being in force and comes within sec. 6. Consequently, I am not prepared to hold that sec. 435 and sec. 439, Cr. P. C., do not apply to these proceedings.

This point however is not of any real importance, for in my judgment the order of the Municipal Magistrate was a judicial order and it was made by him either in the exercise of criminal jurisdiction or in the exercise of civil jurisdiction, and this Court would have jurisdiction to interfere by way of revision under one Code or the other. See *Besant v. Advocate-General of Madras* (1). In that case Lord Phillimore, after referring to the fact that the High Courts of Calcutta, Madras, and Bombay possessed the power of issuing a writ of *certiorari*, is report-

(1) 1. L. R. 43 Mad. 146 (P. C.) (1919).

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ed at p. 160 to have said : " If the order of the Magistrate were a judicial order, it would have been made in the exercise of his civil or of his criminal jurisdiction, and procedure by way of revision would have been open." That is exactly the point, which was put by the Court to the learned Advocate-General in the course of the argument.

In my judgment, this Court has jurisdiction to revise the order of the Municipal Magistrate, and for the reasons already stated I am of opinion that the Rule should be made absolute and the order of the Municipal Magistrate should be set aside.

PANTON, J.—I agree.

P. D.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 887 OF 1924.

NEWBOULD, J.
B. B. GHOSE, J.
1925,
Heard, 20, 21, 22, 23
and 26, January.
Judgment,
12, February.

PRATAP CHANDRA
GUHA ROY,
Petitioner,
v.

THE KING-EMPZOR,
Opposite Party.

BUCKLAND, J.
1925,
Heard, 19, March.
Judgment,
23, March.

Penal Code (Act XLV of 1860), secs 499 and 500—Defamation—Prosecution, when maintainable by an individual though the defamatory matter relates to a class of individuals—Charges, how to be framed in such circumstances—Sec. 499, Explan. (2), meaning of—The police force at a particular place, if an association or collection of persons contemplated by the explanation—Distinction, if any, between a criminal proceeding and a civil suit with reference to this point—Trial on improperly drawn charges, if a proper trial—Charging a person with crime—Plea of veritas, how established—Abuse and defamation distinguished.

The complainant was a member of the police force stationed at a particular place and the chief investigating officer in connection with two occurrences alleged to have taken place there, one of dacoity and the other of assault on the police. The Petitioner, a member of the District Congress Committee, on hearing stories of oppressive acts committed by the police in the locality, came there, questioned the villagers and took down notes of statements made by them. He was convicted on two charges of defamation relating to two speeches made by him on two different occasions, the averment in the first charge being that the Petitioner had defamed the complainant by making and publishing an imputation concerning the police force employed at the particular place of which the complainant was a member and the principal officer in charge of the investigation to the effect that, not to speak of the police only, but the British Government themselves and the superior officers from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct; the averment in the second charge being that the Petitioner defamed the complainant by making an imputation against the said police force to the effect that the said police force had bitten off the nipple of the breast of women and had bitten the cheek of a woman nine months' pregnant.

Held per NEWBOULD, J.—That the words set out in the first charge were not mere abuse but were clearly defamatory and, the imputations appearing from the evidence to have been made against the police force as a whole of which the complainant was a member, the conviction on the first charge was properly had.

That the imputations in the second

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charge, not being against a collection of persons as such of which the complainant was a member but of certain definite brutal acts against some individual members thereof, were not defamatory of the complainant.

Per B. B. GHOSE, J.—That the charges were not sustainable against the Petitioner at the instance of the complainant.

To speak of a person as a beast or a pig is defamatory, but the words "the British Government themselves and the superior officers including from the District officer down to the Daroga and Chowkidars were all beasts and pigs" were too wide to admit of the construction that any particular police officer was defamed.

EASTWOOD v. HOLMES (1) relied on.

The words in explanation 2 of sec. 499, I. P. C., mean that a collection of persons as such may be collectively defamed in the same manner as a "company."

The general principle on which a company may be said to have been defamed would therefore apply equally to the case where it is alleged that a collection of persons as such has been defamed.

METROPOLITAN SALOON OMNIBUS CO. v. HAWKINS (2), MAYOR, ETC., OF MANCHESTER v. WILLIAMS (3), SOUTH HETTON COAL CO. v. NORTH EASTERN NEWS ASSOCIATION (4), THE KING v. OSBORNE (5), KING v. ORME (6) and REX v. WILLIAMS (7) referred to.

The true rule is that if a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him per-

sonally and he is the person aimed at before he can maintain a prosecution for defamation.

All circumstances which were apparent to the bystanders at the time the alleged defamatory words were uttered and what meaning such words would have fairly conveyed to their minds have to be considered to determine whether the words were defamatory and whether they referred to the complainant.

Applying these principles and taking all circumstances into consideration the words complained of in the charges were not proved to have been used with reference to each and every member of the police force and the complainant could not therefore be said to be a person aggrieved by the offence complained of.

The words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. Where there is a denial the evidence in support of the prosecution must be scrutinised.

Held further—That at the trial the accused was entitled to prove the notes of statements of complaints against the police taken down by him when he went to the locality as evidence of his good faith and these were relevant on the question although the persons who made the statements were not examined.

Where the defamation imputes a crime to the complainant, to sustain a plea of veritas there must be the same strictness of proof as on a trial for such crime.

Held per BUCKLAND, J.—That Exp. 2 to sec. 499, I. P. C., is intended to include a company or an association or collection of persons as such within the word person as used in the definition, so that the latter should not be limited to individuals.

(1) 1 F. & F. 347 (1858).

(2) 4 H. & N. 87 at p. 90 (1859).

(3) [1891] 1 Q. B. 94.

(4) [1894] 1 Q. B. 133.

(5) 2 Barn. 138; 2 Swan. 503n.

(6) 1 Ld. Raym. 486.

(7) 5 Barn. & Ald. 595 (1811).

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In a case in which the explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this explanation justify a charge of defaming an individual and a charge cannot combine the explanation with the definition for such a purpose.

That it is doubtful if the police force at a particular place is such an association or collection of persons as is contemplated in Exp. 2, sec. 499.

ALDRIDGE v. BARROW (8) referred to.

That there was confusion in the charges framed between the complainant and the police force at the particular place in relation to the various ingredients of the charge and the charges framed did not conform to the requirements of the definition of the offence of defamation.

That inasmuch as a trial on the charges framed was no trial at all the accused must be retried on charges properly framed.

That the offence of defamation consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it and an individual may be as much defamed by words apparently only of general application as by words referring to him by name.

This was a Rule granted on the 30th September, 1924 against an order of the Sub-Divisional Magistrate of Faridpore (Mr. A. R. Bose), dated the 21st July

1924, convicting the Petitioner under sec. 500, I. P. C., and sentencing him to 1 year's simple imprisonment, which order was modified on appeal by the Sessions Judge of Faridpore (S. C. Mullick, Esq., I. C. S.) on the 25th September 1924.

The Petitioner had delivered several speeches condemning the action of the police engaged in the investigation of an alleged dacoity committed in a house at a village called Char Maniar in Faridpore and also of alleged assault committed on the police who tried to arrest the dacoits while they were engaged in the very act of dacoity, by the villagers, who it was alleged, mistook the police for dacoits. It was alleged that the speeches were defamatory. Rasiduddin who was a Sub-Inspector of Police and officer in charge of the Police investigation at Char Maniar laid a complaint for the prosecution of the accused under sec. 500, I. P. C. The accused was charged on three counts, tried and convicted by the Sub-Divisional Magistrate of Faridpore on all counts. The three charges related to three speeches delivered by the accused on the 13th June 1923 at Berhamgunge, on the 17th June 1923 at Faridpore and on the 19th June 1923 at Boalmari. On appeal the accused was acquitted of the charge relating to his speech at Boalmari but he was convicted of the other two charges and the sentence was reduced to six months' simple imprisonment by the Sessions Judge.

The accused moved the High Court and obtained a Rule. The Rule came on for hearing before Mr. Justice Newbould and Mr. Justice B. B. Ghosh who were divided in opinion. The case with their opinions was placed before Mr. Justice Buckland under sec. 429, Cr. P. C.

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The dissentient JUDGMENT OF NEWBOULD and B. B. GHOSE, JJ. were as follows :—

NEWBOULD, J.—The Petitioner Pratap Chandra Guha Roy was tried and convicted by the Sub-Divisional Magistrate of Faridpur on three charges of defamation and was sentenced under sec. 500 of the Indian Penal Code to one year's simple imprisonment for each offence, the sentences to run concurrently. On appeal to the Sessions Judge of Faridpur his conviction on the third charge was set aside and the sentences were reduced to six months' simple imprisonment on each of the two charges on which the conviction was upheld, these sentences also running concurrently. The Petitioner has obtained an open Rule from this Court calling upon the District Magistrate and the complainant to show cause why the conviction of and the sentence passed on the Petitioner should not be set aside or such other orders passed as to this Court may seem fit.

The two charges in respect of which the Petitioner's conviction has been upheld are as follows :—

Firstly—That you on or about the 13th day of June 1923 at Berhanganj, P. S. Sibchar, defamed the complainant by making and publishing the following imputation in your speech at a public meeting concerning the police force employed at Char Maniar of which the complainant is a member and the principal officer in charge of the investigation to the effect that not to speak of the police only but the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct, intending to harm and knowing and having reason to believe that it would harm the reputation of the said complainant and the police force em-

ployed at Char Maniar and that you thereby committed an offence punishable under sec. 500, Indian Penal Code, and within my cognizance.

Secondly—That you on or about the 17th day of June 1923 at Faridpur, P. S. Kotwali, defamed the complainant by making and publishing in your speech at a public meeting the following imputation concerning the police force employed at Char Maniar of which the complainant is a member and the principal officer in charge of the investigation to the effect that the police force employed at Char Maniar had bitten off the nipple of the breast of women and had bitten the cheek of a woman nine months' pregnant intending to harm and knowing and having reason to believe that such imputation will harm the reputation of the complainant and the police employed at Char Maniar, and that you thereby committed an offence punishable under sec. 500, I. P. Code and within my cognizance."

The complainant is Rasiduddin Khan, a Sub-Inspector of Police. On the night of the 16th May 1925, a dacoity was committed in the house of one Adu Molla in village Char Maniar. In consequence of information received a body of police under another Sub-Inspector Badaruddin Ahmed arrived there while the dacoity was going on. For some reason that has not been made clear the Sub-Inspector Badaruddin and his party were attacked and kept confined by the villagers of Char Maniar. Rasiduddin Khan was the Sub-Inspector in charge of Sadarpur Police Station in whose jurisdiction Char Maniar is situated. As such he investigated both the case of dacoity and the case of assault on the police mentioned above. The Petitioner who is a member of the District Congress Committee made several speeches and the charges set out above

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relate to statements he is alleged to have made in two of those speeches.

A great deal of time has been wasted in the lower Courts owing to their having investigated issues that did not arise on the charges framed and the defence set up by the Petitioner. The charges though not well worded have evidently been framed on the case for the prosecution that the complainant is one of an association of persons, the police force employed at Char Maniar, and that imputations have been made against this collection of persons as such, so as to amount to defamation as defined in sec. 499, I. P. C., with special reference to Exp. 2 of that section. The main defence of the Petitioner is a denial that he defamed the complainant. Though he does not deny having made imputations against some members of the police force employed at Char Maniar, he contends that these imputations are not directed against the whole body of members of that force and were not defamatory of the complainant either individually or as a member of that body. His case is that so far as he made general imputations they were criticisms of the acts of the Government and so far as he made imputations of definite acts, they were against Bengali constables only and not against the whole Police force at Char Maniar. He has attempted to justify the accusations of the constables but no attempt has been made to justify any imputation against the complainant. Consequently it is irrelevant whether the imputations against the constables were true or were made in good faith and it is unnecessary to consider the evidence relating to these issues.

As regards the charges on which the Petitioner has been convicted the first contains a definite allegation that the

complainant was defamed by an imputation concerning the police force employed at Char Maniar, of which he was a member. The words set out in the charge are not mere abuse and are clearly defamatory. The only defence worthy of serious consideration that is made to this charge is a denial that such words were used. The principal witness as to the words used in the speech delivered at Berhamganj was Ansar Ali (P. W. No. 6), a Sub-Inspector who took written notes of the speech in long hand Bengali. For the Petitioner, it is urged that the defamatory words set out in the charge are not found in these written notes (Ex. 7) and therefore the charge must fail. But the written notes do not purport to be a complete report of the speech. I see no reason why this witness with the assistance of these notes should not be able to remember that these words were used. Further the charge is not that the Petitioner used these actual words but that he used words to this effect. That he used words imputing bestial conduct to the police force engaged at Char Maniar appears not only in the written notes but is also supported by the evidence of Mahabatulla, an Assistant Sub-Inspector of Police (P. W. 7) and three non-official witnesses (P. Ws. 20, 21 & 22). From their evidence it is clear that these imputations were made against that police force as a whole and not against the Bengali constables only. This evidence is unrebutted and justifies the findings of the lower Courts, that the first charge has been established.

In my opinion the conviction on the second charge cannot be upheld. Though the learned Sessions Judge finds that in the speech delivered at Faridpur, the whole force at Char Maniar were attacked by the Petitioner, this is not sufficient to

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support a conviction on this charge as framed. The charge does not relate to the whole speech but to portions alleging certain definite acts of brutality. It is not suggested that the complainant personally was accused of these acts. The imputations were not against a collection of persons as such but against some individual members of that collection of persons. To accuse the police force of biting off a nipple of a woman or biting a woman's cheek is absurd on the face of it and no such absurdity is to be found in the report of this speech, Ex. 12, the accuracy of which is not seriously disputed. The prosecution might have been able to make out a case of defamation by innuendo on the allegation that the speech implied that the officer-in-charge of the investigation was responsible for the acts of his subordinates, but the charge as framed does not require the Petitioner to meet such a case.

It was not argued before us that the sentence was too severe.

I would therefore make this Rule absolute to this extent and reverse the finding and sentence convicting the Petitioner on the second charge. I would not interfere with the conviction and sentence on the first charge.

I regret that I feel compelled to differ from my learned brother. As this difference will necessitate a reference to a third Judge I think it is necessary to express my opinion shortly on some other points though I have held them to be irrelevant to the issues that really arise in the case.

The plea of veritas entirely fails. In both the judgments of the lower Courts good reasons are given for holding that the evidence to support the charges of misconduct against the constables is totally false. No attempt was made at the hear-

ing of this Rule to meet the arguments in these judgments on which these findings were based. I can attach no weight to the argument that so many women could not have made such complaints unless there were some grounds for them. It amounts to no more than saying that if enough mud is thrown some will stick. I am unable to accept the plea that these accusations were made in good faith. It is impossible that a man of the Petitioner's intelligence and education could have believed the stories that were told to him. I have no doubt that he made these false imputations not believing them to be true but out of hatred of the British Government.

The learned Sessions Judge has written in his judgment that though he is inclined to hold that there was some kind of rough handling of Gaizulla and also that there might have been some rough handling, such as, the catching hold of women's hand, pulling at their cloth, etc., there is no credible evidence to support a judicial finding of these facts. The Petitioner may have believed that there was a substratum of truth in the stories that were told to him but even so it was not for the public good to make these false charges. On the contrary by supporting grossly false exaggerations he made it more difficult for the truth to be ascertained and the offenders, if any, to be punished.

As my learned brother and myself are divided in opinion, the case with our opinions thereon will be submitted to the Chief Justice in order that they may be laid before another Judge of the Court under sec. 429 read with sec. 439 of the Code of Criminal Procedure.

B. B. GHOSE, J.—I regret I have not been able to agree with my learned brother on all the questions and as I have come

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to different conclusion I give my reasons in some detail.

This Rule was obtained by the Petitioner against the conviction and sentence under two charges of defamation under sec. 500, I. P. C., by the Sessions Judge on appeal from a conviction by the trial Court. The Sessions Judge acquitted him of one of the three charges on which he was originally convicted and reduced the sentence from one year's to six months' simple imprisonment on each charge, the sentences to run concurrently. The facts are that there was a dacoity in the house of one Adiladdi or Adu Mollah of village Char Maniar on the 16th of May 1923. When the dacoity was going on six constables, under two Sub-Inspectors, arrived at the place and they entered the house and succeeded in capturing 3 of the dacoits. The villagers turned out and apparently mistaking the policemen for dacoits assaulted them and kept them tied up in the house of Adu Mollah. Information reached the Sadarpur thana, within the jurisdiction of which Char Maniar is situated, next morning, of the dacoity as also of the policemen having been tied up and policemen in two batches arrived at the village. The first batch of policemen released the men who had been kept tied up the previous night. The complainant Sub-Inspector Rasiduddin arrived at the village with the 2nd batch of men on the 17th May in the afternoon. Other police officers also came from other thanas. On the arrival of the police at the village almost all the male population fled away leaving the women behind them. On the 18th May house to house search was made in the village by the police, and the police remained there for several days making enquiries in both the cases, of assault on the police and of dacoity. The Petitioner heard stories of oppressive acts committed

by the police in the village, came there early in June with some other persons, saw many of the women who were alleged to have been maltreated and other persons and took down notes of what he had been told. Leaving the village with the information he had obtained he delivered three speeches in three different places in which he is alleged to have made defamatory statements with regard to the complainant. We are not now concerned with the third charge of which the Petitioner has been acquitted by the learned Sessions Judge. We have to deal with the first two charges only. I should first dispose of two questions of a preliminary nature. It was urged that the complaint is not sustainable because it was made at the instance and under the orders of the superior officer of the complainant and not of his own motion. I do not think there is any substance in this contention. If the complainant has been defamed it is of no consequence that he complained under the orders of his superior officer in order to clear his character, although if left to himself he might not have taken the trouble of prosecuting the offender. The second question relates to the rejection of the notes taken by the Petitioner of the statements made by the villagers which he sought to prove in the trial Court. The Sessions Judge on appeal admitted the notes of the statements of those persons only who were called as witnesses at the trial presumably as corroborative of their evidence but rejected the rest. In my opinion the Petitioner was entitled to prove the notes as evidence of his good faith and they were relevant on the question, although the persons who made the statements were not examined. I hold that the notes were wrongly rejected, but I do not think there should be an order for re-trial on that ground as there are

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sufficient materials on the record for deciding the question.

The charges we have to deal with are these :—

“ Firstly, that you, etc., etc., defamed the complainant by making and publishing the following imputations in your speech at a public meeting concerning the police force employed at Char Maniar, of which the complainant was a member and the principal officer . . . to the effect that not to speak of the police only but the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct, intending to harm, etc., etc.

Secondly, that you, etc., etc., defamed the complainant by making . . . the following imputation . . . to the effect that the police force employed at Char Maniar had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman, etc.”

I shall now deal with the questions raised as applicable only to the first charge. It is urged that the words are merely abusive and not defamatory. General words of abuse may not be defamatory but I cannot hold that to speak of a person that he is a beast and a pig in his conduct is not defamatory. The next plea is that the Petitioner did not utter the words set out in the charge but only spoke about the beastly oppression by the constables. There cannot be any doubt that the words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. When there is a denial the evidence in support of the prosecution must be scrutinized. The notes of the speech were taken in long hand by P. W. 6 who says the accused

spoke fluently and he could not take down all that the accused said. In his notes, Ex. 7, the following words occur : “ What oppression has been committed on women of 14 to 30 years, for which it is the duty of every one of us to extirpate the police like dogs, hogs and (illegible). Why the police only, the barbarous British Government itself from the highest officer the District Magistrate down to the Daroga, Duffadar and Chowkidar all are beasts (illegible).” These words are different from those set out in the charge. In his deposition the witness gives the words in Bengali which may be translated thus, “ We should try to extirpate the police with our heart's blood like despicable dogs, pigs and goats. Why the police only, the Daroga, Magistrate, Duffadar, Chowkidar all behave like beasts and pigs.” These also are not the same words as in the charge. The other witnesses who speak about the words uttered by the Petitioner are P. W. 7, P. W. 20, P. W. 21 and P. W. 22. I need not set out in detail what each witness says. It is sufficient to say that the words ascribed to the accused are differently stated by each witness and the petition of complaint also puts them differently. In this state of the evidence I cannot hold that it has been proved that the accused spoke the words stated in the charge, and it would not be correct to say that the words given in the different versions have the same meaning. When spoken words are alleged to have constituted the offence, a very slight alteration of a word may give quite a different meaning to them. From the petition of complaint and also the evidence of P. W. 6 it is clear that a distinction is made between the “ police ” and the superior officers, as Daroga and the Duffadar as well as Chowkidar.

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This supports to some extent the plea of the accused that what he said was in relation to the constables and not with reference to the superior officers. In my judgment the evidence does not substantiate this charge and it must therefore fall on that ground. The next point urged is that the words the accused is charged with are too general and cannot be defamatory of an individual such as the complainant. The case of *Eastwood v. Holmes* (1) is cited in support, where it was observed by Willes, J., that if a person wrote all lawyers were thieves, no particular lawyer could sue him for libel. It seems to me that the words in the charge "the British Government themselves, and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts, etc." are too wide to admit of the construction that any particular police officer was defamed.

The other questions raised apply equally to both the charges. The first question is whether the complainant was the person defamed or, in other words, whether he is a "person aggrieved" by the offence as contemplated under sec. 198 of the Criminal Procedure Code, so as to entitle him to maintain the prosecution. This is what is stated in the petition of complaint: "First it appears therefore that in making the above charges Dr. Pratap Chandra Guha Roy has intended to harm the reputation of the police and other high officials of the British Government and the Government themselves. . . . The allegations are being announced throughout the District and it is therefore necessary that their falsity should be proved in the most effective manner, viz., by trial in Court of law, etc." The learned Standing Counsel

relies on explanation 2 of sec. 499, I. P. C., as giving the complainant the right to maintain the prosecution. That explanation runs as follows:—"It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such." The contention seems to be that in this case there was defamation of the police force, i.e., a "collection of persons as such." As far as I am aware those words in the explanation have not been judicially dealt with in any reported case. In my opinion those words mean that a collection of persons as such may be collectively defamed in the same manner as a "company." The general principles on which a company may be said to have been defamed would therefore apply equally to the case where it is alleged that a "collection of persons as such" has been defamed. Those general principles were formulated by Chief Baron Pollock in *Metropolitan Saloon Omnibus Co. v. Hawkins* (2), where he said: "It (a corporation) could not sue in respect of an imputation of murder or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." This was adopted in *Mayor, etc., of Manchester v. Williams* (3), where it was laid down that a corporation may sue for a libel affecting property, not for one affecting personal reputation. Similarly, Lopez, L. J., said in *South Hetton Coal Co. v. North Eastern News Association* (4): "A corporation or company could not sue in respect of a charge of murder, or incest or adultery because it

(2) 4 H. & N. 87 at p. 90 (1859).

(3) [1891] 1 Q. B. 94.

(4) [1894] 1 Q. B. 133, 141.

(1) 1 F. & F. 347 (1858).

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could not commit those crimes. Nor could it sue in respect of a charge of corruption or of an assault because a corporation cannot be guilty of corruption or of an assault although the individuals composing it may be." These observations are quite apposite to the question before us and in my opinion the police force as such cannot complain of any imputation as regards its personal reputation because it cannot be guilty of beastly conduct, nor can the collective body be guilty of the offence of biting off the nipple of the breast of a woman or of biting the cheek of a woman. The matter may be tested in another way. Suppose somebody laid a complaint before a Magistrate in terms of the words of the charges in this case, would any Magistrate issue process against the police force as such or any member of the police force? I am sure no Magistrate would. In my judgment therefore the charges fail on the ground that they refer to the personal conduct only of a collection of persons as such.

I shall next deal with the case of *The King v. Osborne* (5), on which the learned Standing Counsel relied strongly. I take the report of the case from 2 Swanston as it is fuller than the report in Barnardiston. The report runs as follows:—"The paper on which the information was prayed, contained an account of a murder committed on a Jewish woman and child by certain Jews lately arrived from Portugal and living near Broad Street, because the child was begotten by a Christian, and the affidavits set forth that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad Street, were attacked by multitudes in several parts of the City, barbarously treated and threatened with death, in case they were found

abroad any more. Strange showed cause against the information, and that it could not be granted as for a libel, because it not appearing who the persons reflected upon are, no judgment can be given for the King, as in *King v. Orme* (6).

"*Sed per cur.* Admitting an information for a libel may be improper, yet the publication for this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible." It seems to me that Court held in that case an information for a libel was improper but it was granted for some other misdemeanour, as tending to raise tumults, etc. I do not think this case helps the prosecution. Nor does the case of *Rex v. Williams* (7), as in that case the imputation was against all the clergy in Durham and the libel was on every one of them. There is no imputation like that in the present case. I may also refer to the *Nil Darpan* case tried by the Supreme Court of Calcutta; cited in Mayne's Criminal Law of India. There the words complained of were, "I present the indigo planters' mirrors to the indigo planters' hands. . . ." Sir Barnes Peacock, C. J., is reported to have observed on the words used, "This certainly appears to me to represent to the indigo planters that if they look into this paper, they would see a true representation each of himself." The true rule appears to be that if a person complains that he has been defamed as a member of a class he must satisfy the Court that the

(6) 1 Ld. Raym. 486.

(7) 5 Barn. & Ald. 595 (1811).

(5) 2 Barn. 138; 2 Swan. 503n.

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imputation is against him personally and he is the person aimed at, before he can maintain a prosecution for defamation. In England the question as to how the words were understood by those to whom they were addressed, is a question for the jury if the Judge holds that there is a *prima facie* case. Here when the case is not tried with the aid of a jury, the question must be decided by the Judge as a question of fact, and in deciding this question the following principle should be borne in mind: "All circumstances which were apparent to the by-standers at the time the words were uttered should be put in evidence, so as to place the jury as much as possible in the position of such by-standers, and then it is for the jury to say what meaning such words would fairly have conveyed to their minds." Odgers on Libel and Slander, 5th Ed., p. 111. We should not construe the words as we would a document of title according to rules of construction of deeds, and specially when the words spoken have not been proved with certainty, and we have to decide not merely whether the words are defamatory but also whether the words refer to the complainant. Apply these principles and taking all circumstances into consideration, I am of opinion that the words complained of in the charges have not been proved to have been used with reference to each and every member of the police force and the complainant cannot therefore be said to be a person aggrieved by the offence complained of. In my opinion the charges are not sustainable against the Petitioner at the instance of the complainant.

In my opinion this is sufficient to dispose of the Rule, but as the matter must be placed before another Judge on account of our difference of opinion I must record my judgment as to whether the case falls

under any of the exceptions to sec. 499, I. P. C., assuming that the complaint is otherwise sustainable. As regards the first exception, i.e., the plea of truth, I agree with the learned Sessions Judge when he says that where the defamation imputes a crime to the complainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime. But in this case no crime was imputed to the complainant himself and the persons against whom the allegations were made, were not before the Court. In this case no Court would be justified in pronouncing an opinion that the allegations against persons not before it, were true without giving an opportunity to those persons to be heard. I pointed this out to the learned Counsel for the Petitioner when he was submitting that the allegations were true. All that the accused could establish in the present case was that there was *prima facie* evidence as to the truth of the allegations and which the accused might reasonably believe to be true or, in other words, his good faith. It is contended on behalf of the Crown that the Petitioner cannot urge the plea of good faith, because he says he spoke only about the conduct of the constables and all that he heard was about the conduct of the constables. If his plea that he spoke only about the constables is not accepted, the plea of good faith on his own statement is not maintainable. I do not think this contention can be accepted, as it seems to me not proper that one part of the statement of the Petitioner should be rejected and the other part used as an admission of guilt. In one portion of his argument the learned Standing Counsel said that although the members of the police force were fluctuating, the imputations might be held to be on the complainant because

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the men were under his control and he was at the place all along. If that be so, the Petitioner may establish his good faith by giving evidence with reference to the conduct of the constables. It was however not argued on behalf of the Crown that the Petitioner had no reasonable cause for believing the statements he had heard in the village and that he has not succeeded in establishing his good faith on that ground. But as the learned Sessions Judge came to a different conclusion I think it right to record my opinion on the question. It appears to me that on the finding of the Sessions Judge himself some acts of oppression were committed there. Dealing with the matter of Gaizuddi who was alleged to have been beaten with the result that he died, the learned Judge observes, "Moulvi A. Quadery has stated in his deposition that although he found no marks of injury on the man and most of the people there said that the man had epilepsy, some people also were saying at the time that Gaizuddi had been beaten by constables. I am therefore inclined to hold that there was some kind of rough handling on him."

This witness was the Deputy Superintendent of Police and he saw the man when he was in a dying condition. He also deposed that Deputy Magistrate, Babu Mani Mohan Ghose, P. W. 14, who was there also heard about this at the time. It is regrettable that none of these officers made any enquiry at that time about the allegations, which might have enabled them to find out the truth at once. The Sessions Judge further held that there might have been some rough handling, such as, catching hold of women's hands, pulling at their cloth, etc. I cannot agree with the Deputy Magistrate, P. W. 14 above named, that pulling women by the hands, taking away their cloth, making

women naked, prodding them with guns, could be legally justified. It is not necessary for the purpose of this case to examine the evidence regarding the various cases dealt with by the Sessions Judge. But I think it would be right to refer to some of the cases. One Fuljan Bibi came into Court and deposed amongst other things that the nipple of her breast was bitten off. She was not asked whether she was willing to submit to an examination of her person, but was disbelieved because another witness who went to the village to make enquiries stated that the name of another woman was given to that witness as having been so maltreated. I do not think this to be satisfactory. The case of one Haju Bibi also deserves notice. She complained that she had been raped. It was alleged that there was an eye witness, a boy of about 16 years named Noai. Noai was examined by the Deputy Magistrate several times, a rather unusual procedure. The matter was adjourned for the identification of the man. The Deputy Magistrate P. W. 14 says, "Noai witness identified constable Mir Ahmed Ali as the ravisher. The constable was mixed up with 30 others." After this identification the case was dismissed. In this case I think either the constable should have been tried for the offence alleged or the woman for bringing a false charge against an innocent man. But as I have said it is immaterial for the present case whether the stories were true or false. In my opinion, however, the Petitioner had reasonable grounds for believing in the truth of the allegations made to him having regard to all the circumstances and as it is also not argued on behalf of the Crown that there were no reasonable grounds for the Petitioner's belief, I hold that the case comes under the ninth exception of sec. 499, I. P. C., al-

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though the language of the Petitioner is otherwise objectionable. On all these grounds I would make the Rule absolute and acquit the accused of the charges. I do not think it necessary to refer to some other points urged by the Petitioner's Counsel as in my opinion they fall within one or other of the questions I have dealt with.

Messrs. S. N. Halder, B. K. Chowdhury and D. N. Sen with Babus Suresh Chandra Taluqdar, Ashitaranjan Ghosh, Bhudard Haldar, Manmatha Nath Roy (Jr.) and D. N. Bhattacharjee for the Petitioner.

Mr. B. L. Mitter, Standing Counsel, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—The Petitioner in this case has been tried and convicted by the Sub-Divisional Magistrate of Faridpur on three charges of defamation and was sentenced under sec. 500, I. P. C., to 1 year's simple imprisonment, these sentences to run concurrently.

On appeal to the Sessions Judge of Faridpur his conviction on the 3rd charge was set aside and the sentences were reduced to 6 months' simple imprisonment on each of the two charges on which the conviction was upheld, these sentences also to run concurrently.

He has obtained a rule from this Court calling upon the District Magistrate and the complainant to show cause why the conviction and the sentence passed upon him should not be set aside or such other orders passed as to this Court may seem fit.

The rule came on for hearing before my learned brothers Newbould and B. B. Ghose, JJ., who are equally divided in opinion. The case with the opinions of

the learned Judges has been laid before me under sec. 429, Cr. P. C.

The charges in respect of which the Petitioner's conviction has been upheld by the Sessions Judge are as follows :

Firstly.—That you on or about the 13th day of June 1923 at Berhamganj P. S. Sibchar, defamed the complainant by making and publishing the following imputation in your speech at a public meeting concerning the police force employed at Char Manair of which the complainant was a member and the principal officer in charge of the investigation to the effect that not to speak of the police only but the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct, intending to harm and knowing and having reason to believe that it would harm the reputation of the said complainant and the police force employed at Char Manair, and that you thereby committed an offence punishable under sec. 500, I. P. C., and within my cognizance.

Secondly.—That you on or about the 17th day of June 1923, at Faridpur P. S. Kotwali, defamed the complainant by making and publishing in your speech at a public meeting the following imputation concerning the police force employed at Char Maniar of which the complainant was a member and the principal officer in charge of the investigation to the effect that the police force employed at Char Manair had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman nine months pregnant intending to harm and knowing and having reason to believe that such imputation will harm the reputation of the complainant and the police employed at Char Maniar and that you thereby committed

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an offence punishable under sec. 500, I. P. C., and within my cognizance.

It has been submitted on behalf of the Petitioner that these charges are defective.

Under sec. 499, I. P. C., whoever by words . . . makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said to defame that person.

The person concerning whom the imputation is made, whom it is intended to harm in his reputation, and who in consequence is defamed is the same throughout.

There is confusion in these charges between the complainant and the police force at Char Maniar in relation to the various ingredients of the charge.

It is charged that the complainant was defamed by imputations made concerning the police force at Char Maniar, and that the reputation intended to be harmed was that of the complainant and the police force.

It is obvious that charges so framed do not conform to the requirements of the definition.

The defects seem to have originated in a failure to appreciate Exp. 2 to the section and the principles applicable when the words making the imputation appear to be general expressions but the complaint is that they are directed against a particular individual.

The explanation in my opinion is intended to include a company or an association or collection of persons as such within the word "person" as used in the definition so that the latter should not be limited to individuals.

In a case in which the explanation is properly called into use the identity of

the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such—and the last two words of the explanation are most material to its correct application—cannot by virtue of this explanation justify a charge of defaming an individual, and a charge cannot combine the explanation with the definition for such a purpose. Nor does it carry the matter any further to state as has been done by the charges in this case that the complainant was a member of the police force at Char Maniar.

These charges seem to have assumed that the police force at Char Maniar is an association or collection of persons such as the explanation contemplates, but without expressing any definite opinion on the point, as it does not directly arise, I have considerable doubt whether such a view is correct. *Aldridge v. Barrow* (8) which is some authority on the point was a civil suit but that would not appear to affect the principle (*vide* the observations of Fletcher Moulton, L. J., in *Jones v. E. Hulton & Co.* (9)).

In this case the Petitioner is charged with having defamed an individual. The imputations in the charges are general expressions assuming that they concern the complainant. * This would appear to be the case notwithstanding the reference in the first to the District Magistrate and the Daroga, because neither of these officers, who are capable of identification, if the investigation referred to in the

(8) I. L. R. 34 Cal. 662: s. c. 11 C. W. N. 680 (1907).

(9) [1909] 2 K. B. 444 at p. 460.

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charge is specified, which has not been done, is the complainant in the case. As regards the second charge though no one is referred to by name or by reference to his office in the imputations charged, the nature of the imputations is indicative of the fact that an individual may be meant.

It may be that the general nature of the imputations has led to the confusion in the charges. There is no necessity for that to have occurred.

The cardinal rule is that the offence consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it [Per Lord Loreburn, L. C., in *E. Hulton & Co. v. Jones* (10)] Lord Shaw of Dumferline in his speech cited *Bourke v. Warren* (11) in which Abbott C. J., said:—"The question for your consideration is whether you think the libel designates the Plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel: it is sufficient if those who know the Plaintiff can make out that he is the person meant."

Following upon the rule so laid down it becomes a matter of comparative indifference whether the words are general or refer to a specific individual, but lest this be taken too literally I should explain that it may be that an individual is as much defamed by words apparently only of more general application as by words referring to him by name. The test is that formulated by the learned Judges whose observations I have quoted.

A very good instance of a case where defamatory matter may appear only to

apply to a class of individuals yet, if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class an action may be maintained by such individual in respect of the publication of such matter, is to be found in *Le Fanu v. Malcolmson* (12). The defamatory matter is too long to be reproduced here *seriatim*; all that I need quote are a passage from the judgment of Lord Cottingham L. C.:—"If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels;"

and the following passage which is to be found in the judgment of Lord Campbell:—

"The first objection which has been relied on by the counsel for the Plaintiff in error, who certainly has argued the

(10) [1910] A. C. 20.

(11) 2 C. & P. 307 (1826).

(12) 1 H. L. C. 637 (1848).

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case with his usual ability, and has brought forward all the arguments that learning and talent could supply; the first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself.

Now I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated."

The confusion of ideas which these charges disclose makes it impossible for a proper trial to be held. To give but one instance—the question of the relevancy of evidence will be approached from a different stand-point if the charges stand as drawn or if they are drawn as they should be in accordance with the principles applicable to the case. I may even go so far as to say that there has been no trial at all of the Petitioner for having defamed the complainant, for a trial on these charges cannot be said to have been such a trial.

In the circumstances the evidence and

the merits generally have not been gone into. As I appreciate the situation there should be a new trial upon charges properly drawn, and in that view I ought to express no opinion on the merits even had they been fully argued. The question is as to the form the final order should take, as to which I have now heard learned counsel for the parties.

The order will be that the conviction and sentences by the Sessions Judge, Faridpur, be set aside and I direct that the case be retried by the District Magistrate, Faridpur, or by such Subordinate Magistrate to whom he may assign the case, other than Babu A. R. Bose, Sub-Divisional Magistrate of Faridpur, before whom the previous trial was held.

D. N. S.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SUMNER.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.
1924,
Heard, 28, October.
Judgment,
21, November.

WILLIAM
GRAHAM,
Appellant,
v.
KRISHNA CHAN-
DRA DEY,
Respondent.

Specific Relief Act (1 of 1877), secs 16, 14-17—Contract, part of, which cannot be specifically performed—Specific performance as to rest when can be decreed, when part not negligible—Court, if may make new contract for parties—Costs, when defence without merit, allowed.

Secs. 14 to 17 of the Specific Relief Act taken together constitute a complete Code within the terms of which relief by way of specific performance dealt with therein must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the

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language of the section must ultimately prevail.

Before a Court can exercise the power given by sec. 16 (in a case where it is not proved that the part of the contract left unperformed bore only a small proportion in value to the whole within sec. 14 and that the purchaser had declined to accept relief on the terms of sec. 15) it must have some material tending to establish that (1) taken by itself there was a part of the contract which could and ought to be specifically performed and (2) which stood on a separate and independent footing. It cannot apply the section on a mere surmise that, if opportunity were given for further inquiry, such material might be forthcoming and possibly might be found to be sufficient. Further the words of the section do not authorise the Court to take action otherwise than judicially and in particular do not permit it to make for the parties or to enforce upon them a contract which in substance they have not already made themselves. The words exclude a new bargain that cannot be said to be contained in the old one.

The successful Appellant was deprived of his costs, his defence having been "singularly devoid of merit."

This was an appeal (No. 156 of 1923) from a decree, dated the 26th March 1923, of the High Court at Calcutta, which reversed a decree, dated the 27th November 1920, of the Subordinate Judge of the 3rd Court at Alipour.

By an agreement in writing, dated the 15th September 1919 and made between the Appellant of the one part, and the Respondent of the other part, the Appellant agreed to sell and the Respondent agreed to purchase certain property in Tollygunj for Rs. 1,53,000. The property was described in the schedule to the said agreement under two headings, A and B,

the one as containing 11 bighas 13 cottahs, and the other (plot B) 11 bighas 4 cottahs and 2 chittacks.

The agreement provided for completion within 14 days in order that it might be disposed of before the Puja holidays, and that time should be of the essence of the contract.

The title deeds to the said properties were delivered to the Respondent's solicitors, who then discovered that the property comprised in plot B belonged to the Appellant's wife, that the Appellant had entered into the agreement without her knowledge or consent, and was unable to give a good title to plot B.

The sale accordingly was not completed within the time specified, and the Appellant gave notice to the Respondent that the contract was cancelled.

On the 10th November 1919 the Respondent filed a suit for specific performance and in the alternative for damages for breach of contract.

The Subordinate Judge offered the Plaintiff a decree for conveyance of plot A under the terms of the sec. 15 of the Specific Relief Act, 1877; this offer was refused, and, no evidence of damage being adduced, he dismissed the suit without costs.

On appeal the High Court (C. C. Ghose and Panton, JJ.) were of opinion that, although the case did not come within the purview of secs. 14 and 15 of the Specific Relief Act, it did come within the purview of sec. 16 since the contract though nominally one was really divisible and that on general equitable grounds the Appellant ought to be held liable. They accordingly held that the Respondent was entitled to specific performance of the agreement to the extent of the Appellant's interest in plot A with a proportionate abatement of the purchase price with re-

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spect to plot B and they remitted the case for the assessment of such abatement.

Messrs. A. M. Dunne, K. C. and Bryan Farrer for the Appellant (*ex parte*).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—This was a purchaser's suit to enforce under the Specific Relief Act, 1877, a contract for the sale of two plots of land for one sum of Rs. 1,53,000 in the Tollygunj District of Calcutta. The contract required the vendor to make out a marketable title and, in case of failure to do so, bound him to refund the deposit on demand. It also stipulated that, in case of any deficiency in the area or quantity of land, no compensation should be payable by the vendor on actual measurement. There was no general condition either providing for compensation or excluding it. The vendor proved to be unable to make a title to the second plot and the trial Judge, having offered the Plaintiff a decree for the conveyance of the other plot on the terms of sec. 15, which offer was refused, dismissed the suit without costs. On the issue of damages for breach of the contract no evidence of material damage was given.

On appeal the High Court, considering that the case fell within the terms of sec. 16, allowed the appeal but, having before them no evidence of the value or character of the plots beyond the particulars given in the contract, remitted the case to the trial Judge, in order that he might take evidence and assess the abatement of price to be allowed in respect of the failure to make title to one of the plots.

Secs. 14 to 17, inclusive, of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together

they constitute a complete Code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail.

Sec. 17 prescribes that there shall be no grant of specific performance except in cases coming within one or other of the three previous sections. It was not proved that the part of the contract which was left unperformed bore only a small proportion in value to the whole within sec. 14, and the purchaser had declined to accept relief on the terms of sec. 15. Accordingly, sec. 16 (which appears to be novel in the width of the power which it confers) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot B which (a) "taken by itself could and ought to be specifically performed," and (b) "stood on a separate and independent footing" from the other part of the contract, which admittedly could not be performed.

Their Lordships think (1) that before a Court can exercise the power given by sec. 16 it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient; and (2) that the words of the section, wide as they are, do not authorise the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties or to enforce upon them a contract, which

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in substance they have not already made for themselves.

When the whole contract is enforced in one way or another, as to the greater part by the remedy of specific performance and as to a small residue by compensation, it is not necessarily making a new contract to select from among the remedies, which the Court can grant, one for the major and another for the minor part of the contract. For this jurisdiction sec. 14 specifically provides and sec. 17 forbids any extension beyond it. Hence sec. 16, both because it must be something not covered by sec. 14 and because no Court can act unjudicially without either statutory warrant or consensual authority, must be limited and the expression "stands on a separate and independent footing" points to a limitation, which would exclude any new bargain, that cannot be said to be contained in the old one.

In the present case the contract states that the plots are in the same District, are of about the same area, are both equipped with tanks but otherwise are without specific description, and are both so delimited that they can be said to be bounded by such and such roads or properties on the north, south, east and west. The price, however, is a price for both together and, in describing the steps to be taken as to making title, granting an assurance, and receiving rents and profits, both plots are dealt with together as a whole, and there is nothing by which to separate them or to place one on a footing independent of the other. In fact, if it were not for the statement of their areas, which are cautiously stated not to be guaranteed, and of their boundaries and locality, no separate and independent footing could be suggested or alleged to distinguish either from the other. It may be that in the estimation of the parties

at the time of the agreement one was more valuable than the other, bigha for bigha, or one was made more valuable than it would otherwise have been by the simultaneous acquisition of the other, apart from their respective areas. Nothing is stated about the quality or amenities of the land. It may be that, because both were sold together, the total price was less than the aggregate prices would have been, if both had been sold apart. To call the parties to give further evidence now is to try to make them agree on a new price, subject to settlement by the trial Judge, if they differ; it is, in fact, to impose on them an arbitration, to which they have not submitted. To resort to expert evidence is to inquire what they ought to have agreed upon, though the fact is that, left to themselves, they did not choose to do so. To remand the case to the trial Judge is to delegate to him a discretionary decision, which rested with the High Court itself in the view which it took of the appeal. Their Lordships are, therefore, of opinion that the judgment of the High Court cannot stand and that the judgment dismissing the suit should be restored.

The trial Judge gave the successful Defendant no costs. The defence was singularly devoid of merit. The vendor, a barrister-at-law, owned only one of the two plots, which he agreed to sell, the other, as he must have known, belonging to his wife, and the assurance, which he subsequently gave upon a requisition on title, that his wife would concur, was somehow falsified. He then set up an affirmative defence, that time was of the essence of the contract, which failed at the trial and has since been abandoned. Their Lordships accordingly think that there ought to be no costs now on either side, either of the appeal or of the pro-

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ceedings in the Courts below, and they will humbly advise His Majesty to the above effect.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

G. D. M.

[CIVIL REVISIONAL JURISDICTION]

REF. No. 9 OF 1924.

<p>CHATTERJIA, J. C. C. GHOSE, J. CUMING, J. 1925, Heard, 25, May. Judgment, 9, June.</p>	}	<p>ISABELLA COAL COMPANY, Appellant, v. THE COMMISSIONER OF INCOME-TAX, BENGAL, Respondent.</p>
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Indian Income Tax Act (XI of 1922), sec. 10 (2) (viii)—Road and public works cess, if should be deducted from profits of colliery for assessment of income-tax—Colliery, if a premises—Cess, if a "local rate."

In determining the assessable income of a colliery under the Indian Income Tax Act, cess paid on account of the colliery shall be deducted as "local rate" as it is paid for the use of the colliery, which is a premises within the meaning of sec. 10 (2) (viii) of the said Act.

This was a Reference under sec. 66 (2) of the Income Tax Act, XI of 1922, from the Commissioner of Income-tax, Bengal (Mr. W. D. R. Prentice), dated the 3rd November 1924.

The facts are these: When the Isabella Coal Company was assessed in Calcutta to income-tax a claim by the Company to be allowed to deduct the amount paid on account of road and public works cess in computing the profits and gains assessable to income-tax was rejected. The Company appealed to the Assistant Commissioner of Income-tax, Calcutta, claiming, among other things, that under sec.

10 (2) (viii) of the Income Tax Act, allowance should be made for the amounts paid as road and public works cess as these cesses were "local rates." This claim was rejected by the Assistant Commissioner of Income-tax, Calcutta, on the basis of the decision by the Patna High Court in the case of *K. M. Selected Coal Company of Manbhum* (3). The Company has now applied for a Reference to the High Court of the "point of law—whether road and public works cess is a 'local rate' within the meaning of cl. (viii) of sec. 10 (2) of the Income Tax Act, XI of 1922."

The questions of law referred for decision are as follows:—

(i) Should an allowance be made to the Isabella Coal Company under sec. 10 (2) (viii) in respect of the amount paid by it on account of road and public works cess on the ground that these sums were paid on account of "local rates" in respect of premises used for the purposes of the business?

(ii) Should an allowance be made to the Isabella Coal Company under sec. 10 (2) (ix) in respect of the amount paid by it on account of road and public works cess on the ground that it is an expenditure incurred solely for the purpose of earning such profits and gains?

The Commissioner of Income-tax expressed his opinion on the two points in the negative.

Mr. N. N. Sircar (with *Mr. U. N. Sen Gupta*) argued on behalf of the Coal Company that there are two questions:—(1) Whether road cess is a local rate and (2) whether cess payable in respect of colliery is a local rate paid for the use of the premises within the meaning of sec.

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10 (2) (viii) of Income Tax Act of 1922. It is a local rate. [Referred to *Surno-moyee Debec v. Purresh Narain Roy* (4).] The cess was paid for the use of premises within the meaning of sec. 10 (2) (viii). A colliery is a premises. The ordinary notion of premises is no guide. It is a premises from legal point of view. [Secs. 5, 6, 72 of the Cess Act (Act IX, B. C., of 1880).] Even in the case of mines although the amount of cess may be determined on the profits as provided in sec. 72, the liability arises because it is immoveable property—sec. 6 of the Cess Act. It is paid for the use of the premises. The proper use of a colliery is to cut and to take coal out of it. That is the only mode of its enjoyment. [Cited *Mohesh Narain v. Nourbat Pathak* (1).]

The Advocate-General, Mr. S. R. Das [with Mr. S. M. Bose (sr.)] for the Commissioner of Income-tax argued that under the Cess Act, mines were to be assessed like a business on the net annual profits. The cess did not come under sec. 10 (2) (ix) of the Income Tax Act as it was not an expenditure incurred solely for the purpose of earning such profits.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA AND C. C. GHOSE, JJ.—This is a Reference under sec. 66 (2) of the Income Tax Act, XI of 1922.

The assessee, the Isabella Coal Company, paid road and public works cess in respect of their coal mine, and claimed a deduction of the amount paid by them as cesses, in computation of the income-tax under cls. (viii) and (ix) of sec. 10 (2)

of the Income Tax Act, XI of 1922, and the question referred to us is whether the sums paid by them as cesses should be deducted under cls. (viii) and (ix) of sec. 10 (2) of the Act.

Sec. 10 (1) lays down that the "tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him." (2) Such profits or gains shall be computed after making the following allowances, namely :—(Omitting the other clauses).

(viii) Any sum paid on account of land revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business ;

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

It is not, and cannot be, disputed that road cess and public works cess are "local rates." The question is whether they are local rates "in respect of such part of the premises as is used for the purposes of the business."

The first point therefore is whether a coal mine comes within the expression "premises." The word "premises" is not defined in the Act. It is used with reference to buildings, but it is also used with reference to land, and there is nothing to show that in law the expression is restricted to buildings. We think that the expression is wide enough to cover a coal mine.

The next question is whether the coal mine is "used for the purpose of the business." The assessee is a Coal Company. They raise and sell coal. It is contended however that so far as the coal taken out, in respect of which the cess is levied, is con-

(1) I. L. R. 32 Cal. 837 at pp. 840, 852 (1905).

(4) I. L. R. 4 Cal. 576 at p. 580 (1875)

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cerned, it is not used for the purposes of the business as "use" does not contemplate the destruction of the thing itself. But having regard to the nature of the property (a coal mine), the cutting and taking away coal is using the premises for the purposes of the business. "In the case of mining properties the only mode in which they may be profitably used is to take from them valuable ores," and the "taking of ore from the mine is rather the use than the destruction of the estate." See *Mohesh Narain v. Nowbat Pathak* (1). Cesses paid by the Company therefore are paid in respect of the premises and for the purposes of the coal business. Sec. 5 of the Cess Act (Act IX of 1880, B. C.) lays down that all immoveable property (except as otherwise in secs. 2 and 8 provided) shall be liable to the payment of a road and public works cess. Sec. 6 provides that "the road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immoveable property ascertained respectively as in this Act prescribed." Cesses therefore are payable in respect of all immoveable property, and among others, mines.

The learned Advocate-General however contends that a distinction has been drawn in sec. 6 of the Cess Act (IX of 1880, B. C.) between land and mines, that in the former, the cess is payable on its annual value, whereas in the case of mines, it is payable on the net profits of the mine, and although if the cess were payable on the mine as land it would be a local rate "in respect of the premises used for the purposes of a business," it is not so as the cess is payable in respect of the net profits of a mine. But sec. 5 lays

down that all immoveable property (except houses, shops and other buildings) shall be liable to the payment of a road and a public works cess and mine is immoveable property. It is true that sec. 6 lays down (so far as mines are concerned) that the cesses shall be assessed on the annual net profits from mines. But sec. 6 merely provides the mode of assessment, and does not change the nature of the imposition, which is a tax imposed on all immoveable property which includes mines.

It is contended however that the cess is not payable on mine but on such part of it from which coal is taken away, and not even on the coal taken out unless there is a profit, and the cess is payable only on the net profits. But unless the coal is taken out there would be no profits.

Lastly, it is contended that as cess is payable on the net profits, it is not payable until the net profits are ascertained, and therefore cannot be deducted. But under sec. 72 of the Cess Act the net profits of a mine (and quarries, etc.) are to be calculated on the average of the annual net profits for the last three years for which accounts have been made up.

The Commissioner of Income-tax relies upon the case No. 102 of 1920 decided by the Patna High Court [*In the matter of Raja Jyoti Prosad Singh Deo of Kashipur* (2)], and "*In the matter of K. M. Selected Coal Company of Manbhum* (3)." In the first case it was held that income derived from the rents and royalties of collieries does not fall within "income derived from business" under sec. 5 (iv) of the Income Tax Act, 1918, but within income derived from other sources "

(1) I. L. R. 81 Cal. 857 at p. 852 (1905).

(2) [1921] Pat. 81 : 6 P. L. J. 62 (F. B.) (1921).

(3) I. L. R. 3 Pat. 295 (1923).

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under cl. (vi) of that section, and that in assessing income-tax on such income, the amount paid in respect of road cess and public works cess should not be deducted from the taxable income. That case was a reference (under sec. 51 of the Income Tax Act of 1918) upon the application of the assessee who did not carry on business but who received rents and royalties and the question was whether road and public cesses paid by him should be deducted in assessing the tax payable by him.

As stated above, it was held that the income derived from rents and royalties of collieries does not come under the head of income derived from business, and therefore did not fall under sec. 9 of the Act which provided that the tax shall be payable by an assessee under the head "income derived from business" in respect of the profits of any business carried on by him and then set out allowances which might be deducted in computing the profits. Sec. 11 of the Act, which dealt with income derived from other sources, made an allowance of expenditure "incurred solely for the purpose of making such income or earning such profits." The learned Judges were of opinion that payments made on account of road cess and public works cess cannot be deducted under sec. 11 in assessing the income-tax. In the view we take of cl. (viii) of sec. 10 (2) of Act XI of 1922, it is unnecessary to consider the above question in the present case.

In the second case [*K. M. Selected Coal Company* (3)], it was held that a rate on the annual output of a mine imposed on a colliery proprietor under sec. 23 (3) of the Bihar and Orissa Mining Settlement Act, 1920, by the Local Mines

Board of Health, and a cess in respect of the annual despatches of coal and coke from a mine imposed on a colliery proprietor under sec. 45 of the Jheria Water Supply Act, 1924, by the Jheria Water Board do not fall within sec. 10 (2) (viii) of the Income Tax Act, 1922, but they do fall within cl. (ix), and, therefore, should be deducted under the latter clause for the purpose of determining the proprietor's taxable income. The rates payable under those two Acts are no doubt local rates, but not rates imposed on such part of the premises as is used for the purposes of business. The rates are imposed on the owners of mines—on the annual output from their mines under one Act, and on the annual despatches of coal and coke from the mine under the other. The Court there had not to consider the rates imposed by the Cess Act, under which cess is imposed upon all immoveable property. So far as cl. (viii) of sec. 10 (2) was concerned all that was necessary to decide was that the word "premises" does not include the annual output or the annual despatches of coal from the mines, upon which alone the rates were payable under the two Acts mentioned above.

Road cess and public works cess on the other hand are taxes not against a person but against the property itself. In *Surnomoyee Debee v. Puresh Narain Roy* (4), the learned Judges observed that it is a tax upon immoveable property and is assessed upon the annual value of that property. They were not considering mines, in which case the mode of assessment is differently laid down. In *Manindra Chandra Nandy v. Secretary of State for India* (5), the Judi-

(4) I. L. R. 5 Cal. 576, 1580 (1876).

(5) I. L. R. 38 Cal. 373, 876: s. c. 15 C. W. N. 210 (P. C.) (1910).

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cial Committee observed that "both in secs. 6 and 72 (of Cess Act, IX of 1880) the net annual profits have reference to the property and not to the individual."

We are accordingly of opinion that cesses paid by the Company are local rates "in respect of such part of the premises as is used for the purposes of the business" within the meaning of cl. (viii) of sec. 2 of the Income Tax Act, and that they are entitled to deduction of the amount of the cesses paid.

In this view it is unnecessary to consider whether the payment comes under cl. (ix) of sec. 10 (2) of the Act.

The Petitioner Company is entitled to the costs of this reference which is assessed at Rs. 350 including Counsel's fee.

CUMING, J.—This is a reference by the Commissioner of Income-tax.

The facts are these: A certain coal Company, the Isabella Coal Company, has been assessed to income-tax.

The Company contended that they were entitled to deduct first the amount they have paid on account of road and public works cess in computing the amount assessable to income-tax. They contend that their case falls under either sec. 10 (2) (viii) or sec. 10 (2) (ix).

This claim has been rejected by the Commissioner of Income-tax and on the application of the Company this reference has been made to the Court. The case turns on the construction of these two sections of the Income Tax Act, sec. 10 (2) (viii) and (ix).

Sec. 10 (2) (viii) runs as follows:—
"Any sums paid on account of land revenue, local rates or municipal taxes in respect of such part of the premises

as is used for the purposes of the business."

It is conceded that road cess and public works cess are local rates.

Mr. Sircar contends on behalf of the Company that the tax is leviable on the mine and not on the income (sec. 5, Cess Act), that it is calculated on the income no doubt but this is merely the method of assessment, that the only way of using the mine is by extracting the coal, that a mine is a premises and so the whole of the mine is used for the purposes of the business. Hence the present case comes under sec. 10 (2) (viii).

The learned Advocate-General would seem to contend that a mine is not a premises, that the assessment is made really on a business, the business being that of cutting coal and that the cess is really paid on account of the business. The cutting of coal is the destruction and not the use of the premises.

The cess is paid on the profit and hence on the business.

I think the Company must succeed. I hold that a mine is a premises.

The expression premises has never as far as I know been legally defined. It has been in one case held to mean a 100 acre park. Popularly no doubt premises usually means a building. Legally I do not think it does. We often hear the expression "house and premises" which clearly shows that the premises are not the house only. I am of opinion that a colliery is a premises.

Then the whole colliery is used for the purpose of the business. The colliery is used by digging the coal out of the seams, bringing it to the surface and selling it.

The learned Advocate-General would

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contend that this is destroying the colliery, not using it.

As Mookerjee, J., points out in *Mohesh Narain v. Nowbat Pathak* (1), the taking of ore from a mine is rather the use than the destruction of the estate, the partial exhaustion being but the incidental consequence of the use.

As far as I am aware there is no other way of using a colliery or mine except by digging the coal or minerals out of it.

The learned Advocate-General would contend that in the case of a mine it is really a cess levied on a business because the road cess and public works cess is assessed on the annual net profit. This argument confuses the thing if I may say so which is liable to pay the tax and the method of arriving at the amount to be paid in any case.

Sec. 5 of the Cess Act states that all immoveable properties shall be liable to the payment of a road cess and public works cess. A business cannot be said to be immoveable property.

Sec. 6 on which the learned Advocate-General has relied merely prescribed the method for determining the amount of cess to be paid, in the case of land, on the annual value and, in the case of mines, on the annual profit. No doubt the extraction and selling of coal is a business but road cess and public works cess is assessable not on the business but on the immoveable property owned by the person or persons carrying on the business. It is the property that is liable, not the person (see sec. 5).

I am therefore of opinion that a colliery is a premises, that it is used for the purposes of the business, which busi-

ness is the extraction and sale of coal and that the road cess and public works cess is a local rate.

That being so, the Isabella Coal Company are entitled to deduct the amount paid as road and public works cess in computing their gains and profits assessable to income-tax.

In this view of the case it is not necessary to consider whether the case falls under sec. 10 (2) (i) of the Income Tax Act.

Messrs. G. N. Dutt & Co., Solicitors for the Coal Company.

Mr. G. C. Gooding, Solicitor for the Commissioner of Income-tax.

P. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER

No. 115 of 1923.

<p>SUHRWARDY, J. CUMING, J. 1924, 28, November:</p>	}	<p>THE BENGAL COAL COMPANY, LTD., Plaintiff, Appellant, v. AFGAR COLLIERIES, LTD. and ors., Defendants, Respondents.</p>
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Compromise, order recording, followed by decree — Order, if may be appealed from after decree passed — Appeal against decree

An appeal was filed only against the order recording a compromise or a partial settlement of a suit under Or. 23, r. 3, C. P. C., although there was a decree in pursuance of the order:

Held—That the appeal was incompetent in that a decree having been passed before the appeal was filed an appeal lay from the decree and not from the order which was superseded by the decree.

This was an appeal against the order of Babu Bejay Gopal Chatterjee, Sub-

(1) I. L. R. 32 Cal. 537 at p. 552 (1905).

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ordinate Judge of Asansol, in Zillah Burdwan, dated the 8th of December 1922.

The facts of the case will appear from the judgment.

Mr. S. R. Das and Babu Hemendra Nath Sen for the Appellant.

Mr. N. Sarkar, Babus Atul Ch. Dutt, Bireswar Bagchi and Manmotha Nath Ganguly for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from an order recording a compromise or a partial settlement of a suit under Or. 23, r. 3, C. P. C. The order appealed against was passed on 8th December 1922. On 15th January 1923 a decree was prepared in pursuance of that order in accordance with the provisions of r. 3. On the 26th February this appeal was filed only against the order of the 8th December but no appeal was preferred against the decree. A preliminary objection was taken by Mr. Sarkar on behalf of the Respondents that the present appeal is incompetent in that the decree having been passed before the appeal was filed an appeal lay from the decree and not from the order which is superseded by the decree. We think this objection must prevail. So far as this Court is concerned it must be now taken to be settled that where a preliminary decree or order is followed by a final decree appeal does not lie against the former after the final decree is passed. All the cases on this point have been cited, considered and followed in *Nanibala v. Ichhamoyee* (1). In *Madhu Sudan v. Kamini Kanta* (2) the learned Judges observe that under

sec. 588 of the old Code (corresponding to 43 of the new Code) appeal has been allowed from two classes of orders, some of which do not affect the decision of the case and some that do. In both cases the right to appeal from the order is lost after the preparation of the final decree. In that case the appeal was brought against an order of remand after the final decree was passed in the case. The learned Chief Justice in the course of his judgment laid down the principle that there could be no appeal against an order whether interlocutory or otherwise after the final disposal of the suit. In the case of *Nanibala v. Ichhamoyee* (1), the appeal was preferred against the preliminary decree in a partition suit after the final decree was made. The principle underlying these decisions is stated in *Mackenzie v. Narsingh Sahai* (3) to be that if the appeal is brought from the preliminary decree after the passing of the final decree which is not appealed from and if the appeal succeeds the result would be that the final decree which had not been appealed against would have to be indirectly set aside, a state of things the legislature could never have contemplated, or there would be a final decree binding on the parties inconsistent with the preliminary decree or order.

The learned Advocate-General for the Appellant concedes that the law is settled as above but he attempts to distinguish the present case on the ground that in the cases above referred to and those which they follow, some act had to be done and some further steps taken by the Court or the parties before the passing of the final decree, whereas in the present case the decree automatically followed the

(1) 40 C. L. J. 291 (1923).

(2) 4 L. R. 32 Cal. 1023 (1905).

(1) 40 C. L. J. 291 (1923).

(3) 1 L. R. 36 Cal. 720, s. c. 10 C. L. J. 113 (1909).

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order and therefore any variation of the order must *ipso facto* govern and modify the decree. The distinction suggested is that in cases of remand orders and preliminary decrees in suits for partition or account the final decree is independent of the preliminary decree while in a case like the present the decree is dependent on and subordinate to the order which it merely follows and embodies.

As no authority directly in point has been placed before us, we have anxiously considered the point raised in all its aspects but we have not been persuaded that any real distinction as has been suggested exists between the two classes of cases. The question relating to dependant and subordinate decrees was fully considered in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (1) and is the *ratio decidendi* of the case of *Ram Nath v. Basanta* (4). The latter case is instructive and lays down the proposition that if the appeal is preferred from the preliminary decree before the final decree is passed the later decree should be held to be contingent on the result of the appeal. The principle of dependant and subordinate decree was first adumbrated in *Shamaprashad v. Hurroprashad* (5) as applying to several actions based on the same foundation of right or "cause of suit" where the first action is challenged before the subsequent actions are decided. The same principle under similar circumstances has been extended to proceedings in the same suit.

There is doubtless the distinction as suggested by the learned Advocate-General but on principle the final decree in a suit for a partition or accounts or after remand is as much dependent on the preliminary decree which it follows for

its correctness and effect, as the decree in the present case may be said to be on the order.

There is another consideration which has weighed upon us in holding that the two classes of cases above referred to stand on the same plane. Sec. 96, C. P. C., confers the right of appeal from every decree if such right is not otherwise barred. It does not seem reasonable to presume that the legislature intended that the right of appeal against two proceedings in one suit—the order and the decree—should co-exist. If the decree follows the order it will be no straining of the language to say that the order, and for that matter all previous proceedings, get merged in the decree which is the final declaration of the Court's mind and decision and lose their separate existence.

We cannot hold that the appeal from the order alone is maintainable unless we agree with the learned Counsel in holding that as a matter of law if the order appealed against is vacated or varied the decree must be similarly affected. We find no authority or logic in support of this contention.

We see no reasons why the principle laid down in the case of *Madhu Sudan Sen v. Kamini Kanta Sen* (2) is not applicable to the present order. The learned Chief Justice in deciding that case made no distinction between interlocutory or other classes of orders and in that view of the case the appeal is incompetent and must be dismissed.

We are of opinion that considerations which govern the case of a preliminary and final decree apply with equal force to the case like the present.

In our judgment this appeal is incompetent and cannot proceed.

Counsel for the Appellant has verbally

(1) 40 C. L. J. 291 (1923).

(4) 17 C. W. N. 868 (1913).

(5) 10 M. I. A. 208 (1885).

(2) I. L. R. 32 Cal. 1023 (1905).

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prayed that in the event of our holding against him on this point the Appellant may be permitted to convert the present appeal into an appeal from the decree. In view of the fact that there is no authority of this Court directly bearing on the above question and the Appellant may have *bonâ fide* preferred the present appeal, we think we ought to accede to the request and give him the necessary permission as was given in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (1). The order we propose to pass is that if the Appellant files a certified copy of the decree and puts in the proper court-fees within two weeks from this date this appeal will be registered as an appeal from original decree; in default, the appeal will stand dismissed.

We think the Respondents are entitled to their costs of the hearing before us. We assess such costs at 10 gold mohurs to be paid by the Appellant to Respondent No. 1 and 5 gold mohurs to each of the remaining Respondents who have appeared.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE

No. 20 OF 1923.

WALMSLEY, J.	}	GOBINDA RAMANUJ DAS
PAGE, J.		MOHANTA, Plaintiff,
1923,		Appellant,
Heard, 8, 9, 26 &		v.
21, January.	}	RAM CHARAN DAS, De-
Judgment,		fendant No. 1 & SHYAM-
27, February.		MAL DAS, Defendant
		No. 2, Respondents.

Muth, mourashi—Office of mohant and property of muth, if can be partitioned—Revocation of Will by subsequent Will—Subsequent Will invalid—Dependent relative revocation—Animus revocandi should be unqualified.

(1) 40 C. L. J. 281 (1922).

Where the mohant of a muth of the mourashi class made a Will whereby he appointed the Plaintiff his successor and subsequently executed two documents also intended to operate as a Will by one of which he appointed the Plaintiff as the paricharak mohant and by the other appointed another chela as the gadinashin mohant and cut away a portion of the properties from the parent foundation and gave it to the former:

Held—That the animus revocandi was not unqualified and the testator's intention was that the previous Will would be revoked only if it could be replaced by the provisions of the later Will.

That the two documents subsequently executed together purported to effect a partition of the office of the mohant and the property of the muth, which was contrary to Hindu law and consequently invalid. There was therefore no revocation.

On the question whether by accepting and acquiescing in the arrangement made by the later documents, the Plaintiff was estopped from questioning its validity.

Held—That the arrangement made by the later documents being ultra vires, no amount of acquiescence would validate it, and there being nothing to show that the other party to the arrangement was induced thereby to alter his position for the worse, there was no estoppel.

This was an appeal preferred on the 21st December 1923 against the decree of the Subordinate Judge, 2nd Court of Zillah Midnapur (Babu Jibendra Prosad Chatterjee), dated 27th November 1922.

The facts of the case will appear from the judgment.

Babus Ram Chandra Majumdar, Banashibashi Mukerjee and Jyotir Mohan Bhattacharjee for the Appellant.

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Babus Mohendra Nath Roy, Brojodal Chakravarti, Rupendra Kumar Mitter and Rama Prasad Mukerjee for the Respondent No. I.

Mr. K. Ahmed and Babu Debi Prasad Dutt for the Respondent No. II.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The questions raised in this appeal are rather out of the ordinary, they relate to the right to succeed to a *mohantship* and to enjoy possession of the property belonging to the foundation.

The Appellant is the Plaintiff, Gobinda Ramanuj Das, commonly called Chhota Gobinda to distinguish him from another Gobinda, the Gobinda through whom the Defendant claims.

In the District of Midnapur there is a *muth* called the Nayaganj Bora Asthal; it has subordinate Asthals, one of them at Shyamchandpur. The Thakurs installed in the *muth* are Sri Sri Gopinath Jiu and Raghunath Jiu and the *sheba* is performed by members of the Ramanuj sect. Nothing is known of the foundation of the *muth*. The earliest document on the record is one of 1841 by which one Nitai Singh gave various pieces of land to the then *mohant* Lachman for the purpose of carrying on the *sheba* of Sri Sri Gopinath Jiu, and of another Thakur Sri Sri Sitaram Jiu to be installed at Shyamchandpur.

Lachman was succeeded by Bharat Ramanuj Das, on the strength of a Will or a deed of nomination made in 1878. There was, so far as we know, no dispute about Bharat's succession.

In 1908 Bharat was growing old, and he then made a Will by which he appointed the Plaintiff as his

chela and successor. He lived however for ten years longer, and a few days before his death, he made two documents, one in favour of the Plaintiff, the other in favour of the other Gobinda, or Bara Gobinda as he is called: by the former he appointed Chhota Gobinda to be *paricharak mohant* of Shyamchandpur, while by the latter he appointed Bara Gobinda to be "*gadinashin mohant* like myself."

On the death of Bharat, Bara Gobinda applied to the Collector under the Registration Act for the entry of his name in place of Bharat's in regard to some of the property belonging to the *muth*. Chhota Gobinda objected, but afterwards—on 15th Magh 1325—the two executed mutual *ekrarnamas*, which for the time composed their differences. A year later on 18th February 1920 Bara Gobinda died, leaving a Will by which he appointed the first Defendant Ram Charan to be his principal *chela* and successor, and the Plaintiff's case is that Ram Charan with the help of Shyamal Das, his uncle, the second Defendant, and Brojo Mohan Das, the cook of the Nayaganj Asthal, the third Defendant, is keeping him out of possession of the properties of the *muth*.

The case for the defence is that any nomination made by Bharat in the deed of 1908 was cancelled by the later deeds of 1918, that the Plaintiff acquiesced in the arrangements made by Bharat's deeds of 1918, that Bara Gobinda succeeded to the *gadinashin mohantship* in accordance with Bharat's nomination of 1918, and that he in due course nominated the Defendant Ram Charan to the *mohantship* shortly before his death.

This narrative serves to set out the principal points of difference. For the Plaintiff it is contended that the nomi-

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nation once made in 1908 could not be set aside by Bharat, that Bharat as a matter of fact did not know what he was doing when he executed the later deeds on the eve of his death, that the Plaintiff is not bound by his assent expressed in the *ekrarnama* of 1910, that Bara Gobinda did not really nominate Ram Charan and that if he made a deed nominating him he did not understand what he was doing, and lastly that the disposition made by Bharat in 1918 was invalid because it involved the division of the office, and the partition of property belonging to the *muth*.

Other questions were raised in the lower Court: for example it was said that Bara Gobinda was a leper and could never have become *mohant*, and that Plaintiff was disqualified by lameness. Nothing however was said before us, on those points, and I shall not allude to them further. The substantial questions are those that I have mentioned on the previous paragraph, and I shall confine my attention to them.

Nothing is known of the history of the *muth*: it may be very ancient but that does not matter: it was certainly in existence in 1841, and we have the fact that the *mohant* of that day was Lachman, and that Bharat succeeded him. It is common ground too that the *muth* is of the kind known as "*mourashi*," that is to say, that within certain limits, each *mohant* designates his successor.

The case for the Plaintiff is that Bharat did nominate him by the deed of 1908, and this is not denied. Defendant says that that nomination was revoked by the deeds of 1918. The question here is whether the power of nomination once exercised could be revoked. Plaintiff says that it could not be revoked and that under it he attained a position from

which he acquired the right of succession, that is to say, that the Will of 1908 nominated him as chief *chela* and that he became such, and is consequently entitled to succeed to the *mohantship*.

To take the latter point first, the Plaintiff is at this disadvantage that he cannot throw much light upon the rule of succession in this *muth*. The earliest evidence on this point is the deed executed by Lachman in favour of Bharat in 1878; but that document says nothing about Bharat being or, becoming chief *chela*: he is appointed to be *mohant* as the better of two "*mantra sisyas*." As Lachman was *mohant* in the year 1841 oral evidence as to the practice of the *muth* before Bharat succeeded Lachman must in the nature of things be valueless.

Bharat's deeds and Bara Gobinda's deed are the only other pieces of evidence to be considered. In the 1908 document Bharat said: "You Sri Gobinda Ramanuj Das Rusuiya (cook) are pre-eminent among my *chelas* Having full confidence in you. . . . I do gladly and out of my free will appoint you as the chief *chela* according to the rules and customs laid down by my predecessor *mohants* and make you the *malik* and *gadinashin mohant* like me." The same Bharat, however, in 1918 executed deeds which make no reference to any such rules and customs: to each Gobinda he said: "You are my *chela* and the object of my affection and there is another *chela*."

It is clear that in 1918 Bharat claimed the right to nominate whom he pleased to the *mohantship*, subject only to the restriction that the person chosen must be a *chela*. I think therefore that the freedom of choice claimed by documents of 1918 negatives the suggestion contained in the 1908 document.

Bara Gobinda's document of 1920 deals

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with the point in this way. It runs : " I having at present got two *chelas*, one Jagannath Das, and the other yourself Ram Charan Das Rasuiya and out of the two you Ram Charan Das Rasuiya being the chief *chela* (*pradhan chela bidhay*) and having known you to be of good conduct, mild, good-natured and competent to manage all affairs, and knowing that the works of the *deb shebas* would be well managed and the properties relating to the *deb shebas* would be protected by you, I appoint you to be the *mohant* like myself." Those words clearly mean that Ram Charan received the preference, in part, because he was the chief *chela*, but also in part on account of his competence and moral qualities. The allusion to a two-fold reason for the choice seems to indicate a recognition that the *pradhan chela* would ordinarily succeed, but not necessarily, and an assertion that the decision as to whether he should or should not succeed rests with the *mohant*.

Another line of argument on this subject was based on the use of the word " Rasuiya." It is said that the chief *chela* became the official cook to the *mulh* and enjoyed that honourable title. The documents support that view. Bharat called the Plaintiff Rasuiya in the document of 1908. In 1918 he gave the title to Bara Gobinda, but not to the Plaintiff, and Bara Gobinda in turn gave it to Ram Charan. It does not appear, however, that as Rasuiya the *pradhan chela* was in any better position. The conclusion to which I come therefore is that the Plaintiff has failed to prove that the chief *chela* had an absolute right of succession.

The other argument in connection with Bharat's deed of 1908 is that he exercised his power of nomination and had no right of revocation. The answer to this argument is that the document of 1908

was nothing but a Will : it is called a Will, and it was registered as a Will, and its terms are the terms of a Will, for it says : " By means of this Will I declare that the properties . . . shall remain in my possession and control during my life-time On my death, etc." As a Will it could be revoked, and I do not think that the clause appointing Chhota Gobinda to be chief *chela* could change the character of the document as a whole, and take from its maker the power of revocation.

My view therefore is that the arguments which the Plaintiff bases on the Will of 1908 must both be rejected. It was a Will and capable of being revoked. Assuming that it gave the Plaintiff the status of chief *chela* or recognised that he had that status it is not shown that as chief *chela* he had an unqualified right to succeed to the office of *gadinashin mohant*.

I should add here that no arguments were addressed to us on the Defendant's attack upon the Will as made under influence, or upon the alleged cancellation of the Will. The findings of the learned Subordinate Judge on those points therefore stand unchallenged.

The next argument is that the Court below is wrong in holding that the *ekrarnamas* estop the Plaintiff from " claiming the office of *gadinashin mohant* and denying the validity of the provision which empowered Bara Gobinda to nominate a successor from amongst his *chelas*." The Judge's finding that the two documents of 1918 were executed by Bharat of his own free will is not questioned, so we are concerned only with the effect of the *ekrarnama* on the terms of the documents. The learned Judge thinks that the *ekrarnama* estops the Plaintiff from arguing that Bharat could not make the dispositions contained in

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those documents. This I think is wrong, for the reason that there is no evidence to show that as a result of the *ekrarnamas* Bara Gobinda was induced to alter his position. He gained an advantage, it is true, in that he succeeded to the office of *gadinashin mohant*, but that is a very different thing from altering his position. There is the further objection that if the disposition of 1918 was *ultra vires* as I think it was, no amount of acquiescence on the part of Chhota Gobinda could change its character.

Now, I come to what seems to me the principal question in the case, namely, whether Bharat's dispositions of 1918 were invalid. It is said that they were invalid because they split up the office of *mohant*, and because they involved a division of the properties. It seems to me clear that they did have these effects. We do not know what the arrangements were for carrying on the *sheba* at the subordinate *Asthals*, but it is quite clear that until Bharat died there was one *mohant* and only one. By his deeds of 1918 he created two *mohants*, a *gadinashin mohant* at Nayaganj and a *paricharak mohant* at Shyamchandpur; and this was not a temporary measure to end on the death of one; for to each was given the power of appointing successors. As for the properties, a considerable amount was cut away from the parent foundation, and given to Syamchandpur; it was made subject to a tribute of Rs. 100 a year, to be recovered by suit, but save for that payment the property attached to Shyamchandpur was completely separated from the *muth* at Nayaganj. Nothing but default in appointing a successor can ever restore the previous condition of things. The learned Subordinate Judge seems to think that the annual tribute sufficiently indicated that Shyam-

chandpur was dependent on Nayaganj. The learned pleader for Respondent put forward another argument, namely, that there was no division of the office because Bharat only arranged for one man to discharge one class of duties and the other another class. Neither explanation seems to me at all satisfactory. There are two *mohants* where there was one, and the *mohant* of Nayaganj has to be content to let the *mohant* of Shyamchandpur hold a considerable amount of the land belonging to the foundation. Such a result must be equivalent to partition of the office and of the property, and is, I think, contrary to Hindu law. In the case of *Sethuramaswamiar v. Meraswamiar* (1), their Lordships of the Judicial Committee said: "The headship of a *muth* is not a matter of partition."

I think therefore that on this part of the case the Plaintiff's contention is correct, namely, that Bharat did attempt to make a partition of the office and of the property, and that to that extent at least his disposition of 1918 is void. The question then arises as to the result that follows from this view.

The two documents of 1918 were executed on the same day and they refer to one another, and they must be regarded as constituting one Will. Together they make an unlawful disposition, and they contain no other disposition. It is suggested that they should be regarded as valid to the extent that they nominate Bara Gobinda as *gadinashin mohant* and invalid only so far as they operate to cut down his powers and transfer some of the property to a second *mohant*. This view seems impossible for the reason that it ignores the obvious desire on Bharat's part to provide for Chhota Gobinda. A

(1) 22 C. W. N. 457; s. o. 27 C. L. J. 231 (P. C., (1917).

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position of affluence and importance at Syamchandpur for Chhota Gobinda was part of Bharat's scheme. He tried to effect this by dividing the office and the property, and the gift to Bara Gobinda was only of part of the office and part of the property. I do not think that it would be reasonable to hold that because the part assigned to Bara Gobinda included the dignity of *gadinashin mohant*, that gift must prevail over the whole of the office and the whole of the property to the exclusion of Chhota Gobinda.

Next comes the question whether the inoperative Will contained in the documents of 1918 did as a fact revoke the earlier Will. (I have already said that we were not asked to reverse the Judge's finding about the alleged cancellation of the 1908 Will). The change in disposition is so great that I think the desire to revoke is a necessary inference, but the question arises whether Bharat had an unqualified desire to revoke, or whether he desired to revoke the first Will only if he could replace it by Will which would successfully effect the dispositions set out in the 1918 documents. I think it is clear that Bharat wanted to make a Will; he had no intention of dying intestate; his *animus revocandi* therefore had only a conditional existence, and the inference must be that the intention to revoke was not present. The result of this view is that the Plaintiff must succeed under the Will of 1908.

I may be disposed to think that the Plaintiff must succeed even if it be held that the Will of 1908 was revoked. The dispute between the parties must then be decided by the practice of the *muth* so far as we know it. I have already referred to the evidence bearing on the preferential position enjoyed by the *pradhan chela*. I think it is clear that Chhota

Gobinda was the *pradhan chela*: the Will of 1908 nominates him as *pradhan chela* and it may be regarded as evidence that from that time forward he was in fact *pradhan chela*. He continued to be a *chela* for he is called such in the 1918 documents, and it is rather significant that those documents do not make use of the expression regarding either Gobinda, although Bara Gobinda in his Will describes Ram Charan as *pradhan chela*. The circumstances warrant the view that Chhota Gobinda was the *pradhan chela* at the time of Bharat's death, and in the absence of any valid disposition by the late *mohant* he is entitled to succeed to the office of *mohant* with the custody of the property.

My conclusion therefore is that the appeal should be allowed and the suit decreed with costs in both Courts. Let a decree be drawn up in terms of the first four prayers in the plaint. The Defendant No. 1 alone will be liable for the costs of the Plaintiff.

PAGE, J.—I agree. As I apprehend the matter, the determination of this appeal mainly depends upon whether Bara Gobinda was validly appointed by Bharat the *gadinashin mohant* of the Nayaganj Asthal. It was conceded before us that the Will of 1908 and the two documents which comprised the Will of 1918 were duly executed, and that the terms thereof expressed the deliberate intention of a competent testator on the dates upon which the Wills were executed. The Appellant, however, contends that the 1908 Will must be taken to be the instrument by which Bharat's successor was appointed, while the first Respondent contends that the Will of 1908 was revoked by the Will of 1918, and that under the Will of 1918 he was validly

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nominated *gadinashin mohant* of the *Asthal*.

Now, in my opinion, the provisions of the Will of 1918 upon which the Respondent founds his claim to the *gadi* at Nayaganj were *ultra vires* and inoperative, and that in executing the two documents which together form the Will, Bharat was acting in violation of the constitution of the *muth*. According to Hindu law neither the office of a *mohant* nor the property of a *muth* can be the subject of partition. To hold otherwise would be to open the door to fraud and illegality, and would result in a rapid disintegration of religious foundations, and the dissipation of property settled in favour of *muths* and kindred institutions.

It is unnecessary in this case for the Court to consider whether a *mohant* is entitled, and if so, under what conditions, to create a *muth* subordinate to the *muth* of which he is the *mohant*; for, in my opinion, having regard to the language in which the Will of 1918 was couched, it cannot reasonably be contended that Bharat thereby effected the creation of a *muth* at Syamchandpur subordinate to the *muth* at Nayaganj: and yet it was upon this ground that the learned trial Judge held that the Will of 1918 was valid and *intra vires*. It is true that under the Will of 1918 an annual tribute of a hundred rupees was to be paid by the *mohant* of Syamchandpur into the *gadi* of Nayaganj. But in the Will it is also provided that the *mohant* at Syamchandpur should otherwise be independent of the *mohant* at Nayaganj, and that he should be entitled as *malik* of the *muth* to hold and administer the estates and property thereunder appropriated to the *muth* at Syamchandpur without interference by the *mohant* at Nayaganj.

Nay more, it was provided that the line of succession of the *mohants* of Syamchandpur should be different from that of the *mohants* of Nayaganj, and that the newly appointed *mohant* of Syamchandpur was to "continue to own and hold possession of the said estates and property down to your *chelus* and *parchelas* in succession." Now, in my opinion, by means of this instrument Bharat clearly and deliberately attempted to effect a partition of the office of *mohant*, and of the property dedicated to the *muth* at Nayaganj.

Babu Mohendra Nath Roy on behalf of the first Respondent on the assumption that the Will of 1918 operated in the manner which I have stated, admitted that *pro tanto* the Will was void and inoperative, but he contended that the proper course for the Court to adopt was to treat the appointment of Bara Gobinda as *mohant* of Nayaganj as valid, and to expunge the offending provisions of the Will. In my opinion, the Court would not be justified in treating the provisions of the Will in the manner suggested by the learned pleader for the Respondent, for the result would be to deprive the Appellant of any right to succeed Bharat as *mohant*. So to hold, in my judgment, would be to act in opposition to the intention of Bharat. I have no hesitation upon the evidence in holding that Bharat was not minded wholly to oust the Appellant from the *mohantee*. It is not an unreasonable inference to draw from the evidence that the importunities—and it may be the machinations—of Bara Gobinda and Shyamal Das, the uncle of the first Respondent, overbore the enfeebled Will of Bharat and that he was thereby prevailed upon to divide the *mohantee* and the property dedicated to the *muth* between

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Bara Gobinda and Chhota Gobinda. Be that as it may, in my opinion, the several provisions of the Will of 1918 must stand or fall together, and I hold the Will of 1918 to be *ultra vires* and void.

But it is urged that the Appellant by reason of his acquiescence in the scheme propounded by Bharat in his Will of 1918 is precluded from challenging the validity of the provisions of this Will. Now, the main issue in this case is whether the scheme laid down by Bharat in the Will of 1918 violated the constitution of the *muth*, and, in my opinion, the solution of that problem cannot depend upon whether a beneficiary under the illegal scheme acquiesced in the transaction.

The equitable doctrine of acquiescence may be taken to be that "if a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence." [*Per* Cottenham, Lord Chancellor, in *Duke of Leeds v. Lord Amerst* (2).] But acquiescence cannot rehabilitate or render valid a transaction which is *ultra vires* and illegal. Further, it must be borne in mind that estoppel by acquiescence connotes, among other things, that the person estopped in effect has represented to the person who is infringing his right that he is not entitled to complain that his right is being invaded, and that the party relying upon this representation has altered his position to his detriment under a mistaken impression that he was legally justified in acting as he had done. But, in my opinion, the doctrine has no application in the circumstances of this case, for not only must Bara Gobinda have known that

any attempt to effect a partition of the *muth* would contravene the rules of his order, but there is no evidence whatever which would justify the Court in holding that either Bara Gobinda or the Respondent Ram Charan, relying upon any such representation by the Appellant, altered his position to his detriment, or at all. Bara Gobinda sat on the *gadi* at Nayaganj because he had been nominated *mohant* under the Will of 1918, and not because he was induced so to do by reason of any representation on the part of the Appellant. Further, in any event the Appellant did not acquiesce in the nomination of the first Respondent by Bara Gobinda; on the contrary, he has consistently challenged its validity. In my opinion, there is no substance in the plea of estoppel, and it cannot be sustained. For these reasons, I am of opinion that Bara Gobinda was not duly nominated *mohant* by Bharat, and that the nomination of the first Respondent by Bara Gobinda is void and of no effect.

In these circumstances it became necessary to consider whether the Plaintiff has made out his claim to be the *gadinashin mohant* of the Nayaganj Asthal. He bases his claim upon two grounds: (1) That he was duly nominated by Bharat under the Will of 1908; (2) that he was the senior *chela* of Bharat. As regards the first ground, the Respondent contends that the Will of 1908 was revoked by the Will of 1918. It is, I think, clear that the provisions of the Will of 1918 are so inconsistent with those of the Will of 1908 that it must be taken that Bharat intended that the two Wills should not stand together, and that the nomination to the *mohantee* at Nayaganj and at Syamchandpur should supersede the nomination of the Appellant as *mohant* under the Will of 1908. [See

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Kent v. Kent (3).] But, in my opinion, Bharat did not intend that the Appellant, whom he had appointed senior *chela*, should in any event wholly lose the *mohantee*. I think that Bharat intended that the nomination of the Appellant under the Will of 1908 should be revoked only in the event of the nomination under the Will of 1918 proving to be valid and effective. He neither desired nor contemplated that he would die intestate and without having duly nominated a successor to the *mohantee*. In these circumstances, in my opinion, the provisions of the Will of 1918 effected merely a dependent relative revocation of the Will of 1908, and, the Will of 1918, being invalid and inoperative, the Will of 1908 must stand, and the Appellant who was appointed thereunder must be declared to be the *mohant* of Nayaganj. [See *In the goods of Middleton* (4) and *Dancer v. Craft* (5).] In my opinion, the same result would follow even if the Court were to hold that the Will of 1908 had been revoked. The *muth* at Nayaganj was a *mourasi muth*, and although it was not satisfactorily proved at the trial that it was in accordance with the rules of the *muth* at Nayaganj that the senior *chela* should succeed to the *gadi* on the death of the reigning *mohant*, it is consonant with the principles of Hindu law relating to a *mourasi muth* that the senior *chela* should succeed; *a fortiori* in the absence of a valid nomination by the reigning *mohant*. [See *Mohunt Ramanuj Das v. Mohunt Devraj Das* (6) and *Ram Prakash Das v. Anand Das* (7)].

Now, it is conceded that Bharat pur-

ported to appoint the Appellant senior *chela* under the Will of 1908, and there is evidence that thereafter he performed duties, such as, giving *mantras* and performing the *punya* ceremony, which strongly support the view that he was regarded as, and had been appointed, the senior *chela* in Bharat's life-time. I should add that whatever rights in respect of the *mohantee* the second Respondent may have possessed, he lost through his misconduct and his disobedience to Bharat. For these reasons, in my opinion, the appeal should be allowed and a decree passed in favour of the Appellant.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 522 OF 1924.

NEWBOULD, J.	}	MESSER BEPARI and
B. B. GHOSE, J.		ors., Appellants,
1925,		v.
16, January.	}	THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 364, omission to comply with the requirements of, if vitiates the trial

The examination of the accused during their trial in the Court of Sessions was not recorded:

Held—That the omission to comply with the requirements of sec. 364 of the Code of Criminal Procedure vitiated the trial. The convictions and sentences were set aside and the case was directed to be heard according to law.

The provisions of sec. 364 of the Code of Criminal Procedure are mandatory.

This was an appeal preferred on the 29th September 1924 against the convictions and sentences to various terms of imprisonment under secs. 147, 148, 323 and 324, I. P. C., passed by the Sessions Judge of Faridpur (Mr. S. C. Mallik), on the accused, dated 24th July 1924.

(3) [1902] Probate 108.

(4) 10 Jurist N. S. 1109 (1864).

(5) L. R. 8 P. & D. 98 (1873).

(6) 6 S. D. A. Beng. 262 (1839).

(7) L. R. 43 Cal. 707; s. c. 20 C. W. N. 802 (P. C.) (1916).

MESSER BEPARI v. THE KING-EMPEROR.

The facts of the case sufficiently appear from the judgment.

Mr. B. M. Sen, Counsel, and Babu Monmotha Nath Roy, (Jr.) for the Appellants.

Mr. Khundkar for the Crown.

The JUDGMENT OF THE COURT was as follows :—

In this appeal the learned Counsel appearing for the Appellants has succeeded on a preliminary point and it is unnecessary to deal with the facts. It is contended that the trial was vitiated owing to the failure of the learned Sessions Judge to comply with the provisions of sec. 342 and sec. 364, Cr. P. C. As regards non-compliance with sec. 342 the affidavit filed on behalf of the Appellants is in a form to which the Court has more than once taken serious objection. The statement in the affidavit is as follows :—“ That during the trial before the Court of Sessions at the close of the prosecution case and before the accused were called on to enter upon their defence the accused were not examined under sec. 342, Cr. P. C.” This statement leaves in doubt whether the accused were examined at all, or whether they were examined but not at the right stage of the trial, or whether they were examined at the right stage of the trial, and it is contended that that examination was not in compliance with the provisions of sec. 342, Cr. P. C. In argument we are told that what happened was that at the close of the prosecution case the accused's Pleader and not the accused themselves were asked if they wished to make any statement and the accused's pleader stated that they would not do so. If that is what happened it was certainly not compliance with sec. 342, since one of the essential points for which that section provides is that the

accused themselves should have an opportunity of making their statement directly to the Court and not through the intervention of a pleader. On behalf of the Crown it is stated that information has been received that the accused themselves were questioned. Had the appeal depended solely on this point we should have thought it our duty to enable the Crown to give evidence in the form of an affidavit on this point and should have adjourned the appeal for this purpose. But it appears that the objection as to the procedure under sec. 364, Cr. P. C., is sound. All that appears on the record as regards the examination of the accused is contained in the order sheet, the relevant portion being as follows :—“ Trial resumed to-day. The statements of the accused recorded in the committing Magistrate's Court are put in by the Public Prosecutor. The accused do not make any further statement in this Court and decline to examine any witness.” No record of the accused's examination was recorded and the provisions of sec. 364, Cr. P. C., on this point are mandatory, and in two recent unreported cases it has been held that similar omission to comply with the provisions of this section vitiated the trial. These unreported cases are Cr. Reference under sec. 307, Cr. P. C., No. 47 of 1924 decided on the 11th September 1924, and Cr. Appeal No. 348 of 1924 decided on the 3rd November 1924. Following these decisions we must hold that the trial of the Appellants was not in accordance with law.

We accordingly allow this appeal. We set aside the convictions and the sentences passed on the Appellants and direct that the case be re-heard according to law.

H. D. C.

PRIVY COUNCIL.

[APPEAL FROM ALIAHABAD.]

LORD SUMNER.

SIR JOHN EDGE.

MR. AMER ALI.

SIR LAWRENCE JENKINS.

1921,

Heard, 11, 13 and

14, November.

Judgment,

2, December.

JAG PIA AD

RAI and anr.,

Appellants,

v.

MUSAMMAT

SINGARI,

Respondent.

Hindu law—Mitakshara—Joint family—Partners or coparceners—Joint or separate—Union after separation—Effect of separation amongst brothers or sons of brothers—Entries in village papers and joint payment of taxes and banking account, evidentiary value of.

There was separation of a joint Mitakshara family, when the coparceners came to an agreement that the eldest of them should divide the property into shares.

When coparceners in a Mitakshara family have separated, an agreement to re-unite must be proved like any other fact and if not proved they remain separate. The separation of the brothers does not necessarily involve the separation inter se of the sons of one such brother.

BALABUX LADHURAM v. RUKHMABAI (1) and HARI BAKSH v. BABU LAL (2) referred to.

Entries in khewats and other village papers showing that the shares of the co-owners have been specified afford by themselves no proof that the owners were members of a joint Mitakshara family or had separated.

REWA PRASAD SUKAL v. DEO DUTT RAM SUKAL (3) and NAGESHAR BAKSH SINGH v. GANESHA (4) referred to.

Payments jointly of Government reve-

(1) L. R. 30 I. A. 130 : s. c. I. L. R. 30 Cal. 725; 7 O. W. N. 612 (1903).

(2) L. R. 51 I. A. 163 : s. c. 28 C. W. N. 953 (1924).

(3) L. R. 37 I. A. 99 (1899).

(4) L. R. 37 I. A. 57 (1919).

nue, taxes, income-tax and such like payments do not by themselves indicate that the parties making such payments are joint or separate, are partners or coparceners.

The fact that money had been lent on mortgages or had been applied in the purchase of property does not by itself indicate that the money was or was not the separate money of Hindu coparceners.

The fact that two or more Hindus had a banking account does not by itself prove that the moneys received by the bank were moneys of a joint Hindu family or of Hindus who were partners in farming or other business.

This was an appeal (No. 78 of 1923) from a decree, dated the 13th July 1921, of the High Court at Allahabad, which reversed a decree, dated the 24th April 1918, of the Court of the Subordinate Judge of Gorakhpur.

Gaya Prasad, the husband of the Respondent, died in October 1915, a Hindu and governed by the Mitakshara. The Respondent claiming to be his sole heir applied for mutation of names in respect of her husband's properties. The Plaintiffs opposed her and contended that Gaya Prasad was joint with them.

Their contention was rejected by the Revenue Authorities and they accordingly filed suit for possession claiming title by survivorship. The Subordinate Judge found that although there was a partition in 1896 the ancestors of the parties became re-united and that Gaya Prasad's estate devolved upon the Plaintiffs.

The High Court (Sir Grimwood Mears, C. J. and Sir P. C. Banerji, J.) considered that the oral evidence of re-union was untrustworthy.

They held that the documentary evidence and the conduct of the parties from 1892 up to the death of Gaya Prasad conclusively established separation in estate.

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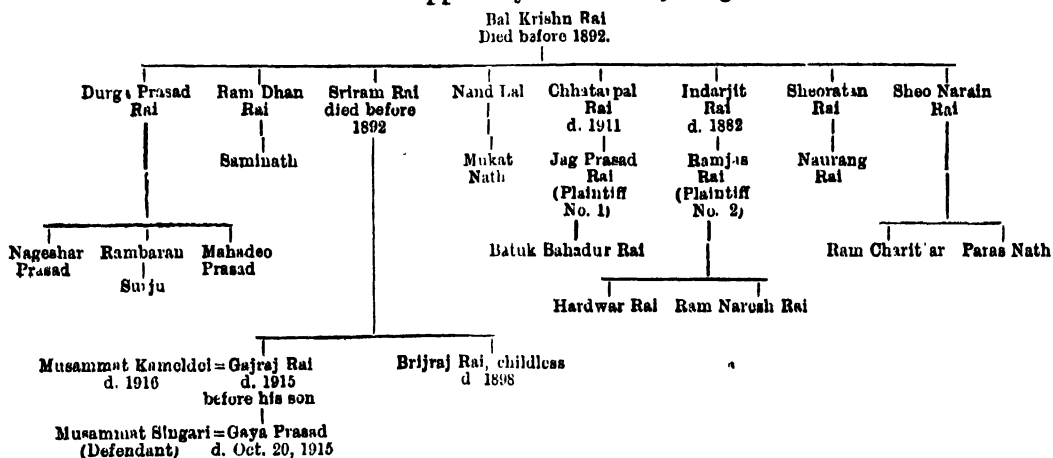
They were of opinion that there was some evidence of joint business transactions but in the absence of the account books, which the Plaintiffs failed to produce, and which would have shown the method in which periodic balances were dealt with, they decided that the Plaintiffs had not made out their case.

Messrs. DeGruyther, K. C. and A. Majid for the Appellants.

Messrs. Dunne, K. C. and B. Dubé for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by



The suit in which this appeal has arisen was brought by Jag Prasad and Ramjas Rai against Musammat Singari, the widow of Gaya Prasad, who died childless, for possession, or a declaration that the Plaintiffs are entitled to the possession of property of which Gaya Prasad died possessed on the allegation that they and Gaya Prasad were, when he died, members of a joint Mitakshara family.

Bal Krishna had eight sons who are shown in the pedigree, and he with his eight sons, when they were all living, constituted a Mitakshara joint family. The family was possessed of several villages

the Plaintiffs from a decree of the High Court at Allahabad, dated the 13th July 1921, which reversed a decree of an Additional Subordinate Judge of Gorakhpur, dated the 24th April 1918.

The family to which the parties to the suit belonged is a Hindu family which is governed by the law of the Mitakshara. The following pedigree shows how the parties to the suit are connected with each other, but in reading the pedigree as printed, it must be read from the right of the reader to his left. Sheo Narain was the eldest son of Bal Krishn Rai and of his seven younger brothers, Durga Prasad was the youngest.

and other property. The family lived at Sonchiraiya, which was the principal ancestral village. Their Lordships do not know when Bal Krishn died, but he died several years before 1892. Indarjit, who was the third son, died in 1882. Sriram, Ram Dhan and Durga Prasad, who were the sixth, seventh and eighth sons, died before 1892. All the eight sons had married and had a son or sons who were living in 1892. In 1892 the family agreed that Sheo Narain, who was the eldest son of Bal Krishn, should partition the joint family property into eight equal shares. The intention of such a partition obviously

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was that there should be a separation of the family into eight families, each representing one of the eight sons of Bal Krishn and his descendant or descendants and joint within itself. In their Lordships' opinion the effect of that agreement was that the previous joint family separated into eight families. Thereupon Sheo Narain in 1892 partitioned the joint property into eight shares. The parties to the agreement were not satisfied that the eight shares into which Sheo Narain had partitioned the property were equal in value, and on the 3rd January 1895, the following persons, describing themselves as Nand Lal Rai, Chhatarpal Rai and Sheoratan Rai, sons of Bal Krishn Rai, deceased; Nageshar Prasad Rai, Rambaran Rai and Mahadeo Prasad Rai, sons of Durga Rai, deceased; Brijraj Rai and Gajraj Rai, sons of Sriram Rai, deceased; Saminath Rai, son of Ram Dhan Rai, deceased; and Ramjas Rai, son of Indarjit Rai, deceased, appointed three arbitrators to make the partition in eight equal shares of the property in Sudar tahsil, District of Gorakhpur, and other tahsils.

One of the three arbitrators died before an award was made and thereafter the co-sharers who were parties to the agreement of the 3rd January 1895 executed on the 18th February 1896 an agreement by which they appointed the two surviving arbitrators and another man in the place of the deceased arbitrator, as arbitrators to partition the property in eight equal shares. The agreement of the 18th February 1896 contained the following authority and directions to the arbitrators:—

"The said arbitrators becoming unanimous should conscientiously take down the evidence on oath of each party on every point, examine the quality of every land on the spot, and at their pleasure amend

or not amend the map and the lots prepared by Sheo Narain Rai, arbitrator. The arbitrators should in the lot which they may form include bonds, mortgage-deeds, decrees, cows, bullocks, etc., the property of all sorts in the districts of Azamgarh and Gorakhpur, and Nepal *ilaga* (which has been omitted) equalising the value. The arbitrators should separate the share of all the 8 persons. Each party will be liable for payment of revenue of the share which will be allotted to him in a particular village. If any bond or any property is found to be the exclusive property of any party, his statement may be taken down on oath and the same may not be partitioned. The arbitrators should mark out the land forming the share of each party. Each party is at liberty to carry on his business either separately or jointly. Whatever may be the decision of the arbitrators about all sorts of expenses shall be valid. The parties would accept the award of the arbitrators, unanimously arrived at on the points mentioned above, and no party shall deviate from it, but if any party deviates, his objection shall not be entertainable by the Court. The arbitrators are competent in every way to do what they like. All of us, the executants, shall be bound by the award which all the three arbitrators will make unanimously. The arbitrators should allot equally unculturable and *dihat* lands and fruit and timber trees of all sorts to each co-sharer. They are at liberty to alter or uphold the lots mentioned above. They should make *chaks* of productive and unproductive lands equalising their value. As regards the lots to be prepared by the present arbitrators, all of us, the executants, agree that if, on account of any previous act, the whole or part of the lot of any party be disturbed in some way, all of us, the executants, shall be responsible therefor and shall make it up from our respective share. As regards the rights of all of us, the holders of 8 *thoks*, whatever the arbitrators will determine and record, the same shall be accepted by us. We, the executants, representing the 8 *thoks*, shall accept whatever the award the arbitrators will make unanimously about the property of all sorts belonging to us. Nobody will raise any objection and if he raises any, it shall not be entertainable by this Court. Hence we have executed this agreement so that it may be of use in time of need.

"Dated 15th February, 1896."

Their Lordships would infer from that agreement that the parties to it or some of them had, although the family had separated, been carrying on some business jointly as partners.

Before the arbitrators made their

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award, Sheo Narain and his brother Nand Lal had agreed to re-unite together, and they made an application to the arbitrators that two shares should be dealt with in the award as one undivided share. Their Lordships quote para. 6 of the award which was made as showing what that application was. It is as follows. —

"5. Out of the holders of 8 lots, Sheo Narain Rai, the former arbitrator, prepared a lot in his name and another in that of Nand Lal Rai separately and gave different colours in the map in accordance therewith. Now both these persons apply and make statement on oath that both of them are joint in the entire business connected with the village and Court and are joint in mess, that a single lot of the entire moveable and immoveable property may be drawn up for both of them at the time of partition or that both the lots may be joined in one and represented by one colour, and that subsequently both of them, or their heirs, will get the entire moveable and immoveable family property partitioned half and half either by mutual consent or through Court, when they will choose to do so. Hence, as desired by both the persons, their lots were joined in one, but they will be represented by former colours."

In compliance with that application the arbitrators allotted to Sheo Narain and Nand Lal two out of the eight shares which they partitioned to Sheo Narain and Nand Lal as one joint share. The arbitrators made their award on the 19th December 1896.

The High Court and the Subordinate Judge came to concurrent findings, that the award effected a separation of the joint family. In their Lordships' opinion the joint family had separated when they agreed in 1892 that Sheo Narain should partition the joint property in eight shares, and that there was no agreement between the coparceners to continue to be a joint family. The question thus arises whether Chhatarpal, his son Jag Prasad, and Ramjas, ever agreed with Gajraj Rai and his son Gaya Prasad to re-unite as a joint family. It has been

contended on behalf of the Plaintiffs-Appellants that those persons did agree to re-unite, and that they had agreed to re-unite before the arbitrators made their award. If there was a re-uniting it was for the Plaintiffs to prove it.

In *Balabux Ladhuram v. Rukhmabai* (1), it was distinctly held by the Board that when coparceners in a Mitakshara family had separated an agreement to re-unite must be proved like any other fact, and that, if not proved, they remain separate. Some doubts were entertained as to the effect of that decision and it was contended in *Hari Bakhsh v. Babu Lal* (2), that it meant that when brothers who were coparceners separated their separation necessarily involved that the sons of one of those brothers had separated from each other. In *Hari Bakhsh v. Babu Lal* (2) the Board disposed of that contention and pointed out what Lord Davey meant by the judgment of the Board which he delivered in *Balabux Ladhuram v. Rukhmabai* (1) as to a re-uniting of a separated family.

It was contended by the Plaintiffs before the Subordinate Judge, the High Court and this Board that a similar application to that which was successfully made to the arbitrators by Sheo Narain and Nand Lal was made to the arbitrators by Chhatarpal, Ramjas, Brijraj and Gajraj Rai to have three shares allotted to them jointly on the ground that they had re-united, but that the arbitrators had not acceded to their application as Gajraj had not appeared before them to join in the application. If it had been the fact that they had re-united and that they had made the application they could have applied to

(1) L. R. 30 I. A. 130; s. c. I. L. R. 30 Cal. 725; 7 C. W. N. 642 (1903).

(2) L. R. 51 I. A. 108; s. c. 28 C. W. N. 953 (1924).

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the Court when the award came before the Court to be filed as a decree to send the award back to the arbitrators so that they might make it comply with the agreement of the parties. No such application was made to the Court. The Subordinate Judge stated in his judgment :—

"I do not consider it is at all unlikely that such a request was made to the arbitrators) and Gajraj being absent and his personal consent deemed necessary by the arbitrators in a matter of this kind, the request might have been discarded "

The Subordinate Judge did not find that any such request was, in fact, made to the arbitrators. One of the arbitrators was alive when the suit was being disposed of by the Subordinate Judge and might have been able to remember whether such an important application was made to them or not. Ramjas, who is a Plaintiff in this suit, swore that the application had been made to the arbitrators. The High Court did not believe him or that any such application had been made to the arbitrators. The learned Judges of the High Court on this question also said :—

"Further, when about a month later (then the date of the award), namely, on 15th January, 1897, all the parties attended at the Court of the Subordinate Judge to have the award made a decree of Court, no request was made to the Court that the decree should formally modify the award by grouping together into one lot the shares of Chhatarpal Rai, Ramjas Rai and the brothers, Brijraj Rai and Gajraj Rai. Such an application if there had, in fact, been a re-union) would not have been a contentious matter to which any of the owners of the other shares would have raised an objection "

The Plaintiffs also relied upon the evidence of one Sukh Mangal that such an application had been made to the arbitrators; he swore that in his presence Gajraj asked Brijraj and Chhatarpal if the three lots (shares) had been joint, and that they replied "owing to your illness the three lots had not been made joint," and that Gajraj then said : " We will live jointly as

heretofore " and that Brijraj and Chhatarpal agreed to do so. The High Court did not believe the evidence of Sukh Mangal nor do their Lordships believe it, and they do not believe that any such application was made to the arbitrators. That was all the parole evidence upon which the Plaintiffs relied to prove that after separation Chhatarpal, Ramjas and Brijraj and Gajraj had agreed to re-unite. Saminath, the son of Ram Dhan, who attended the arbitrators when they went to the villages, swore that whereas Nand Lal and Sheo Naram did ask the arbitrators to make one joint lot of their shares, neither Chhatarpal, Ramjas, Gajraj nor Brijraj ever made such a request. The High Court believed the evidence of Saminath, as do their Lordships.

Their Lordships will now consider the other documentary evidence, but before doing so they may state that on the evidence in the record they have come to the conclusion that the members of the family who had moved from Sonchiraiya to Shikargarh and had lived there in one house, carried on business as partners, but not as coparceners of a joint family, as money-lenders and in the cultivation of *sir* and *khudkasht* lands, and they may observe that entries in *kheewas* and other similar village papers showing that the shares of co-owners have been specified, afford by themselves no proof that the owners were members of a joint Mitakshara family or had separated. [See *Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (3), which was an appeal from the Central Provinces; and *Nageshar Bakhsh Singh v. Ganesha* (4), which was an appeal from Oudh.] Their Lordships will also observe that in their opinion payments jointly of Government revenue,

(3) L. R. 27 I. A. 39 (1899).

(4) L. R. 47 I. A. 57 (1919).

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taxes, income-tax and such like payments do not by themselves indicate that the parties making such payments were joint or separate; the parties may have been carrying on business as partners and not as Hindu coparceners. For the same reason the fact that money had been lent on mortgages, or had been applied in the purchase of property, does not by itself indicate that the money was or was not the separate money of Hindu coparceners. The books of account of a joint family would, if produced, show whether the moneys or payments had been advanced or paid from a joint Hindu family fund or from a partnership fund. The fact that two or more Hindus had a banking account does not by itself prove that the moneys received by the bank were moneys of a Hindu joint family or of Hindus who were partners in farming or other business. Not one of the documents in this case which has been brought to the attention of their Lordships, proves either that the moneys mentioned were or were not the moneys of a joint Hindu family. The books of account of the joint family, if Chhatarpal, Jag Prasad, Ramjas, Brijraj, Gajraj were after the separation of 1892 members of a joint family, have not been produced, and it was necessary for the Plaintiffs' case that they should have been produced and put in evidence. The books of account would have shown whether the accounts, which must have been kept, were the accounts of a joint family or of a partnership. The non-production of any of those books of account has not been satisfactorily explained by or on behalf of the Plaintiffs, and their Lordships draw the inference that if they were produced they would not support the case of the Plaintiffs.

Their Lordships will now refer to two documents on the record which, in their

opinion, afford crucial evidence that the case of the Plaintiffs is a false case, and that there never was a re-uniting after 1892 of Chhatarpal and Ramjas with Brijraj and Gajraj. Their Lordships may here observe that the Subordinate Judge in his judgment did not attempt to explain the importance of those documents or the non-production of account books which must have been kept; whether the Plaintiffs and Brijraj and Gajraj were or were not coparceners.

The first of the documents to which their Lordships now refer is a petition of the 6th December 1902, for the correction of the *khewat* of the village Naikot, which was one of the villages, which was partitioned by the award of 1896. That petition was presented by Ramjas and he made as Opposite Parties to it Nageshar Prasad, Ram Dhan, Mahadeo Prasad, Saminath, Naurang Rai, Mukat Nath, Ram Charittar for himself and as guardian of his brother Paras Nath, Gajraj and Chhatarpal. In that petition Ramjas said:—

"Application for correction of the 'khewat' relating to 'mauza' Naikot, 'tappa' Marchwar, 'pargana' Binaikpur, under sec. 122, Act No. 2 of 1901.

"The Petitioner begs to state as follows:—

"1. The parties belong to one and the same family. The entire property was partitioned by arbitration. Under the partition made by the arbitration, which was given effect to by the civil Court, no share in 'mauza' Naikot aforesaid was allotted to opposite party No. 1, while the following shares were allotted to the petitioner and to opposite party No. 2, in support of which the 'goshwara' statement prepared by the arbitrators is filed

"2. Every co-sharer has entered into possession of his lot allotted to him by the arbitrators; but it has not been given effect to in the public papers up till now. It is, therefore, hereby prayed that the following corrections may be made in the 'khewat':—

Names of sharers.	Amount of share
Ramjas Rai	... 1 anna 2 pies and 12 ohhatanks.
Saminath Rai	... 1 anna 6 pies and 3 ohhatanks.

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Dudh Nath, Naurang,
Maheshwari Rai, sons
and heirs of Shiva Ra-
ratan Rai, deceased. 1 anna 4 pies and 4 chha-
tanks.

Mukut Nath Rai, son and
heir of Nand Lal Rai,
deceased, Ram Charit-
tar Rai and Paras Nath
Rai, sons and heirs of
Shiva Narain Rai, de-
ceased ... 1 anna 5 pies and 9 chha-
tanks.

Gajraj Rai for self and
heir of Brijraj Rai, de-
ceased ... 1 anna 2 pies and 12
chhatanks.

Chhatarpal Rai ... 1 anna 2 pies and 9 chha-
tanks "

Ramjas signed that petition on the 6th December 1902, and he made at the foot of the petition the following declaration, which he also signed :—

"I declare that the particulars set forth in this petition are true."

Their Lordships assume that the petition of the 6th December 1902 of Ramjas was presented to the Collector of the District or to some Revenue official under him and it appears not to have been complied with, and on the 19th September 1907, Chhatarpal presented to the Revenue official of the District a similar petition for the correction of the *khewat* of Mauza Naikot, and he made as Opposite parties to it Gajraj, Ramjas, Mukat Nath, Ram Charittar for himself and as guardian of Paras Nath, a minor, Naurang Rai, Nageshwar Prasad, Mahadeo Prasad and Sarja Prasad. In that petition Chhatarpal said :—

"1. The parties held an ancestral eight-anna share in the said share and were in possession of the same as the members of a joint Hindu family.

"2. Subsequently, a partition was made by arbitration, and under the arbitration award confirmed by the civil court, the shares in the said ancestral eight-anna share were allotted to each of the co-sharers as per specification given below.

"3. Under the arbitration award, every co-sharer

is in possession of his share. Corrections in the 'khewat' relating to other villages have already been made; but the corrections in the 'khewat' relating to this village, have not been made with reference to the said award. It is, therefore, hereby prayed that corrections may be made in the 'khewat' with reference to the arbitration award.

"Note—Gajraj Rai, Jag Prasad Rai, and Ramjas Rai have purchased from Saminath under a registered sale-deed, the one anna 6 pie 2 chhatank share which was allotted to him under the partition award. They shall make a separate application for mutation of names in respect of that share.

Specifications of shares in respect of which amended entries are to be made in the 'khewat' with reference to the arbitration award :—

Names of co-sharers		Amount of shares to be entered against the names of the co-sharers with reference to the arbitration award.
Naurang Rai and Musamat Salhanta, heirs of Shiva Ratan Rai (?) deceased ...	...	1 anna 4 pies and 4 chhatanks
Gajraj Rai ...	...	1 anna 2 pies and 12 chhatanks.
Chhatarpal Rai, Petitioner		1 anna 2 pies and 9 chhatanks.
Ramjas Rai ...	...	1 anna 2 pies and 12 chhatanks
Mukut Nath Rai and Ram Charittar Rai for self and as the guardian of Paras Nath Rai, minor, heirs of Shiva Narayan Rai and Nand Lal Rai...		1 anna 5 pies and 9 chhatanks."

Jag Prasad, as the son and general attorney of Chhatarpal, signed Chhatarpal's name to a declaration at the foot of the petition that the particulars set forth in the application were true.

Having regard to those petitions of 1902 and 1907, and to the attempted specification of shares by Sheo Narain in 1892, and to the award of 1896, there cannot be the least doubt that the joint family which descended from Bal Krishn separated into eight families, two of which, Jai

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Narain's and Nand Lal's, re-united before the award was made.

It is true that the plaint of the 11th February 1902 of Gajraj, Chhatarpal and Ramjas (Ex. 7), if it stood alone and could not be explained, would afford strong evidence that Gajraj, Chhatarpal and Ramjas constituted a joint family of which Brijraj was a member. But in 1892 the joint family, which then existed without doubt, had separated and Chhatarpal, Gajraj and Ramjas were not re-united as a joint family. Possibly the explanation is that the statement that the Plaintiffs in that suit were joint with Brijraj was the work of the pleader who prepared the plaint as the easiest way of explaining how those Plaintiffs had a right of suit on a hypothecation bond which had been given in favour of Brijraj alone in 1897.

The statement in the plaint of the suit for malicious prosecution which Ramjas, Jag Prasad and Gajraj brought in 1912 that they "are members of a joint family," which has jointly paid Rs. 900 as revenue and Rs. 65 as income-tax, their Lordships also consider to be worthless in face of the crucial documents to which they have referred.

The conclusion at which their Lordships have arrived is that the decree of the High Court of the 13th July 1921, dismissing the suit of the Plaintiffs with costs, was right and that this appeal should be dismissed with costs, and they will accordingly humbly so advise His Majesty.

Solicitors: *Messrs. Francis & Harker* for the Appellants.

Solicitor: *Mr. H. S. L. Polak* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

Full Bench Reference

No. 5 of 1924

WALMSLEY, J.

C. C. GHOSE, J.

SUHRAWARDY, J.

B. B. GHOSE, J.

DUVAL, J.

1925,

Heard, 11 and

12, May.

Judgment,

15, June.

GORA CHAND HALDER
and anr, Appellants,

v.

P. AFULLA KUMAR ROY
and ors, Respondents.

Executing Court, power of, to question validity of decree—Limits of its competence—Apparent want of jurisdiction of trial Court, only ground.

Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing Court is authorised to question the validity of the decree.

This was a Reference to a Full Bench made on 15th December 1924 by Suhrawardy and Cuming, JJ., in Appeal from Order No. 365 of 1922.

In July 1897 the predecessor-in-interest of the Respondents mortgaged certain properties in Birbhum and certain properties in Santhal Parganas (one of them being Mouloti) to the predecessor-in-interest of the Appellants. Village Mouloti was under settlement in 1910 when the Appellants instituted a suit (No. 57 of 1910) on their mortgage in the Court of a Subordinate Judge of Birbhum. A mortgage decree was passed in their favour. In 1921 the Appellants filed their last application for execution. The Respondents appeared and filed an objection

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to the execution under sec. 47, C. P. Code. The said objection was to the following effect: "This Court had no jurisdiction to try the original suit, in connection with the above execution case. The decree obtained in mortgage suit No. 57 of 1910 is void, that is, a nullity and as such, the execution cannot proceed."

It was held by the Division Bench following the case of *Maha Prasad Singh v. Ramani Mohan Singh* (1), that the Subordinate Judge was not competent to pass the decree in suit No. 57 of 1910. The following question therefore was referred to the Full Bench:—

"Where a decree having been passed by a Court having no jurisdiction to pass it is void and a nullity, is the execution Court competent to question its validity and refuse to execute it?"

The ORDER OF REFERENCE was as follows:—

SUHWARADY AND CUMING, JJ.—This appeal is directed against an order of the Subordinate Judge of Birbhum holding the decree sought to be executed by the Appellant incapable of execution and dismissing his application for execution. In 1910 Appellant obtained the mortgage decree, which he is now seeking to execute, in the Court of the Subordinate Judge of Birbhum in respect of properties, some of which were in the District of Birbhum and some in the Santhal Parganas. In this execution case the judgment-debtors have taken exception to the execution on the ground that when the decree was passed, some of the mortgaged properties situated in the Santhal Parganas were under settlement, and so under sec. 2 of Act XXXVII of 1855 the Birbhum Court had no jurisdiction to pass the decree; the decree having thus

been passed without jurisdiction is void and incapable of execution. The Court below has found that one of the Santhal Parganas properties Mouzah Mouloti was under settlement when the decree was passed and held, under the provisions of the Act above referred to and on the authority of the decision of the Judicial Committee of the Privy Council in *Maha Prasad Singh v. Ramani Mohan Singh* (1), that the Birbhum Court had no jurisdiction to try the suit and pass the decree which is accordingly void and incapable of execution. In this view the learned Subordinate Judge has dismissed the execution case. The finding of fact recorded by the Court below has not been disputed before us by the Appellant, but the order of the Court below has been assailed on two grounds:—(1) that the Court below as executing Court could not go behind the decree and test its validity but was bound to execute it even though it was passed without jurisdiction; (2) that the Court below is wrong in holding that the whole decree was bad and it should have executed so much of it as was valid in respect of the Birbhum properties.

The second contention may be shortly disposed of as untenable in view of the decision of the Judicial Committee in *Maha Prasad Singh v. Ramani Mohan Singh* (1).

On the first point there is no unanimity of opinion and we find it difficult to reconcile some of the decisions of this Court. In *Roopnarain Singh v. Ramajee Singh* (2) and *Narendra Bahadur v. Gopal Shah* (3), the objection that the decree was void and incapable of execu-

(1) L. L. R. 42 Cal. 116; a. c. 18 C. W. N. 994 (P. C.) (1914).

(2) 3 C. L. R. 192 (1878).

(3) 17 C. L. J. 684 (1913).

(1) L. L. R. 42 Cal. 116; a. c. 18 C. W. N. 994 (P. C.) (1914).

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tion was permitted to be raised and allowed in the execution of the decree. A contrary view was taken in *Biswanath Prosad Mahata v. Bhagwandin Pandey* (4) and in *Kali Pada Sarkar v. Hari Mohan Dalal* (5), where it has been laid down that an execution Court cannot question the validity of the decree and refuse execution though the decree was a nullity and passed without jurisdiction. In *Kunja Mohan Chakravarti v. Manindra Chandra Rai Chaudhuri* (6), Mookerjee, J., who was a party to the decisions in *Biswanath v. Bhagwandin* (4) and *Kali Pada v. Hari Mohan* (5), enunciates the proposition of law that when a decree is void and a nullity it is not only the duty of the Court which passed it to ignore it but of every Court to which it is presented. Though the case in which this observation was made did not arise in execution, it is wide enough to cover a case like the present and is in conflict with the view expressed by the same learned Judge in the two previous cases above cited. This question has been recently considered by a Full Bench of the Patna High Court in *Jungli Lal v. Laddu Ram* (7), where on a review of the conflicting authorities it has been held that an execution Court can only execute a valid decree, and a void decree ought to be disregarded without any formal proceedings to set it aside. The same view has been taken in other High Courts. *Imdatt Ali v. Jugan Lal* (8), *Hazi Musa v. Purmanand* (9) and *M. Subramania v. Vaithinatha* (10).

(4) 14 C. L. J. 648 (1911).

(5) I. L. R. 44 Cal. 627; s. c. 21 C. W. N. 1104; 24 C. L. J. 375 (1916).

(6) 27 C. W. N. 543; s. c. 36 C. L. J. 124 (1922).

(7) [1919] Pat. 106; 4 P. L. J. 240 (1919).

(8) I. L. R. 17 All. 478 (1896).

(9) I. L. R. 15 Bom. 216 (1890).

(10) I. L. R. 38 Mad. 682 (1913).

As it is a matter of general importance and the view taken by this Court in the cases of *Biswanath v. Bhagwandin* (4) and *Kali Pada v. Hari Mohan* (5) are not only in conflict with that accepted by the other High Courts but also with the decisions in other cases of this Court to which we have referred, we are of opinion that the present state of the authorities being embarrassing to the lower Courts the law on the point should be settled by a Full Bench.

We accordingly submit the following question for the decision of the Full Bench :—

Where a decree having been passed by a Court having no jurisdiction to pass it is void and a nullity, is the execution Court competent to question its validity and refuse to execute it? As the point has arisen in a second appeal the whole case is submitted to the Full Bench for decision.

Babu Rupendra Kumar Mitter (with *Babus Dharmadas Set and Promotha Nath Bandopadhyaya*) for the Appellant.—There are two classes of cases in which the power of the executing Court has been considered :

(1) Where the decree was passed by a Court having no jurisdiction over the subject-matter.

(2) Where the decree was a nullity by reason of it being passed against a dead man whose legal representative raised the question at the time of the execution.

The cases of *Nagendrabala v. Secretary of State for India* (11) and *Biswanath v. Bhagwandin* (4) are cases falling within the first class. They have held that the

(4) 14 C. L. J. 648 (1911).

(5) I. L. R. 44 Cal. 627; s. c. 21 C. W. N. 1104; 24 C. L. J. 375 (1916).

(11) 14 C. L. J. 23 (1911).

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executing Court must take the decree as it is and cannot question the validity thereof. There is no conflict on this point so far as the Calcutta High Court is concerned.

The cases falling within the second class have not laid down an uniform rule.

The case of *Kali Pada v. Hari Mohan* (5) has laid down that the executing Court in such a case cannot question the validity of the decree. The cases of *Girindra Nath v. Huro Nath* (12), *Roopnarain v. Ramajee* (2), *Narendra v. Gopal* (3) and *Jungi Lal v. Laddu Ram* (7) have laid down that the executing Court can disregard such a decree and refuse execution. The cases falling within this second class can be placed on a different principle. Under Or. 21, r. 22, C. P. C., a notice has to be served on the legal representative of a judgment-debtor who is dead. Such a representative can shew that his predecessor-in-interest was not a party to the suit in the real sense being dead at the time. It has been put so in *Girindra Nath v. Huro Nath* (12). The cases of *Narendra v. Gopal* (3) and *Jungi Lal v. Laddu* (7) purported to be based on the broader principle that the executing Court as other Courts can disregard what is a nullity. In both these cases reliance was placed either in argument or in the judgment in *Girindra Nath v. Huro Nath* (12) and *Roopnarain v. Ramajee* (2) which were decided under Act VIII of 1859. That Act indicated that in certain contingencies executing Court could disregard a decree which appeared to be passed by a Court without

jurisdiction; see sec. 288 of Act VIII of 1859. There is no corresponding section in the Civil Procedure Code of 1908 which indicates that the legislature has since then changed its mind.

It is established that an executing Court is a Court of limited powers. There is a course of decision that it cannot go behind the decree and that an objection under sec. 244 of the old Code and sec. 47 of the new Civil Procedure Code must assume the validity of the decree.

See *Hassan Ali v. Ganzi Ali* (13), *Girish v. Shoshi* (14), *Khettrapal v. Shyama Prasad* (15), *Madan Mohan v. Bhikhar* (16), *Roma Prasad v. Anukul Chandra* (17), *Bindesri v. Lakhpat* (18) and *Kali Pada v. Hari Mohan* (5).

The rule so formulated is based on sound principles of justice, equity and good conscience. If a decree is attacked directly either by way of appeal or review as being passed without jurisdiction, and the decree be vacated the Plaintiff can either take back the plaint and file it in the proper Court claiming the benefit of sec. 14 of the Limitation Act or in a case like the present make the necessary amendment in the plaint. See *Setrucherlu Ramabhadraraju v. Maharaja of Joypore* (19).

Babu Baranashibashi Mukerjee (for *Babu Brojo Lal Chuckerbutty*) with *Babu Panchanan Ghosal* for the Respondents.—Where a decree has been passed

(2) 3 C. L. R. 192 (1878).

(3) 17 C. L. J. 634 (1912).

(5) I. L. R. 44 Cal. 627; s. c. 21 C. W. N. 1104; 24 C. L. J. 375 (1916).

(7) [1919] Pat. 105; 4 P. L. J. 240 (1919).

(12) 10 W. R. 455 (1868).

(5) I. L. R. 44 Cal. 627; s. c. 21 C. W. N. 1104; 24 C. L. J. 375 (1916).

(13) I. L. R. 31 Cal. 179 (181) (1903).

(14) L. R. 27 I. A. 110 (124); s. c. I. L. R. 27 Cal. 951 (1900).

(15) I. L. R. 32 Cal. 265, 267 (1904).

(16) 16 C. L. J. 517 (519) (1912).

(17) 20 C. L. J. 512 (514) (1914).

(18) 15 C. W. N. 725 (728) (1910).

(19) I. L. R. 42 Mad. 518; s. c. 23 C. W. N. 1038 (P. O.) (1919).

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by a Court having no jurisdiction to pass it, it is void and a nullity and the execution Court is competent to question its validity. Now there is a distinction between want of inherent jurisdiction and illegal exercise of jurisdiction. Refers to *Hriday Nath v. Ram Chandra* (20), where jurisdiction is defined. Here the Court had jurisdiction but exercised the jurisdiction illegally. In such a case, the execution Court is not competent to question the validity of the decree. Refers to *Nagendrabala v. Secretary of State for India* (11), where there was an illegal exercise of jurisdiction and not want of jurisdiction. So it was held there that the execution Court cannot try the validity of a certificate under the Public Demands Recovery Act. *Biswanath v. Bhagwandin* (4) seems at first sight to be against us. But we do not know the facts of the case, the judgment does not disclose them. So it is not clear whether it is a case of want of jurisdiction or of illegal exercise of jurisdiction. But as the case of *Nagendrabala v. Secretary of State for India* (11) is relied on, we suppose that it is a case of illegal exercise of jurisdiction. Refers to *Purna Chandra v. Dina Bandhu* (21). Here the legality of a certificate was questioned. It was an illegal exercise of jurisdiction. Refers to p. 819, the observation of Maclean, C. J. The same learned Judge Mr. Justice Mookerjee held in *Golab Sao v. Madho Lal* (22) that an order made without jurisdiction is absolutely null and void; such an order may be shown to be a nullity in any

proceeding where reliance is placed on it. Refers to *Kunja Mohan v. Manindra Chandra* (6), jurisdiction defined. *Nannhoo v. Tofan* (23), *Arjundas v. Gunendra Nath* (24), *Jungi Lal v. Laddu Ram* (7), *Janardhan v. Ram Chandra* (25) and *Ramgopal v. Kishan Chandra* (26). Also refers to *Maha Prasad v. Ramani Mohan* (1). Birbhum Court had no jurisdiction in respect of Santhal Parganas property.

Refers to Trevelyan on Jurisdiction of Civil Courts, p. 6.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—This Reference is made in a first appeal from an order. The necessary facts are given in the Order of Reference and need not be repeated.

The question propounded is in these words: "Where a decree, having been passed by a Court having no jurisdiction to pass it, is void, and a nullity, is the execution Court competent to question its validity and refuse to execute it?"

The learned Judges who made the Reference are satisfied that the decree under consideration was made by a Court that had no jurisdiction to make it, and that in consequence it is void and a nullity. It is not open to us therefore to consider any of the questions involved in those findings. We have to start by accepting the proposition that the Court that made the

(1) 1 L. R. 42 Cal. 116: s. c. 18 C. W. N. 994 (P. C.) (1914).

(6) 27 C. W. N. 542 (546): s. c. 88 C. L. J. 124 (1922).

(7) [1919] Pat. 105: 4 P. L. J. 240 (1919).

(23) 14 W. B. 238 (1870).

(24) 18 C. W. N. 1236: s. c. 20 C. L. J. 341 (1914).

(25) 1 L. R. 38 Bom. 317 (1901).

(26) L. R. 51 I. A. 72, 79: s. c. 1 L. R. 51 Cal. 381, 28 C. W. N. 972 (1923).

(4) 14 C. L. J. 648 (1911).

(11) 14 C. L. J. 83 (1911).

(20) 1 L. R. 48 Cal. 138: s. c. 24 C. W. N. 728, 81 C. L. J. 482 (F. B.) (1900).

(21) 1 L. R. 34 Cal. 811: s. c. 11 C. W. N. 758 (F. B.) (1907).

(22) 9 C. W. N. 956: s. c. 2 C. L. J. 384 (1906).

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decree had no jurisdiction to make it, and by that expression is meant that the Court had not such territorial jurisdiction as would authorize it to make the decree, and not that having jurisdiction it exercised it erroneously. This distinction is of great importance, for with all respect I venture to think that the apparent conflict in reported cases is largely due to failure to keep this distinction clearly in view. It would be tedious to examine the numerous decisions in detail, and it would not lead to any useful result. I think, it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction; within these narrow limits I think that the executing Court is authorised to question the validity of a decree.

As the question arises in a first appeal, we must return the case for final adjudication by the Bench which referred it, with the statement that our answer to the question propounded is in the affirmative.

C. C. GHOSE, J.—I agree.

SUHRWARDY, J.—I agree.

B. B. GHOSE, J.—I agree.

DUVAL, J.—I agree.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 127 of 1924.

SANDERSON, C. J.	}	TILOKE CHAND SURANA
RANKIN, J.		and anr., Plaintiffs,
1923,		Appellants,
Heard, 9, 11 and		v.
12, March.		J. B. BEATTIE & Co.,
Judgment,		Defendants,
13, March.		Respondents.

Transfer of Property Act (IV of 1882), secs. 8, 50, 52—Constructive notice—Lis pendens—The mortgages as a purchaser, whether affected or bound by the constructive notice of the tenant's rights or any collateral arrangements made previous to the mortgage, between the mortgagor and lessee by way of advance to be reckoned as rent paid in advance—Receiver acting beyond his powers—Validity.

If the arrangement between the mortgagor and tenant for prepayment of rent or for setting off future rent against money due from the tenant to the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee; such arrangement will in equity bind a person taking a transfer of the reversion, unless he can show that he purchased for value without notice. If there is a tenant upon a property, his open possession is notice, not only of the immediate terms of his tenancy, but collateral agreements as well, in the absence of all enquiry by the transferees.

A mortgagee cannot repudiate a transaction because the Receiver in his suit acted beyond his power in sanctioning the same, after the transaction had been carried through and after the Receiver and mortgagee had taken advantage thereof.

ASHBURTON (LORD) v. NOOTON (1),

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GREEN v. RHEIMBERG (7) and DANIELS v. DAVISON (9) referred to.

Per RANKIN, J.—In order to get the benefit of the protection of sec. 50 of the Transfer of Property Act, the tenant must pay rent as rent and must not pay rent in advance which, in the circumstances, is a mere loan to the mortgagor.

DENICOLLS v. SAUNDERS (5) referred to.

The Defendants-Respondents were tenants under Messrs. Hyam and Jones from 31st December 1906, paying Rs. 150 per month on a lease for 25 years. On 18th July 1914, the latter mortgaged the premises to Mr. M. A. Sassoon and two other persons, and on 30th April 1917 he again mortgaged the same to Messrs. Mackintosh Burn & Co. On 13th January 1917 a mortgage suit was filed by the first mortgagees. On 16th March 1917 Mr. M. A. Sassoon was appointed as Receiver and the preliminary decree was passed on 27th July 1917. Messrs. Mackintosh Burn & Co. having in January 1919 filed a mortgage suit were added party in the former suit, and on 24th January 1919 the final decree was passed. (The Calcutta Rent Act came into force on 6th May 1920.) On 7th June 1920 the tenants Respondents advanced Rs. 7,800 to the landlords for the repair and improvement of the house, and it was agreed that it should be as payment made "only in advance, on account of rents of the premises No. 3-1, Mangoe Lane, for the purpose of making an additional room on the roof of the one storied godown in the above premises, to be deducted out of the monthly rents payable, viz., Rs. 200 per month." In 1921 the landlords proposed to create an

(6) L. R. 5 C. P. 589 (1870).

(7) [1911] 104 L. T. 149 C. A.

(9) 16 Ves. 249 (1809).

equitable mortgage on the premises to the Plaintiffs, and on 12th July 1921 the Plaintiffs advanced money to pay off the claim of Messrs. Mackintosh Burn & Co. and became the mortgagee by deposit of title deeds. On 20th October 1921, the tenants made "a further advance of Rs. 1,500 to the landlords and on 29th December 1921 another sum of Rs. 2,500 was advanced, on the terms of the arrangements of 7th June 1920. After 7th June 1920 no further rent bills were made out nor rent collected. On 5th April 1922 an order for sale was made and the cl. 15 of the conditions of sale provided that the properties are sold subject to a mortgage, dated 12th July 1921, for 6 lacs carrying interest at 12 per cent. per annum and "the existing tenancies, quit rents, rights of way and other rights and easements, if any, affecting the same and in particular as regards lot No. 1 subject to a lease for a period of 25 years from 31st December 1906." On 24th March 1923 the sale was held and the Plaintiffs-Appellants became the purchaser. On 28th March 1923 the Plaintiffs gave notice of sale to the tenants, the Defendants, and called upon them not to pay rent to any person other than the Plaintiffs. On 31st May 1923 Plaintiffs gave notice to the tenants to quit the premises by the end of June 1923. The tenants set up the agreement of 7th June 1920. On 30th July, the Plaintiff-purchaser gave a further notice to the Defendant calling upon him to quit the premises on 31st August and in default claimed damages at Rs. 300 per month. The Defendant refused and this suit* was filed on 9th November 1923. Page, J., dismissed the Plaintiffs' claim and against that decree this appeal was filed.

Suit No. 2817 of 1923. Judgment on 19th May 1924.

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Sir Benode Mitter (with *Mr. H. C. Majumdar* and *Mr. S. C. Mitter*) argued on behalf of the Plaintiffs-Appellants that prepayment of rent in advance is not the fulfilment of the covenant to pay rent as it became due but is an advance to be appropriated towards payment of rent as the same becomes due. Cited *DeNicholls v. Saunders* (5), *Cook v. Guerra* (8) and *Ashburton (Lord) v. Nocton* (1).

The mortgagor cannot grant a lease after mortgage for more than monthly tenancy in case of houses. See *Madan Mohan v. Rajkishori* (10). This agreement having taken place in 1920 pending the mortgage suit is affected with the principles of *lis pendens*. Auction-purchaser is a party to the suit within the meaning of sec. 52 of the Transfer of Property Act.

Mr. W. W. K. Page argued on behalf of the Respondents that the principle of *DeNicholls v. Saunders* (5) do not apply to the fact of this case because here the mortgage of 1921 in favour of the Plaintiff took place after the agreement of 1920.

In this case the mortgagee Sassoon who was also the Receiver knew of the agreement of 1920 and consequently the auction-purchaser is affected with constructive notice thereof and is bound by the agreement.

[*Green v. Rheimberg* (7) and *Daniels v. Davison* (9) referred to.]

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Plaintiffs against the judgment of my learned brother Mr. Justice Page which was delivered on the 19th of May 1924.

(1) [10 5] 1 Ch. 374.

(5) L. R. 5 C. P. 589 (1870).

(7) [1911] 104 L. T. 149 C. A.

(8) L. R. 7 C. P. 132 (1872).

(9) 15 Ves. 249 (1809).

(10) [1917] C. L. J. 894 (1917).

The Plaintiffs brought a suit against the Defendant, who, was sued as J. B. Beattie & Co., to recover possession of a portion of certain premises, which was occupied by the Defendant. The portion in question was part of the first floor of premises Nos. 3 and 3-1, Mangoe Lane, Calcutta.

There was a prayer for Rs. 3,160 in respect of rent up to the 31st of August 1923.

There was a further prayer for damages at the rate of Rs. 600 per month from the 1st of September 1923 until delivery of vacant possession by reason of the alleged wrongful possession of the Defendant after the 1st of September 1923.

The defence shortly stated was that the Defendant had been a tenant of these premises for a long time, and that in 1920 the Defendant was requested by his landlords, Messrs. Hyam and Jones, to advance money in order that such money might be applied in repairing and improving the premises generally.

It was alleged that it was verbally agreed that the Defendant would advance Messrs. Hyam and Jones money to be spent on repairs, and that the money so advanced would be accepted as rent of the premises paid in advance and that the Defendant would be entitled to remain in possession as tenant of the premises until rent of the said premises at the rate of Rs. 200 per month should have accrued to an amount equivalent to the rent so paid in advance.

It was alleged that the Defendant advanced in June 1920 Rs. 7,800; that on the 20th of October 1921 he made a further advance of Rs. 1,500, and that on the 29th of December 1921 he again advanced a sum of money, this time the sum being Rs. 2,500; that the money was spent by the landlords upon repairs and improvements of the premises in accordance with

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the arrangement and that consequently the Defendant was entitled to remain in possession up to some date in 1926.

The facts of this case may be stated shortly as follows: The Defendant was a tenant of the portion of the premises, which I have mentioned, from about the year 1907 at a rental of Rs. 150. On the 13th of July 1914 his landlords Messrs. Hyam and Jones executed a mortgage to Mr. M. A. Sassoon and two others of the whole premises. On the 13th of January 1917, a mortgage suit was filed by Messrs. Sassoons, the mortgagees: on the 16th of March 1917 M. A. Sassoon was appointed Receiver and on the 27th July 1917 a preliminary decree was made: on the 24th of January 1919 the final decree was made and it included an order for sale.

It should be mentioned that on the 30th of April 1917 Messrs. Hyam and Jones had made a further mortgage of the premises to Messrs. Mackintosh Burn & Co. They had brought a suit and had obtained a decree in January 1919. They were added as parties to the suit of Messrs. Sassoons, and the final decree of the 24th of January 1919 dealt not only with the rights of Messrs. Sassoons, the mortgagees, but also with the rights of Messrs. Mackintosh Burn & Co., as second mortgagees.

The 6th of May 1920 is a material date inasmuch as the Calcutta Rent Act came into force on that date.

The first agreement, which was made by the Defendant with his landlords, was on the 7th of June 1920; and, in respect of that, the sum of Rs. 7,800 was advanced, and a receipt was given in the following terms:—

"Received from J. B. Beattie, Esq., the sum of rupees seven thousand and eight hundred only in advance on account of rents of premises No. 3-1, Mango Lane for the purpose of making an additional

room on the roof of the one storied godown in the above premises, to be deducted out of the monthly rents payable, viz., Rs. 200 per month."

Part of the arrangement was that the rent was to be increased from Rs. 150 to Rs. 200.

On the 12th of July 1921 Messrs. Hyam and Jones created an equitable mortgage by depositing the title deeds of the premises with the Plaintiffs.

In order to carry this out Messrs. Sassoons were paid off and the deeds were handed by them to the Attorneys for the Plaintiffs; and, a receipt was given by Messrs. Sassoons in the following terms:

"Suit No. 270-16.

"M. A. Sassoon v. J. I. J. Hyam.

"Received from Messrs. Hyam and Jones a cheque for Rs. 7,02,000 only, viz., Rs. 6,92,098-3-3 in full satisfaction of the Plaintiff's claim for principal and interest due under the decree herein and Rs. 9,906-13-2 on account of the costs of the suit. We undertake to refund excess, if any, on adjustment of the costs of this suit."

On the 20th of October 1921, as I have already said, a further advance of Rs. 1,500 was made by the Defendant to Hyam & Jones and on the 29th of December 1921 another sum of Rs. 2,500 was advanced. The position, therefore, up to this date was that Messrs. Sassoons had been paid off and apparently had no more interest in the premises. The Plaintiffs became mortgagees by the deposit of the title deeds.

It appears that Messrs. Sassoons subsequently alleged that a mistake had been made in the calculation of the amount which was due to Messrs. Sassoons, and that there was still a sum of about Rs. 25,000 due in respect of interest. In

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consequence thereof an application was made to the learned Judge sitting on the Original Side for the sale of the premises by Messrs. Sassoons: and, on the 5th of April 1922 an order for sale was made. The material part of that order was as follows: "It is ordered that the Registrar of this Court do sell the mortgaged premises Nos. 3 and 3-1 Mangoe Lane and No. 1 Barrettos Lane or a sufficient part thereof with liberty to the Plaintiffs to bid for and purchase the same as directed by the said decree dated the twenty-fourth day of January one thousand nine hundred and nineteen for recovery of the balance of interest due to the Plaintiffs under the said decree dated twenty-seventh day of July one thousand nine hundred and seventeen and it is further ordered that on payment to the Plaintiffs the said sum as aforesaid the receiver of this suit be discharged."

It is not for me in this appeal to express any opinion whether that order should have been made, having regard to the fact that Messrs. Sassoons had accepted the sum, which was actually paid to them in July 1921, in full satisfaction of their claim for principal and interest and had delivered up the title deeds.

The result, however, was that the premises were sold by the Registrar of the Court and the Plaintiffs in this suit became the purchasers at that sale for one lac of rupees and the purchase was stated to be subject to a mortgage, dated the 12th day of July 1921. As far as I knew there was no such mortgage. It was, however, assumed by both parties to this appeal that the mortgage intended to be referred to was the mortgage of the Plaintiffs, dated 12th July 1921.

Cl. 15 of the conditions, upon which

the sale was held, provided that the said properties were sold subject to a mortgage, dated 12th July 1921, in favour of Messrs. Telak Chand Hanotmull for Rs. 6,00,000 carrying interest at 12 per cent. per annum and the existing tenancies, quit rents, rights of way and other rights and easements of any affecting the same: and, it specifically mentioned a lease for a period of 25 years.

The sale was held on the 24th of March 1923, and the Plaintiffs became the purchasers. Their Attorneys by letter, dated 28th March 1923, gave notice to the Defendant of the sale and that the Plaintiffs had become purchasers and they called upon the Defendant not to pay rent to any person other than the Plaintiffs. On the 31st May 1923 they gave notice to the Defendant to quit the premises by the end of June.

Then the Defendant set up the agreement to which I have already referred and I need not read the letters with regard to that.

On the 30th of July the Plaintiffs' Attorneys gave further notice to the Defendant calling upon him to quit the portion of the premises occupied by him on the 31st of August and stated that in default the Defendant would be held liable for damages at the rate of Rs. 300 per month.

The Defendant did not give up possession, and this suit was filed on the 9th of November 1923.

The learned Judge dismissed the Plaintiffs' claim altogether.

As I understand the learned Judge's judgment he treated the three payments which were made by the Defendant in June 1920, 20th October 1921 and 29th of December 1921 as having been made in pursuance of the arrangement which

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was made between the Defendant and his landlords on the 7th of June 1920.

With great respect to the learned Judge, in my judgment, the evidence does not support that finding: and, it appears to me that the case must be considered upon the basis that there was a fresh arrangement made in respect of each of these payments.

It is necessary, therefore, to see whether there is any difference in the rights of the parties as regards these three payments.

I propose in the first place to deal with the payment of Rs. 7,800 and the arrangement which was made in respect of it in June 1920.

In my opinion the evidence shows that the Defendant advanced Rs. 7,800 to his landlords, Messrs. Hyam and Jones, undoubtedly for the purpose of repair and improvement of the premises, and the agreement was that the money was to be repaid by the landlords giving the Defendant credit for the monthly rents as they became due at the rate of Rs. 200 per month. It was an implied term that the Defendant should remain in possession of the premises until the whole amount was repaid in this manner, unless the landlords repaid in a lump sum or otherwise. That being the arrangement, the advance of Rs. 7,800 would cover the rents which were payable for 39 months at the rate of Rs. 200 a month, and would cover a period from June 1920 to the end of August 1923.

I agree with the learned Judge's conclusion that the Plaintiffs cannot recover any rents in respect of the period up to the end of August 1923. I agree with the learned Judge's finding that Messrs. Sassoons and the Receiver Mr. M. A. Sassoon knew about the arrangement which was made between the De-

fendant and Messrs. Hyam and Jones in June 1920 and assented to it. In my judgment the money, which was advanced by the Defendant, was in fact spent on repairs of the premises, as has been found by the learned Judge.

In those circumstances, in my opinion, neither Messrs. Hyam and Jones nor Messrs. Sassoons nor the Receiver could have claimed rent from the Defendant for the period up to the 31st of August 1923.

The Plaintiffs became mortgagees by paying off Messrs. Sassoons and taking a deposit of the title deeds from Messrs. Hyam and Jones on the 11th July 1921 which was after the arrangement made between the Defendant and Messrs. Hyam and Jones: and, I am at a loss to understand how the Plaintiffs could be in a better position than Messrs. Hyam and Jones or Messrs. Sassoons or the receiver.

In my judgment the learned Judge was right in his conclusion as to this part of the case.

The learned Counsel for the Appellants argued that the arrangement which was made between the Defendant and his landlords was of no effect as against the Plaintiffs by reason of the provisions of sec. 52 of the Transfer of Property Act.

Even if the Plaintiffs could be said to be parties who would have any right under any decree or order which might be made by the Court in the mortgage suit instituted by Messrs. Sassoons upon which I express no opinion, I am of opinion that this point is of no avail to the Plaintiffs by reason of the fact that the mortgagees, who were Plaintiffs in the suit, and the receiver were both aware of the arrangement which was made by the Defendant with the landlords and had assented to such an arrangement and the

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Plaintiffs cannot be in a better position than Messrs. Sassoons or the receiver.

The learned Counsel further relied upon the limitation of the receiver's powers as to dealing with the property.

I do not think it necessary to examine in detail what were the powers of the receiver, because I am of opinion that, even if the receiver had no power to sanction the arrangement which was made between the Defendant and his landlords, the Court would not allow him to repudiate the transaction after the transaction had been carried through, and after he, the receiver, and the mortgagees had taken advantage of the transaction and the money had been advanced and spent in the improvement of the premises which were the mortgagees' security. I think there is no substance in that point.

The last point to which it is necessary for me to refer in this connection is the argument of the learned Counsel who appeared for the Appellants, that there was no proof that the arrangement which was made in June 1920 between the Defendant and Mr. Hyam was made with the authority of Mr. Jones, the other landlord.

The issue was, "Was there an agreement between the Defendant and Messrs. Hyam and Jones as alleged in the written statement?"

As I understand the learned Judge's judgment, and on reference to the evidence, the contest was upon the question whether the arrangement alleged by the Defendant had been made. There was no suggestion at the trial that Mr. Hyam was not acting with the authority of his co-lessors; further I do not find the point specifically taken in the memorandum of appeal. In these circumstances and having regard to the nature of the arrangement, which to my mind was a perfectly

proper arrangement, the result of which was for the benefit and advantage of the landlords and an improvement of their property, I have no doubt that Mr. Hyam, in making the arrangement of June 1920, was acting with the authority of Mr. Jones. For these reasons, I agree with the learned Judge's conclusion that the Plaintiffs cannot recover rent in respect of these premises for any period prior to 31st August 1923.

The position, however, to my mind is different as regards the payments which were made by the Defendant on the 20th of October and the 29th of December 1921.

The arrangement as to these payments according to the evidence is said to have been similar to that which governed the previous payment in June 1920.

But as I have already said, it seems to me that the evidence shows that the arrangements of the 20th of October 1921 and of the 29th of December 1921 must be regarded as being separate from the previous arrangement of June 1920. These two arrangements were made after the mortgage to the Plaintiffs. That being so, the rule which was referred to by Lord Justice Swinfen Eady in *Ashburton v. Nocton* (1) is applicable.

The learned Lord Justice stated the rule as follows:—"If the arrangement between mortgagor and tenant for prepayment of rent, or for setting off future rent against money due from the tenant to the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee."

Therefore, unless it can be shown that the Plaintiffs assented to the above-mentioned arrangements between the Defen-

(1) [1915] 1 Ch. 274 at p. 291.

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dant and the mortgagors, I am of opinion that the Plaintiffs are not bound by them. There is no evidence to show that the Plaintiffs consented to the arrangements; and, in my judgment, in October and December 1921 Messrs. Hyam and Jones were not in a position to give more than their personal undertaking to set off the sums which would become due in respect of the monthly rents against the advances which the Defendants made so long as they were in a position so to do. They were not able to bind the Plaintiffs, the mortgagees, or to deprive the mortgagees of any of their rights, which would include the right to give notice to the Defendant to pay the rent to them and on failure by the Defendant to pay the rent to determine the tenancy.

It was alleged that Mr. Hyam did not inform the Defendant of the mortgage which had been created in favour of the Plaintiffs. Even if that be so, although one may sympathise with the Defendant, it does not affect the Plaintiffs' rights.

The learned Counsel for the Defendant based part of his argument upon the Calcutta Rent Act and urged that his client was safeguarded by reason of the provisions thereof.

In my opinion the Calcutta Rent Act is not sufficient to release the Defendant from his liability for the reason that the rent after August 1923 had not been paid by the Defendant to the persons to whom it was due, namely, the Plaintiffs.

There are two other points to which it is necessary for me to refer. The learned Counsel for the Defendant relied upon the doctrine of merger. He referred to the fact that the Plaintiffs had purchased the property at the sale which was held under the order of the Court in March 1923: and, he relied upon the conditions of sale in cl. 15, to which I have already referred.

He urged that the Plaintiffs were affected with notice of the Defendant's tenancy: and for the doctrine of merger, he relied upon the case of *Toulmin v. Steere* (2) and of *Smith v. Phillips* (3).

I am of opinion that the doctrine of merger is not available to the Defendant.

It was held in the case of *Gokaldas Gopaldas v. Puranmal Prem Sukhdas* (4) that the doctrine of *Toulmin v. Steere* (2) is not applicable to Indian transactions, except as the law of justice, equity and good conscience.

Sir Richard Couch, in giving the judgment of the Judicial Committee stated as follows: "The doctrine of *Toulmin v. Steere* (2) is not applicable to Indian transactions, except as the law of justice, equity and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

"In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere* (2) seems to them likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to

(*) 3 Merivale 210 (1817)

(3) 1 Keen's Rep. 694 (1837).

(4) I. L. R. 10 Cal. 1036 (P. C.) (1894).

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useless technicalities, to expense, and to litigation."

I agree with the learned Counsel's argument to this extent that the Plaintiffs, when they bought the premises, did receive notice of the Defendant's tenancy and were thereby put upon enquiry and they must be taken to have had knowledge of the actual facts.

Now, what were the facts of which they would have become aware upon enquiry?

Messrs. Hyam and Jones had made arrangements with the Defendant in October and December 1921, by which the above-mentioned sums were advanced by the Defendant, and they had entered into a collateral bargain by which they had made themselves personally liable to set off the monthly rents as they became due against the sums which had been advanced, and so to repay them. The Plaintiffs would have found that these arrangements were made after the date of the Plaintiffs' mortgage and that they, the Plaintiffs, were not bound by them; consequently, in my judgment, neither of the above-mentioned points, upon which the learned Counsel relied, are sufficient to release the Defendant from his liability.

In my judgment, the Plaintiffs cannot recover any rent for any period prior to the end of August 1923. But the Plaintiffs are entitled to possession of the premises and to recover mesne profits after the 31st of August 1923.

The result is that the Plaintiffs' claim for rent for the period up to the 31st of August 1923 is dismissed; the Plaintiffs are entitled to a decree for Rs. 200 for rent for the month of September 1923, and they are entitled to a decree for mesne profits from the 1st of October 1923 until the date of delivery of possession at the rate of Rs. 210 (two hundred and ten) per month, which we consider to be a fair

rate to be paid for the occupation of the premises. The possession of the premises must be vacated by the Defendant on or before the expiry of three months from to-day.

We have considered the question of costs: and, having regard to the peculiar features of this case, we have come to the conclusion that each party should pay its own costs not only of the appeal but also of the trial. It is not necessary to mention all the reasons which have weighed with us: it is sufficient to say that the Plaintiffs have failed with regard to a substantial part of their claim in which they persisted even in the Court of appeal.

RANKIN, J.—I agree.

As regards the arrangements which were made in October of 1921 and December of 1921, which were after the mortgage by deposit to the Appellants, had been made by Hyam and Jones on the 12th of July 1921 upon the terms of the registered deed of that date—the position is controlled entirely by sec. 8 and sec. 50 of the Transfer of Property Act. The principle to be applied in the case of a mortgage of tenanted land is that the mortgage operates as a grant of the reversion expectant on the determination of the term. In India a mortgage by deposit has the same effect as a "legal mortgage." By sec. 8 accordingly, when this mortgage by deposit was entered into in July 1921, there passed to the mortgagees, namely, the Appellants, the rents and profits accruing after the transfer. The result is that the tenant in such a case has only the protection of sec. 50 of the Transfer of Property Act, which is the equivalent in India of the old statute of Queen Anne which was canvassed in *DeNicholls v. Saunders* (5) and, the principle of that case applies where the arrangement in

(5) L. R. 5 C. P. 589 (1870).

TILOKE CHAND SURANA v. J. B. BEATTIE & Co.

question has taken place subsequent to the mortgage. In order to get the benefit of the protection of sec. 50, the tenant must pay rent as rent, and must not pay rent in advance which, in these circumstances, is a mere loan to the mortgagor. I entirely agree that the evidence does not admit for a moment of these two subsequent arrangements of October and December 1921 being regarded as the carrying out of a previous arrangement entered into in June 1920, and I respectfully differ from the learned Judge in so far as he has not differentiated between the first of the three arrangements and the others.

The only argument which to my mind requires examination in support of the claim of the Respondent to stand as against the Appellants, upon the later arrangements, is the argument urged before us that although the Appellants, had their mortgage of the 12th of July 1921 stood by itself, would not have been bound by the arrangements of October and December 1921, nevertheless when they came to take as auction-purchasers in March 1923 the equity of redemption subject to their own mortgage, they became unable to set up as against the Respondent the rights which they had under their mortgage of July 1921. That, as has been pointed out, is the doctrine of merger and the cases which were relied upon before us, the cases of *Smith v. Phillips* (3) and *Morrogh v. Alleyne* (6) are mere illustrations of the doctrine of merger laid down in the case of *Toulmin v. Steere* (2), an authority which has been much buffeted by modern decisions both in India and in England. I see myself no principle in saying in this case

that the Appellants' position as against the Respondents' was made worse by the circumstance that they paid one lac of rupees and bought in the equity of redemption in addition to their subsisting mortgage. It remains, therefore, to consider the rights of the parties as regards the transaction which was entered into on the 7th of June 1920.

Now, the facts as to this transaction are not very satisfactorily presented in the evidence. The evidence of Mr. Beattie is that the roof of the premises—and I understand he is speaking not only of his own part of the premises—was in a bad condition, that it was leaky, that it required repairs and that the premises otherwise were bad and required repairs. Mr. Hyam's evidence is the same and there is no cross-examination of either witness tending to show that that version of the facts was in any way incorrect. It is quite true that when one scrutinizes the receipt, dated the 7th of June 1920, one finds that the advance is said to be for the purpose of "making an additional room on the roof of the one-storied godown in the above premises." When the Plaintiffs' witness Mr. Shorsbree was in the witness-box he was cross-examined on the basis that a part of the premises was to be constructed out of the advance. However that may be, the Defendant and Hyam both go into the witness-box, they are not asked anything to throw doubt upon the story that the property as a whole was out of repair and that the purpose of that advance was to enable repairs to be made. The learned Judge has accepted that view: and, in the circumstances, it is quite impossible for this Court to accept any suggestion to the contrary.

The position, therefore, was this: A mortgage with the Sassoons had been

(2) 3 Merivale 210 (1817).

(3) 1 Keen's Rep. 694 (1837).

(6) [1873] 7 L. R. Eq. 487.

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made in 1914. In a suit which was solely between the Sassoons and Hyam and Jones and which had begun on the 13th of January 1917, one of the Sassoons had been appointed Receiver so far back as the 16th of March 1917. A later mortgage had been given to Mackintosh Burn, Ltd., in April 1917, and notwithstanding that a preliminary decree had been passed in the Sassoons' suit on the 27th of July 1917, not till 1918 did Mackintosh Burn, Ltd., bring a suit at all. The final decree for sale on the 24th of January 1919 was made in the Sassoons' suit to which Mackintosh Burn, Ltd., were added as parties in order that the rights of all persons might be worked out in each other's presence. It appears that Mr. Hyam was acting really as manager for the Receiver; so he says. At all events, the Receiver was allowing him to make out the rent bills, to endorse them to him and the Receiver's peon collected the rent. The Receiver and Hyam were managing this property for a period of over three years; and we must take it that the time came when the property required to be repaired. At that time it so happened that Mr. Beattie was in this position, at all events, as regards the main part of the premises, that under the Calcutta Rent Act, he had, so long as he would keep the covenants, fixity of tenure, and, in these circumstances, the Receiver and Hyam knowing that they could not eject the Defendant or claim more rent, and being in need of money got the necessary money for repairs by getting him to pay rent in advance. It was a substantial amount of Rs. 7,800. I do not regard that as if the Receiver was wrongly making a lease for three years. It is a mere arrangement whereby Hyam and the Receiver too, in order to get the advance, undertook, so long as Mr. Beattie kept the covenants,

that they would not attempt to give him notice to quit at all events unless they paid off the balance. That may or may not be an arrangement within the competency of a Receiver, but it was done with the consent of the Sassoon mortgagees. It was done at a time when, as the learned Judge found, Mr. Beattie had not been informed about Messrs. Sassoons' mortgage. To my mind it was an entirely unreasonable arrangement. I do not say that it was contrary to the Receiver's duty. But if it was, I do not understand why we are to suppose that the consent of Mackintosh Burn & Co. was lacking to a perfectly good and very beneficial agreement to which they have never objected.

We have to consider whether it binds the equitable mortgagees of the 12th of July 1921.

Now, it seems to me that the cases of *Green v. Rheimbarg* (7) and *Ashburton v. Nocton* (1) show that such an arrangement will in equity bind a person taking a transfer of the reversion, unless he can show that he purchased for value without notice. This no doubt is an advance upon the common law standpoint of *Cook v. Guerra* (8).

In this case there was a tenant upon the property and his open possession is notice not only of the immediate terms of his tenancy but of collateral agreements as well, in the absence of all enquiry by the transferees.

Under the doctrine, therefore, illustrated by *Daniels v. Davison* (9), the mortgagees in this case, who made no enquiry, are not entitled to say that they were purchasers for value without notice. Therefore, the transfer of the reversion to

(1) [1915] 1 Ch. 374.

(7) [1911] 104 L. T. 149 C. A.

(8) L. R. 7 C. P. 132 (1872).

(9) 15 Ves. 240 (1808).

TILOKE CHAND SURANA v. J. B. BEATTIE & Co.

them by the equitable mortgage of the 12th of July 1921 is not a transfer free from the rights of the Respondent under the arrangement of the 7th of June 1920.

In these circumstances the learned Counsel for the Appellant says that in view of the fact that he in March 1923 became the auction-purchaser of the property subject to his own mortgage as has been already detailed, he can obtain a better right and a right to override the arrangement of June 1920 by the doctrine of *lis pendens*. I do not understand him to argue that he could obtain a better right than Messrs. Sassoons, the mortgagees, by the doctrine of subrogation, but he says that as he ultimately became the auction-purchaser he obtained a better right by the doctrine of *lis pendens*. To my mind, that doctrine has no application to this case, not because I am prepared to hold that an auction-purchaser is necessarily outside sec. 52 of the Transfer of Property Act, but because it seems to me that where the Court is by its Receiver managing property for a series of years in a mortgage suit the person who takes the property after that management cannot under this section go back and rip up such transactions of the Receiver and question their formal propriety. The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be established in the suit and which might require a further party to be impleaded in order to make effectual the Court's decree.

I think that the arrangement is one which binds the Appellant.

The Respondent being *prima facie* a monthly tenant, was given on 30th July 1923 a month's notice to leave after August 1923, and it is for him to show what this arrangement of June 1920 was,

and to show that it prevented the owners of the reversion from giving him a valid notice to quit as they purported to do.

The arrangement was on the 7th of June 1920. There is no evidence or suggestion that the rent of the Respondent was payable monthly in advance. The arrangement was according to the written document simply this: "For the purpose of making an additional room on the roof of the one-storied godown in the above premises, to be deducted out of the monthly rents payable, *viz.*, Rs. 200 per month." I have no doubt that the intention was that on the 1st of July the rent for June should be taken to be Rs. 200 and Rs. 200 should be cancelled accordingly. The learned Judge taking, rather at the foot of the letter, two passages in the evidence appears to have thought that the arrangement was that the rent should be increased only as and when the repairs were finished. That, I think, is not the meaning of the receipt: and, so far as I can gather, the computation of the Defendant in para. 5 of the written statement was not based upon anything of the sort. There is no evidence as to when the repairs were finished; and, the burden lies entirely upon the Defendant. In para. 5 of the written statement the computation is made as if the increased rent first applied to the month of July 1920, that is to say, the rent payable on the 1st of August, assuming it to be payable in arrear in respect of July 1920.

In my judgment, the evidence does not show that: and, I think, therefore, that there was a good notice to quit determining the Respondent's status as a monthly tenant. Thereafter his right to continue in occupation rested solely on the Rent Act. The writ was issued on the 7th of November at a time when the rent for

TILOKE CHAND SURANA v. J. B. BEATTIE & Co.

September had not been paid to the proper person, and, as the tenant had no further right to notice, there is no answer to the suit under the Calcutta Rent Act as a matter of ejection. He cannot, however, be charged more than Rs. 200 for September 1923.

Messrs. B. N. Basu & Co., Solicitors for the Appellants.

Mr. J. M. Gregory, Solicitor for the Respondents.

P. D.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

LORD SUMNER.

LORD CARSON.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1924,

Heard, 10 and

11, November.

Judgment,

2, December.

LALA TULSI R M,
Appellant,

v.

RAM SARAN DAS,
Respondent.

Evidence Act (I of 1872), sec 65 (c)—Promissory note, suit on—Note attached to plaint, found missing—Right of Plaintiff to give secondary evidence—Onus of proof, nature and extent of—Negotiable Instruments Act (XXVI of 1887), sec. 87.

Where the original promissory note on which the suit was brought was found missing and a photograph alleged to have been taken some little time before was put in as secondary evidence and the question was whether the Plaintiff had made out grounds for the admission of secondary evidence:

Held—That where the original document had been placed in the custody of the law, the onus of proof did not require the Plaintiff to show how it was afterwards made away with or to satisfy the Court that the Defendant was more likely to have been guilty than himself.

Where the note as originally drawn up showed that it was intended that interest should be paid and the rate was also sufficiently expressed, the interpolation of the words "with interest" did not amount to a material alteration avoiding the note within sec. 87 of the Negotiable Instruments Act.

This was an appeal from a decree of the High Court of Lahore, dated the 20th April 1922, which reversed the decree of the Subordinate Judge of Delhi, dated the 7th January 1918.

The suit was filed by the Appellant to recover the sum of Rs. 8,000 as principal and Rs. 5,720 interest due on a promissory note, the original of which purported to be attached to the plaint.

Prior to the filing of a written statement by the Defendant, the Plaintiff applied for attachment before judgment. During those proceedings a statement was made to the Court that the document on the file was not the original promissory note and the Plaintiff alleged that the original had been extracted from the record. Both parties agreed that the document in Court was a forgery.

The Defendant admitted the execution of a promissory note but alleged that it contained no stipulation for the payment of "interest at 5 per cent. per mensem" as claimed by the Plaintiff. He also alleged that he had only received Rs. 544 out of the Rs. 8,000 consideration mentioned and contended that the suit having been brought on a promissory note the Plaintiff could not recover without producing it.

The Subordinate Judge passed a decree in favour of the Plaintiff for the principal sum of Rs. 8,000 but decided that the rate of interest was unconscionable and awarded interest at the rate of only 12 per cent. per annum.

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The Defendant appealed to the High Court at Lahore (Broadway and Campbell, JJ.) which set aside the decree of the Subordinate Judge and dismissed the suit on the ground that the Plaintiff had not satisfactorily proved the loss of the original promissory note so as to entitle him to give secondary evidence of its contents. In regard to the Plaintiff's contention that he was entitled to a decree on the Defendant's admissions they state—

"We hold that the Plaintiff is not entitled to any decree. It has been urged that he could be given a decree on the Defendant's admissions that he signed a promissory note for Rs. 8,000 and that he has acquired a house for which the greater part of the price of Rs. 8,000 was paid by the Plaintiff. The first admission, however, is a piece of secondary evidence of the existence of the promissory note on which the suit is based and so cannot be taken into consideration. The second admission is not an admission of liability. In fact the Defendant has denied what the Plaintiff asserts, that a loan of Rs. 8,000 was made to him, and he has also denied that he is liable to pay this sum. Whether the Plaintiff should receive any remedy by application of the doctrine of equity would depend upon an examination of the nature of the contract entered into between the parties and this cannot be proved."

Sir G. Lowndes, K. G. and Mr. B. Dubé for the Appellant.

Sir William Finlay, K. C. and Mr. A. DeMello for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—The Appellant sued upon a promissory note made by the Respondent and he lost in the High Court

the decree which he had recovered at the trial. Curiously enough the main question is, whether he discharged the onus of proving that the note had been lost without his default, so as to entitle him to give secondary evidence of its contents.

According to the practice, either the original note or a copy of it had to be attached to the plaint. It was stated, both in the plaint and in the list of documents accompanying it, that the note exhibited was the original. This was on 14th February 1917. Next day the Plaintiff's pleader received notice from the Court officials, that he must amend his list and pay a further process fee. He went to the office to make these defects good and, apparently, had access at least to the list of documents, if not to the other papers. Thereafter the officials, probably on the same day, served the Defendant with the plaint and so gave him the opportunity of learning that the original document had been filed in Court, but what action he took thereon, if any, is matter of conjecture.

On the 1st March 1917, an application by the Plaintiff for attachment before judgment came before the District Judge. The Defendant's pleader looked at the file and was heard by the Plaintiff's pleader to say that the note was forged. On this the Plaintiff's pleader also looked at the file, and at once applied to the Judge, saying that the original note had been abstracted and a false one substituted and asking him to hold an inquiry into the circumstances of this change. The District Judge then examined sundry officials but the result was negative, for they did not incriminate either themselves or one another. When the trial came on, the Plaintiff's pleader asked to be allowed to put in, as secondary evidence of the note, a photograph of it taken some little time

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before, and, as his statement was accepted that he filed the original with the plaint and had nothing to do with the substitution, the photograph was let in. Witnesses were then called on both sides. The Defendant did not deny that he had made a note for the alleged amount, Rs. 8,000, but he said that it contained no provision for interest. The photograph concluded with the words "with interest @ Rs. 5 per cent. per mensem." The words "with interest" appear from the photograph to have been written by the same hand as the rest of the body of the note, but at a later time and in part of the space originally left for the stamp and the signature, and the letters " @ Rs. 5 per cent. per mensem " seem to have been written at the same time as the body of the note and by the same hand *currente calamo*. In the event the trial Judge found for the genuineness of the note as shown in the photograph and gave a decree for the amount of the principal, but reduced the interest from the exorbitant rate of 60 per cent. to a mere 12 per cent. per annum.

The High Court held on appeal that the Plaintiff had failed to prove the actual attachment of the original note to the plaint, when it was filed. If so, the evidence given by his pleader was false, and false almost certainly to his knowledge, and the Plaintiff neither showed that, owing to its loss or otherwise, he was unable to produce it for a reason not arising from default or neglect on his part, nor indeed that it was lost at all. [Evidence Act, 1882, sec. 65 (c).] Accordingly, as the claim on the note could not succeed without either the note itself or secondary evidence of its contents (sec. 91), and no alternative cause of action was pleaded or relied on, the suit necessarily failed.

Their Lordships are unable to adopt

this conclusion. The Plaintiff's pleader gave positive evidence that he attached the note itself to the plaint, and that it was subsequently abstracted, and there was no direct evidence to the contrary. Mistake on his part was unlikely, for he was a young man, just beginning practice and anything but busy, and he acted as his own clerk. To have stated twice over in the documents filed that the original note was exhibited, and then to have exhibited a document, which bore no resemblance to the original as shown in the photograph, and was not even an exact copy of its wording, was wantonly and without reason to prepare for himself difficulties at the trial. The trial Judge was critical of this pleader's evidence and in some respects discredited it, but this statement at any rate he accepted and their Lordships think that, so far, his view should prevail. How, when and at whose hands the subsequent substitution took place is matter of surmise only. If the statement of Neki Ram, a temporary clerk in the Court offices, can be accepted, he numbered the substituted document with the serial number, which it was found, when produced, to bear on February 22nd or 23rd. This at any rate narrows down the time of the change to the period between 16th February and 22nd February, but that is all that is known. It may be taken as certain that the change was made with criminal intent, and it is almost certain that someone in the Court offices was privy to it, if he were not the actual perpetrator at the instigation of the guilty litigant, but, even if that guilty litigant were the Plaintiff, the original exhibition of the note itself must be taken to have been proved.

It has next to be considered whether the onus of proving loss in the Court offices, without default on the Plaintiff's

LALA TULSI RAM *v.* RAM SARAN DAS.

part (for here neglect obviously **does** not arise), was properly discharged. There is no positive evidence at all against the Plaintiff's pleader, who, if any one on the Plaintiff's side, would appear to be the guilty party, except that on 16th February he had the opportunity of manipulating the documents, if the whole of those lodged the day before were, as is most likely, handed to him then, but even so he could not have made the change without some official's connivance and, if he was minded to do so, he could not have failed to see that honesty would be the better policy. The changeling could deceive no one; it challenged suspicion and was certain to recoil upon himself.

On the other hand, there is even less ground for implicating the Defendant's pleader. His statement to the Court, which was in no way shaken, was that he called the document a forgery as soon as he saw it, not because he knew that the disappearance of the original had already been brought about, but because the document exhibited mentioned interest and he knew from his client that none had been stipulated for. It was not shown that the Defendant himself had meddled in the matter or visited the Court offices at all. The change took place and that is all that is known. Except that the motive was criminal and the plot equally tortuous and futile, their Lordships can form no opinion about what was actually done. As the original document was placed in the custody of the law, their Lordships do not think that the onus of proof required the Plaintiff to show how it was afterwards made away with, or to satisfy the Court that the Defendant was more likely to have been guilty than himself. His denial of any participation in the act, if believed, was enough.

From this the rest follows. Admissible evidence of the contents of the note was forthcoming. As photographed, it contained originally provision for interest, and the interpolation of the words "with interest" would not, within the provisions of the Indian Act, amount to a material alteration avoiding the note, for it was intended that interest should be paid and the rate was sufficiently expressed already (Negotiable Instruments Act, sec. 87). Accordingly, their Lordships do not think themselves warranted in disturbing the conclusion of the learned trial Judge. The advantage, which he enjoyed, of seeing the witness and noting his demeanour was greater in the case of the Plaintiff's pleader than it is with many Indian witnesses, for the pleader was a professional man with University degrees, whose mind could be more certainly read by the learned Judge, than if the question had arisen with a mere ryot or a mahajan.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the trial Judge ought to be restored and the appeal allowed with costs here and below.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitor: *Mr. Ed. Delgado* for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)**Full Bench Reference****No. 1 of 1925****IN****REF. No. 5 OF 1924.**

WALMSLEY, J.
 GREAVES, J. •
 C. C. GHOSE, J.
 B. B. GHOSE, J.
 MUKERJI, J.
 1925,
 Heard,
 29, June.
 Judgment,
 22, July.

NAWABZADI MEHER
 BANO KHANUM and ors.,
 • Applicants,
 v.
 THE SECRETARY OF
 STATE FOR INDIA IN
 COUNCIL, Opposite
 Party.

Indian Income Tax Act (XI of 1922), sec. 2 (1) (a) and sec. 4 (3) (viii) — Selami or mutation nazar, if agricultural income within the meaning of sec. 2 (1) (a) of the Indian Income Tax Act and as such, if exempt from assessment to income-tax

Per CURIAM (WALMSLEY, J., dissentiente) — Selami or nazar paid by a tenant to a landlord for the recognition of a non-transferable holding is rent or revenue within the meaning of sec. 2 (1) (a) of the Indian Income Tax Act and, as such, is exempt from income-tax by virtue of sec. 4 (3) (viii) of the same Act.

MAHARAJA BIRENDRA MANIKYA v. SECRETARY OF STATE FOR INDIA (1) *dissented from.*

This was a Reference to the Full Bench made by Greaves and Mukerji, JJ., on 27th January 1925 upon a reference which had been made by the Commissioner of Income-tax, Bengal (Mr. W. D. R. Prentice), dated the 6th June 1924, under sec. 66 (2) of the Indian Income Tax Act (XI of 1922) for the opinion of the High Court on the following questions raised by the applicants in connection with assessment of their income derived from *selami* or mutation *nazar* :—

(I) Whether mutation *nazar*, that is, the

amount paid to a landlord for recognising the transfer of a holding by one tenant to another, is agricultural income within the meaning of sec. 2, sub-sec. (1) (a) of the Indian Income Tax Act, XI of 1922;

(II) and as such, is exempt from assessment to income-tax under sec. 4, sub-sec. (3) (viii) of the said Act.

The facts of the case are fully set out in the Order of Reference.

The ORDER OF REFERENCE was as follows :—

GREAVES, J.—This is a Reference under sec. 66 (2) of the Income Tax Act, Act XI of 1922, made to us by the Commissioner of Income-tax. The point which arises is a very short one, namely, whether mutation *nazar*, that is, the amount paid to a landlord for recognising the transfer of a holding by one tenant to another, is agricultural income within the meaning of sec. 2, sub-sec. (1) (a) of the Indian Income Tax Act, XI of 1922, and as such is exempt from assessment to income-tax under sec. 4, sub-sec. (3) (viii) of the said Act. The Income-tax Officer held that such payments were assessable to income-tax having regard to the decision of this Court in the case of *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1). An appeal was preferred by the assessee against the assessment of the Income-tax Officer. The Assistant Commissioner of the Dacca Range rejected the appeal agreeing with the decision of the Income-tax Officer. Accordingly, an application was made to the Commissioner of Income-tax asking for a reference to this Court under the provisions of the section of the Act to which I have referred and the Commissioner has, accordingly, referred the question in the terms which I have indicated. He

(1) I. L. R. 48 Cal. 706 : s. c. 25 C. W. N. 80 (1920).

(1) I. L. R. 48 Cal. 706 : s. c. 25 C. W. N. 80 (1920).

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agrees with the Income-tax Officer that the assessment was rightly made and that the *nazar* is not agricultural income and is, therefore, not exempt from income-tax and he adopts as the grounds of his decision the reasoning of this Court in the case of *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) to which I have just referred. The case of *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) was decided under the Income Tax Act of 1918, but it is conceded that so far as the question now before us is concerned, that Act was identical with the present Act of 1922. The point, therefore, is covered by the decision in *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) provided we agree with that decision. Before I refer to it I must refer shortly to the sections of the Income Tax Act of 1922 which bear upon the point. Sec. 4, sub-sec. (3) provides that the Act is not to apply to certain classes of income. Amongst these, is the agricultural income and in sec. 2 of the Act agricultural income is defined as rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by Officers of Government as such. The land in respect of which the *nazar* was paid was a part of a permanent-settled estate which is also subject to road-cess.

Two points arose for decision in the reference to which the case of *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) relates. The first point was whether

(1) I. L. R. 48 Cal. 766 : s. c. 25 C. W. N. 80 (1920).

the *nazar* or *selami* payable in respect of a tenancy of waste land was assessable to income-tax or exempt as being rent or revenue derived from land used for agricultural purposes within sec. 2, sub-sec. (1) (a) of that Act. The second question was the one which directly arises on the present reference, namely, whether the *nazar* or *selami* paid for the recognition of the transfer of a holding from one tenant to another was rent or revenue derived from land which was used for agricultural purposes within the meaning of sec. 2, sub-sec. (1) (a) of the then Income Tax Act. The learned Judges who heard the reference decided that *nazar* or *selami* paid in respect of waste land was revenue within the meaning of sec. 2, sub-sec. (1) (a). The reason for their so holding was that they thought that the amount fixed for periodical payment, that is, rent, was not independent of the *nazar* or *selami* and that the *nazar* or *selami* was a capitalised sum which taken with the periodical rent constitute in the aggregate the consideration for the grant. When, however, they came to consider the question of *nazar* or *selami* paid for recognition of the transfer they held that this was not revenue within the meaning of sec. 2 (1) (a) because it was not a return, yield or profit of any land and further that it was not rent in any sense of the term but they held that such a payment was a payment to purchase peace in order that the landlord might not contest the validity of the transfer and they held that this was not a payment that came within the scope of the definition of agricultural income. With all respect to their Lordships who decided that case I feel some difficulty in accepting the reasoning upon which it is founded. The expression "revenue," as they say in their judgment, includes return, yield or profit of any land and I find

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it very difficult to escape from the conclusion that a payment of this kind is not profit derived from the ownership of the land. If, therefore, revenue includes profit, as I think it does, then it seems to me that *nazar* or *selami* is really derived from land which is used for agricultural purposes within the meaning of the expression as it occurs in sec. 2 (1) (a) of the Indian Income Tax Act of 1922.

The result is that, in my opinion, the assessee is exempt from payment of income-tax by reason of the provisions of sec. 4, sub-sec. (3) (viii) of the same Act. The question, therefore, which we refer for the decision of a Full Bench is whether the decision in *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) as regards *selami* paid for the recognition of a transfer of a holding from one tenant to another is correct and the question which arises for the decision of the Full Bench is whether *nazar* or *selami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in sec. 2 (1) (a) of the Indian Income Tax Act, XI of 1922. If the Full Bench hold that such *nazar* or *selami* is not assessable to income-tax, this judgment will be forwarded to the Commissioner. If, however, the Full Bench hold that the case of *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) was rightly decided, the matter will come back to this Bench in order that we may deal with the other question which was raised before us by the assessee, namely, that having regard to the provisions of the Permanent Settlement no liability for

assessment has been imposed by the Income Tax Act on *nazar* or *selami*.

MUKERJI, J.—I agree.

Babu Jogendranath Mukerjee (with *Babu Paresch Nath Mukerjee*) argued on behalf of the applicants that *nazar* was a part of rent derived from land. Admitting that it is no part of rent, it is a payment by one who had derived his title from the tenant which was in reference to land and not independent of land. Revenue is defined in Murray's Oxford Dictionary, Vol. VIII (Ed. 1910), p. 597, as a return from property or collective items or amount which constitute an income from possession of land. Therefore *nazar*, if it is not rent, is at least part of revenue as mentioned in the Income Tax Act, and whether it is derived from settlement of waste land or from mutation, is part of a profit derived from land. Such income is within the meaning of agricultural income as defined in sec. 2 (1) (a) of the Act and therefore exempt from income-tax.

The Standing Counsel (Mr. B. L. Mitter) with *Babu Surendra Nath Guha*, Senior Government Pleader, and Mr. Nuruddin Ahmed, Junior Government Pleader, contended on behalf of the Crown that *nazar*, whether it is rent or revenue, does not touch the question; it must be derived from land, it must flow from land. Mutation *nazar* does not directly arise from land, it arises out of a particular transaction. It is not rent because the incidents of the tenancy continued as before. "Nazar" is not incident of the tenancy. Referring to sec. 18 (6) of the Bengal Tenancy Act, it is a landlord's fee levied and paid when one tenant transferred a non-transferable holding to another. That money flowed from the transaction which intervened between the old and the new tenancy. It has been

(1) I. L. R. 48 Col. 766: s. c. 25 C. W. N. 80 (1920),

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held in *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India in Council* (1) that *abwabs* or illegal impositions are assessable to income-tax. In *Partridge v. Mallandaine* (2), it was held that profits derived from betting were assessable. Therefore, impositions whether illegal or statutory were assessable. The question is, whether it was derived from land? Sec. 12 of the Bengal Tenancy Act provided for payment of a landlord's fee when a transfer of permanent tenure was sought to be registered. In order that the transfer be a valid one, the fee must be paid; it is an incident of the transfer and not an incident of the tenancy.

Nazar is similarly paid for recognition of the transfer. It might be revenue but not derived from land.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This Reference raises the question of the liability of mutation *nazarana* to income-tax.

The referring Judges are unable to agree with the view taken in the case of *Birendrakishor Manikya v. Secretary of State for India* (1). In that case it was held that the premium paid for the settlement of waste land or abandoned holdings is not liable, but that the premium paid for recognition of a transfer of a non-transferable occupancy holding from one tenant to another is liable.

I was one of the three Judges who delivered that decision, and I find that I am in a minority on this Bench. In the absence of any fresh arguments it is enough for me to say that I adhere to the opinion expressed in that judgment for the reasons there given.

(1) I. L. R. 48 Cal. 766 : s. c. 25 C. W. N. 80 (1920).

(2) 18 Q. B. D. 276 (1886).

GREAVES, J.—The question which arises for the decision of the Full Bench is, whether *nazar* or *selami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in sec. 2 (1) (a) of the Indian Income Tax Act (Act XI of 1922). This question arose for the decision of the Court in the case of *Birendrakishor Manikya v. Secretary of State for India in Council* (1) and it was there decided that such payments were assessable to income-tax. Doubts having been raised as to the correctness of that decision the matter has been referred to the Full Bench. Agricultural income is not assessable to income-tax under the Income Tax Act in which Act such income is defined as rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such and the land in the present case in respect of which *nazar* was paid was a part of a permanently settled estate which is subject to road-cess. It is admitted by the learned Standing Counsel who appeared for the Secretary of State that *nazar* is revenue but he argues that although it is revenue it is not revenue derived from land but from the transaction, that is, from the recognition of the transfer and that it is an incident of the transfer and not of the tenancy and therefore does not flow from the land.

In the case of *Birendrakishor Manikya v. Secretary of State for India in Council* (1) the learned Judge who delivered the judgment of the Court referred to the definition of revenue in the Oxford Dictionary as “the return, yield, or pro-

(1) I. L. R. 48 Cal. 766 : s. c. 25 C. W. N. 80 (1920).

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fit of any land, property or other important source of income; that which comes into one as a return from property or possessions, specially of an extensive kind; income from any source specially of an extensive kind; income from any source but specially when large and not directly earned."

The conclusion seems to me irresistible that if it is admitted, as I think it is rightly admitted, that *nazar* is revenue it is profit of the land and that it flows therefrom or from the ownership thereof but in *Birendrakishor Manikya v. Secretary of State for India in Council* (1) it is said that this is not so and that it cannot be deemed the return, yield, or profit of any land but that it is money paid by the transferee to the landlord to purchase peace, so that he may not contest the validity of the transfer.

This no doubt is true but it seems to me to ignore another aspect altogether, namely, that it is money which comes to the landlord by virtue of the fact that he is the owner of the land. Viewed in this light it clearly is derived from the land and is agricultural income within the definition thereof contained in the Income Tax Act and as such exempt from assessment to income-tax under that Act.

I would therefore answer the question referred to the Full Bench by saying that *nazar* or *selami* paid by a tenant to a landlord for the recognition of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in sec. 2 (1) (a) of the Indian Income Tax Act (Act XI of 1922) and that it is exempt from assessment to income-tax by virtue of the provisions of sec. 4 (3) (viii) of the same Act.

It follows that in my view the decision

(1) I. L. R. 48 Cal. 766; A. C. 25 C. W. N. 80 (1923).

in *Birendrakishor Manikya v. Secretary of State for India in Council* (1) in so far as it holds to the contrary is not correct.

This judgment will be forwarded to the Commissioner of Income-tax.

C. C. GHOSE, J.—I agree with my learned brother Mr. Justice Greaves in the view which he has taken.

B. B. GHOSE, J.—I agree in the opinion expressed by my learned brother Mr. Justice Greaves.

MUKERJI, J.—I also agree in the judgment delivered by my learned brother Mr. Justice Greaves.

P. D.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 76 of 1923.

WALMSLEY, J.

MUKERJI, J.

1925,

Heard, 23, June.

Judgment,

8, July.

SM. SABAT KAMINI

Dist. Plaintiff,

Appellant,

v.

NAGENDRA NATH PAL,

Defendant, Respondent.

Limitation, suspension of, apart from provisions of Limitation Act (IX of 1908), if allowable on grounds of equity—Limitation Act (IX of 1908), Art. 109—Profits received after execution sale but before confirmation thereof—Limitation, if begins running after confirmation—Cause of action, accrual of, if necessarily starting point of limitation—Limitation Act (IX of 1908), secs 3 and 9

A mortgage sale held on 6th May 1913 was not, owing to an infructuous application to set aside the sale, confirmed till 28th January 1914. In a suit by the auction-purchaser to recover sums realised by the Defendant as rents from the tenants of the land, instituted on 16th September 1916:

Held—That the limitation in respect of rents realised between the date of the sale and the date of its confirmation, which

(1) I. L. R. 48 Cal. 766; A. C. 25 C. W. N. 80 (1923).

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began running under Art. 109 of Act IX of 1908 from the dates of the receipt of the profits, did not remain suspended till the date of confirmation of the sale, having regard to the clear language of that article and the absence of any provision of the Act modifying its operation.

Per WALMSLEY, J.—The principles laid down in *RANEE SURNOMOYEE v. SHOSHEE MOOKHEE* (1), which were enunciated for very different circumstances, could not be extended to this case without subjecting the provisions of Art. 109 to considerable modification.

Per MUKERJI, J.—Apart from the provisions of the Limitation Act itself, there is no principle which can legitimately be invoked to add to or supplement its provisions.

Having regard to the fact that the starting point of limitation for suits as provided by the third column of the Schedule to the Limitation Act does not always synchronise with the accrual of the cause of action and to the mandatory provision of sec. 3 and the provision of sec. 9 that when once time has begun running no subsequent disability or inability to sue stops it except in cases to which the proviso to the section applies, a saving or exception not found in the Act should not be implied, however much it may be within the reason of those that are recognised by the Act or however much the ends of justice in a particular case may demand.

The decision of the Judicial Committee in *RANEE SURNOMOYEE'S* case (1) does not create an exception beyond what is provided for by the statutes of limitation of this country.

Except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversights there is no scope for the

application of any principles of equity in the administering of the statutes of limitation, and the Judicial Committee has not laid down any such principle as being of universal applicability, and all the decisions of the Judicial Committee as well as most of the cases decided in this country are supportable on grounds which are not founded on any general equitable principle extraneous to or unauthorised by the statute. In cases in which the question arises as to the starting point of time for the purposes of limitation, these decisions are mostly reconcilable with a proper appreciation of what the cause of action means when the starting point is the cause of action, or with a proper interpretation of the words used in the third column of the articles in other cases; and in cases where the question of suspension arises, if time has once begun to run it never again ceases to run, but there may be satisfaction of a claim or the cancellation of a cause of action, operating to suspend the right of the Plaintiff who may on the removal of the satisfaction or cancellation avail of a fresh cause of action which arises by reason thereof. The substitution of a new legal right on principles of equity is hardly permissible under the statute law as it stands, and a revival of the old cause of action once satisfied or cancelled is foreign to its conception.

Art. 109 of the Limitation Act does not admit of any consideration as to when the cause of action may have accrued to the Plaintiff, and claims of profits wrongfully received beyond three years before the suit cannot be recovered.

This was an appeal preferred on the 13th November 1923 against a decree of the District Judge of Zillah Bankura (H. M. Veitch, Esq.), dated the 24th July 1923, modifying a decree of the Subordinate Judge of that District (Babu Sarat

(1) 12 M. I. A. 244 (1866).

SM. SARAT KAMINI DAS v. NAGENDRA NATH PAL.

Kishore Bose), dated the 11th October 1917.

The facts material to this report were as follows :—

The Plaintiffs' predecessors-in-interest purchased some properties in execution of a mortgage decree on 6th May 1913. The judgment-debtor having applied to have the sale set aside, the sale was not confirmed until 28th January 1914 when the judgment-debtor's application was rejected. The Defendant had obtained a usufructuary mortgage of the properties from the mortgagors after the decree but before the sale and as usufructuary mortgagee realised rents from the tenants on the land. The Plaintiffs instituted the present suit on 16th September 1916 for recovery of the profits thus wrongfully realised by the Defendant, after the date of the sale, from the tenants. At a previous stage of the suit, the case had once come up before the High Court when it was decided that the suit was maintainable as one for recovery of profits of immoveable property wrongfully received and was governed, as to limitation, by Art. 109 of the Limitation Act. [See *Nagendra Nath Pal v. Sarat Kamini Dasi* (47).]

The case was remanded to the lower Appellate Court for findings upon the evidence as to what portion of the profits had been received by the Defendant within and what beyond three years of the suit and in regard to the latter as to whether the running of limitation was suspended owing to the pendency of proceedings to set aside the sale.

The District Judge upon remand dismissed some portion of the claim as time-barred under Art. 109, the profits as to several items having been received more than three years before the suit. He was of opinion that the proceedings to set aside

the sale did not operate in law to suspend the running of the statute.

The Plaintiffs preferred this second appeal.

Babu Parthananon Ghosh for the Appellant.—Between the date of the sale (6th May 1913) and the confirmation of the sale (28th January 1914) which was delayed by reason of the infructuous proceedings to set aside the sale, the Plaintiff could not sue for mesne profits. He was therefore entitled to count limitation from the date of confirmation of the sale. Under sec. 65 of the Civil Procedure Code, only after confirmation could the purchaser say he had title. Though that title related back to the date of sale, until confirmation it was an inchoate title.

There is a principle of suspension of limitation apart from the provisions of the Limitation Act. *Januki Nath v. Bijoy Chand* (35), also *Dwijendra v. Jogesh* (41) in which the principle was applied with reference to Art. 109 of the Limitation Act. Mookerjee, J., there approves of and accepts the minority opinion of Sadasiva Iyer, J., in *Muthu Korakkai v. Madar Ammal* (40). Refers to *Lakhan Chandra v. Madhusudan* (4), affirmed by the Privy Council in *Nrittyamani v. Lakhan Chandra* (3).

The questions discussed by the Madras Full Bench were : (i) From what date limitation began running in the case? (ii) If it did begin running from the date of the original confirmation of the sale, whether the running of the limitation was suspended during the period the validity of the sale was being disputed? The Full Bench was agreed on one point, viz., if it

(3) I. L. R. 43 Cal. 660 : s. c. 20 C. W. N. 522 (P. C.) (1916).

(4) I. L. R. 35 Cal. 209 (1907).

(35) 33 C. L. J. 336 (1921).

(40) I. L. R. 43 Mad. 185 (F. B.) (1919).

(41) 39 C. L. J. 40 (1923).

(47) 26 C. W. N. 336 (1921).

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was not possible to bring a suit, limitation would not run. They proceeded on the assumption that time ran from the first confirmation, but as a suit could not be brought until the second confirmation, time ran from the latter date. As an instance of running of time being suspended, cites *Dinanath v. Jadunath* (36).

Babu Nagendra Nath Ghose (with *Babu Narendra Nath Chaudhuri*) for the Respondent.—In *Dwijendra v. Jogesh* (41) the Plaintiff's suit for registration of the document stood dismissed during a period of time and succeeded only on appeal. It was therefore a case of absolute extinction of the right to sue which was re-born—a point on which it agrees with the cases of *Surnomoyee v. Shoshee Mookhee* (1) (the leading case on the subject) and *Lakhan Chandra v. Madhusudan* (4) [*Nrittyamani v. Lakhan Chandra* (3) on appeal to Privy Council] and the other Privy Council cases that are usually cited in support of a general principle of suspension apart from the Limitation Act. But the Plaintiff in this case was never in that position. He might have sued whilst the proceedings for setting aside the sale were pending—though presumably the suit would have had to be stayed to await the decision in those proceedings. At no stage of the proceedings was the sale even temporarily set aside. The observations of a general character in *Basu Kuar v. Dhum Singh* (2) have to be understood with reference to the fact that in that

case also the suit for specific performance which ultimately failed and was held thereupon to give rise to a cause of action under Art. 97, was decreed in the first Court—so that here too there was extinction of the right and the suit upon the debt, so long as the decree was subsisting, would have been a "vain litigation." What the Privy Council itself has thought of *Surnomoyee v. Shoshee Mookhee* (1) will appear from *Huro Proshad v. Gopal Das* (29). A landlord whose suit against the tenant for ejectment failed was not allowed to count limitation from the end of the previous litigation because at no time was he in the position of a person whose claim had been satisfied. *Surnomoyee v. Shoshee Mookhee* (1) itself does not profess to do more than interpret and apply to the special facts of the case the statute then in force. The facts were very exceptional.

Submits that barring *Nrittyamani v. Lakhan Chandra* (3) all the Privy Council decisions which suggest the application of a rule of suspension of limitation, based on equitable principles, (if they do not in fact turn upon the interpretation of the language of the specific provisions of the statutes then in force), were cases which arose before the Limitation Act was codified in its present form by the Act of 1871. One peculiarity of the Limitation Acts since 1871 must not be overlooked, viz., that the starting point does not necessarily coincide with the time when the right to sue or apply arises. See Arts. 101, 102, 126, 134 and 143 of the present Act as instances. The starting points fixed are more or less arbitrary and either anterior or posterior to the

(1) 12 M. I. A. 244 (1888).

(2) I. R. 15 I. A. 211; s. c. I. L. R. 11 All. 47 (1888).

(3) I. L. R. 43 Cal. 680; s. c. 20 C. W. N. 522 (P. C.) (1916).

(4) I. L. R. 35 Cal. 209; on P. C. I. L. R. 43 Cal. 600 (1916).

(36) 29 C. W. N. 202 at p. 205 (1924).

(41) 39 C. L. J. 40 (1923).

(1) 12 M. I. A. 244 (1888).

(2) I. L. R. 43 Cal. 680; s. c. 20 C. W. N. 522 (P. C.) (1916).

(29) I. L. R. 9 Cal. 275 (1882).

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accrual of the right. This has been no doubt done to make the provisions of the statute easy of application and to exclude abstract discussions in most instances as to when precisely a right to sue or apply arises. It is more important in such a statute, that the provisions should be easily known and applied than that they should be ideally just. Sec. 9 was significantly enough first enacted in the Act of 1871. "Where once time has begun to run" in that section means "run under the third column of the Schedules." Secs. 3 and 9 of the Act make it quite clear that no principle of extension, exclusion or suspension, not expressly provided for in the Act, is to be applied, individual hardships notwithstanding. *Soni Ram v. Kanhaiya Lal* (5) adverts to sec. 9 and holds that the inability to sue for foreclosure brought about by the fusion of the rights of mortgagor and mortgagee did not stop limitation running. See also *Mani Singh v. Nawab of Murshidabad* (8). As to *Nrittyamani v. Lakhan Chandra* (3), it is difficult to surmise what principle the Privy Council went by, if at all, in affirming the judgment of the High Court in *Lakhan Chandra v. Madhusudan* (4). The principle chiefly relied on in the High Court was that a party should not be made to suffer for the mistakes of the Court. The cases of *Prannath v. Rookea Begum* (9) and *Surnomoyee v. Shoshee Mookhee* (1) relied on by the High Court were not

cited in argument before the Privy Council. [See the arguments in the Weekly Notes Report of *Nrittyamani v. Lakhan Chandra* (3).] In the case of *Prannath v. Rookea Begum* (9) the question was whether there was sufficient cause to delay the institution of the suit, the regulation then in force permitting the Court to excuse the delay on such a ground. No general principle of suspension of limitation could possibly be derived from this case. It is noteworthy that the Indian Appeals series did not consider the decision of the Privy Council in *Nrittyamani v. Lakhan Chandra* (3) sufficiently illuminating to need reporting and in *Niranka Chandra v. Atul Krishna* (43), N. R. Chatterjea, J., remarks that the attention of the Judicial Committee was not drawn to sec. 9 of the Act. Submits that the value of this case as precedent is negligible.

It would be irrelevant to cite as precedents cases like *Basu Kuar v. Dhum Singh* (2), *Hanuman v. Hanuman* (45) and *Amma Bibi v. Udit Narain* (44) which turn upon the interpretation of the language of Art. 97, or *Bajinath v. Ramgut* (11) and *Muthu v. Madar* (40) which turn upon the interpretation of the language of other articles (Art. 178 of the Act of 1877 and Art. 180 of the present Act). But *Muthu v. Madar* (40) supports me in so far as the majority of the Judges definitely negative the existence of a rule of suspension apart from the

(1) 12 M. I. A. 244 (1868).

(3) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522 (P. C.) (1916).

(4) I. L. R. 85 Cal. 209 (1907).

(5) I. L. R. 35 All. 227: s. c. 17 C. W. N. 805 (P. C.) (1912).

(8) I. L. R. 46 Cal. 694: s. c. 23 C. W. N. 531 (P. C.) (1918).

(9) 7 M. I. A. 343 (1859).

(2) L. R. 15 I. A. 211: s. c. I. L. R. 11 All. 47 (1888).

(3) I. L. R. 43 Cal. 660: s. c. 20 C. W. N. 522 (P. C.) (1916).

(9) 7 M. I. A. 323 (1859).

(11) L. R. 23 I. A. 45: s. c. I. L. R. 23 Cal. 775 (1896).

(40) I. L. R. 43 Mad. 185 (F. B.) (1919).

(43) 28 C. W. N. 1009 (1924).

(44) I. L. R. 31 All. 68 (P. C.) (1908).

(45) L. R. 15 I. A. 158: s. c. I. L. R. 19 Cal. 123 (1891).

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Act. Sheshagiri Iyer, J., propounds a rule of equitable interpretation of the words of the third column. But this rule can operate only on those articles which make time run from the date of the accrual of the right. As a general test, it will run counter to the scheme and language of the Act. The language of the third column of Art. 109 at all events does not admit of such liberal or equitable interpretation: "when the profits are received" is absolutely unambiguous. *Dwijendra v. Jogesh* (41) is really no decision on Art. 109. That article is referred to but its terms are not discussed. The latest decision of the Privy Council in a case under Art. 62 [*Juscurn v. Prithi Chand* (7)] applies the statute strictly although there was room, upon the facts of the case, for the application of the equitable principle, if any co-exists with the Limitation Act.

The nearest case is *Saroj Ranjan v. Prem Chand* (46) in which four Judges against one applied Art. 109 strictly, though here too for a time there was extinction of the right to sue owing to a decision of the Court which was ultimately set aside, a point on which the case resembled *Surnomoyee v. Shoshee Mookhee* (1), *Nrittyamani v. Lakhan Chandra* (3) and *Basu Kuar v. Dhum Singh* (2). *Peary Mohan Roy v. Khelaram Sirkar* (42) which is relied on in the last case [*Saroj Ranjan v. Prem Chand* (46)]

advertis to the fact that the words "cause of action" do not occur in Art. 109. The language of the article leaves no room for suspension or extension of the period of limitation by any device of interpretation.

Babu Panchanan Ghose in reply—*Dwijendra v. Jogesh* (41) is in point as Art. 109 was the only article under consideration. *Niranka v. Atul* (43) is distinguishable. The Privy Council accepted the reasons of the High Court judgment fully in *Nrittyamani v. Lakhan Chandra* (3) and that decision cannot be disregarded as obsolete law. *Sadasiva Iyer, J., in Muthu Korakkai v. Madar Ammal* (40) draws the correct inference from all the previous decisions.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—The Plaintiffs prefer this appeal. The facts are as follows: Their predecessors bought certain property in execution of a mortgage decree on 6th May 1913, but the sale was not confirmed until 28th January 1914 when the judgment-debtor's application to have the sale set aside was rejected. In the interval between the decree and the sale, the mortgagor executed usufructuary mortgages in favour of the Defendants, and the latter realized rents from the tenants. The suit was brought to recover the sums realized by the Defendant as rent for the Baisakh and Bhadra kists of 1320 Fasli which fell due after the date of Plaintiffs' purchase. It was instituted on 16th September 1916.

The question of Plaintiffs' right to recover has been finally determined in their

(1) 12 M. I. A. 244 (1888).*

(2) L. R. 15 I. A. 211; s. c. I. L. R. 11 All 47 (1888).

(3) I. L. R. 43 Cal. 660; s. c. 20 C. W. N. 522 (P. C.) (1916).

(7) I. L. R. 46 Cal. 670; s. c. 23 C. W. N. 721 (P. C.) (1919).

(41) 39 C. L. J. 40 (1923).

(42) I. L. R. 36 Cal. 996; s. c. 135 C. W. N. 15 (1908).

(46) 22 C. W. N. 263 (1917).

(8) I. L. R. 43 Cal. 660; s. c. 20 C. W. N. 522 (P. C.) (1916).

(40) I. L. R. 48 Mad. 185 (P. B.) (1919).

(41) 39 C. L. J. 40 (1923).

(43) 28 C. W. N. 1009 (1924).

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favour. It is also settled that Art. 109 of the Limitation Act is the article applicable to the case.

The learned Judge, after remand, has found that some items were realized within three years of the suit, and he has awarded the Plaintiffs a decree for those amounts, but he has dismissed the claim in regard to other items on the ground that they were received more than three years before the institution of the suit. The appeal is in regard to the sums which have been disallowed.

The starting point of limitation is the time when the amounts were received, and the learned Judge's decision is correct, unless we admit the proposition urged on Plaintiffs' behalf that the judgment-debtor's application to set aside the sale prevented the period of limitation from starting. The learned Vakil says that the Plaintiffs had only an inchoate right until the application was rejected and the sale confirmed, and that during this period they could not institute a suit, and that therefore they are entitled to the benefit of the equitable principle adopted in the case of *Ranee Surnomoyee v. Shoshee Mookhee Burmonia* (1). That is the decision to which later decisions refer, and I think it is well to point out that the facts of this case are entirely different from those of that case. In *Ranee Surnomoyee's* case (1) the Plaintiff was in the position of a satisfied creditor until the *patni* sale was set aside: there was no rent left outstanding for which she could bring a suit, but when the sale was set aside, and the zemindar recouped the auction-purchaser and the latter repaid to the *patnidar* the mesne profits of the period of his possession, it was manifestly unjust that the *patnidar* should escape from his liability to pay

A. B. N. L. A. 346 (1908).

rent. In the present case there has not been any such change of position. The issue that hung in the balance while the judgment-debtor's application was pending was whether the Plaintiffs had no right at all or whether their inchoate right should be perfected. During that period, I think they might have instituted a suit: they could not have obtained a decree without the sale certificate, but the absence of the sale certificate would not have been reason for dismissing the suit. I do not, however, wish to rest my decision on that ground. Assuming that for about four months of the three years the Plaintiffs were unable to sue, I do not think that they can demand that on that account the principle which I have mentioned should be extended to their case. Firstly, the terms of the Limitation Act are clear and definite, and there is no clause in the Act to which the Plaintiffs can refer. Secondly, the principle which they invoke was enunciated for very different circumstances. I am aware that it has been extended, but it cannot be extended to this case unless we lay down that Art. 109 is subject to considerable qualifications. Thirdly, although I can easily imagine events which would have produced an interval of full three years between the date of sale and the date of confirmation, I do not think it necessary to speculate on what our decision would have been in such circumstances, for in this case the judgment-debtor's application caused a delay of only seven or eight months, and the Plaintiffs after receiving the sale certificate allowed more than two and a half years to pass without doing anything.

For these reasons I think that the Plaintiffs' appeal should be dismissed and the judgment of the lower Appellate Court confirmed with costs.

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There is a cross-objection by the Defendant. This is in regard to item No. 10. This appears to be a mistake for No. 3. The learned pleader for the Defendant admits that there is a decree to warrant the finding in regard to Item No. 3; while on the other hand, his statement that there is no decree to show realization of Item No. 10 is not disputed. As one is a sum of Rs. 14-10-0 and the other a sum of Rs. 71-14-0 this change will reduce the amount of Defendant's liability by 57-4-0.

No costs are awarded in the cross-objection.

MUKERJI, J.—I agree in the order which my learned brother proposes to pass in this appeal, but in view of the importance of the question which arises I desire to give my reasons.

It must be conceded that upon the plain words of Art. 109 of the First Schedule to the Limitation Act, which is the article applicable to the case as the claim is for profits which are alleged to have been wrongfully received by the Defendant, the claim for such profits would be barred unless the suit is instituted within three years from the dates when the profits are received. It must also be conceded that there is no provision in the Act itself which may operate to save the claim. The question, therefore is as to whether there is any general principle which may be called in aid of the Plaintiff in order to enable him to get out of the situation. The question is not altogether free from difficulty, as it must be conceded that in the reported cases to which our attention has been drawn Courts have from time to time professed to act on principles for which there is no sanction in the Act itself; and there are decisions, bearing upon the matter, of the highest tribunals in this country and

of the Judicial Committee as well, which notwithstanding the efforts made to reconcile them, present points of difference which are not easily reconcilable.

A careful study of the third column of the schedule reveals an outstanding fact which cannot be ignored, namely, that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which again are either anterior or posterior to the accrual of the cause of action. The Act also provides by sec. 9 that when once time has begun to run no subsequent disability or inability to sue stops it, except in the case to which the proviso to the section applies. That the disability or inability contemplated by sec. 9 is confined to such as are mentioned in the Act itself and that new exemptions cannot be recognised is clear from the mandatory words of sec. 3 of the Act. A saving or exception not found in the statute will not therefore be implied however much it may be within the reason of those that are recognised by the statute or however much the ends of justice in a particular case may demand. The periods prescribed by the Act are more or less arbitrary, and the fixing of the periods is founded on considerations of public policy. The statute may bear hardly on individual cases, but the individual hardship will, upon the whole, be less by withholding from one who has slept upon his right than by taking away from the other what he has long been allowed to consider as his own. These considerations cannot be ignored.

The cases which are said to have sanctioned the application of some general principle enuring to the benefit of the Plaintiff and extraneous to the Act itself may broadly be classified into two groups,

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viz., those in which the starting point of limitation fixed by the statute has been held to have arisen at a subsequent date and those in which it has been held that the operation of the statute has been suspended after time has begun to run. It is necessary to bear this distinction in mind in order to appreciate the exact significance of the decisions.

The earliest of these cases is that of *Mussammat Ranee Surnomoyee v. Shoshee Mookhee Burmonia* (1). In that case a sale under the *patni* regulation having been set aside and the *patnidars* restored to possession the zamindar sued the *patnidars* to recover arrears of rent which had accrued before and during the time they were out of possession. The contention of the *patnidars* was that the claim was barred because the suit had not been brought within three years from the date when each instalment of rent fell due. The suit was brought under Act X of 1859. The 32nd section of the Act prescribed the limitation for such a suit as three years from the last day of the Bengali year or from the last day of the month of Jeth of the Fasli or Willayuti year in which the arrear claimed shall have become due. The construction put upon this enactment by the High Court was that the suit should have been brought within three years from the time on which these arrears first became due, *viz.*, the last day of the year for which the rents constituting them had accrued. In the course of the arguments on behalf of the zemindar before the Privy Council reliance was placed on her behalf upon the Limitation Act then in force, *viz.*, Act XIV of 1859, sec. 8 of which prescribed a limitation of three years, for suits for rent, from the time the cause of action arose. Sir James Colville, deliver-

ing the judgment of the Board, observed that if Act XIV of 1859 applied there could be no doubt upon the question, for it was perfectly clear that the cause of action accrued at the time when the *patni* sale having been set aside the obligation to pay the sum of money revived. Their Lordships, however, were of opinion that upon a fair construction of the 32nd section of Act X of 1859 which was the special enactment that was applicable, time had not begun to run until the sale was set aside and that upon the setting aside of the sale and the restoration of the parties to possession they took back the estate subject to the obligation to pay the rent and that the arrears claimed must be taken to have become due in the year in which the restoration took place. Applying the words of the 32nd section to the facts, the suit, having been instituted within three years of the last day of that year, was in time. As regards the view taken by the High Court that the zamindar could have sued for the arrears pending the proceedings to set aside the sale their Lordships dissented from it and observed that until the sale had been finally set aside, she was in the position of a person whose claim had been satisfied and that her suit, if instituted, might have been successfully met by a plea to that effect. This decision therefore did not purport to engraft any foreign principle into the law of limitation then in force.

It turned purely on the construction of the words of the 32nd section of Act X of 1859 and explained what was meant by the expression, "the year in which the arrears fell due" or in other words, decided what was the year in which the arrears could be said to have fallen due, and also indicated when the cause of action arises in a suit for rent.

(1) 12 M. L. A. 244 (1889).

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In the case of *Rasu Kuar v. Dhum Singh* (2) a debtor agreed to convey certain property to his creditor, and to set off the debt against a part of the consideration for the conveyance; a conveyance was executed, but a dispute arose as to whether it was executed in conformity with the contract; the debtor commenced a litigation to enforce the agreement but was unsuccessful and the creditor sued on the debt and the debtor raised the plea of limitation. The debtor's suit, it may be stated, was decreed by the Subordinate Judge but was dismissed on appeal by the High Court. Their Lordships of the Judicial Committee considered the matter from two points of view, namely, according to the terms of the Contract Act, IX of 1872, and also according to the terms of the Limitation Act, XV of 1877, both of which gave the same result. They held that under the 65th section of the Contract Act, the agreement was discovered to be ineffectual on the dismissal of the debtor's suit by the High Court and the debtor became bound to pay the debt on the date on which the suit was dismissed. They also held that Art. 97 of the Limitation Act, XV of 1877, applied and three years would run from the date of the failure of the consideration which also was the date of the said dismissal. In the decision of this case there were no general principles imported or relied upon. Certain general observations, however, are to be found in the judgment in a passage which runs thus: "Baru Mal might have sued for his debt but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till after decision of the specific performance suit. Dhum Singh's defence would have been

that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary to institute a vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time had relieved him from paying at all." These observations merely indicate that in point of fact no remedy was available to the creditor in the meantime and that the law has made provision to guard against the contemplated consequence. They do not purport to invoke any principle extraneous to the Act itself.

The next case is that of *Nrittyamani Dassi v. Lakhan Chandra Sen* (3). That was a case in which the Plaintiffs commenced an action for declaration of their title to a share in certain properties and for possession. They, as *pro forma* Defendants, had supported the Plaintiffs in an earlier suit in ejectment and had asked for a declaration that they too had a share in the property in suit. A decree was passed declaring them jointly entitled to a share and entitling them to possession to the extent of that share. The said decree was set aside on appeal on the ground that the said relief could not be given as between co-Defendants, the suit itself not having been one for partition but for ejectment. The primary Court dismissed the suit as barred computing the period from the original dispossession.

(2) L. R. 15 I. A. 211; s. c. I. L. R. 11 All. 47 (1888).

(3) I.L.R. 43 Cal. 660; s. c. 20 C. W. N. 622 (P. C.) (1903).

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sion. The decision of the Court of Appeal is reported in the case of *Lakhan Chandra Sen v. Madhusudan Sen* (4). The Court of Appeal doubted whether the case fell under sec. 14 of the Limitation Act, but held that the decree which the Plaintiffs had obtained as co-Defendants in the previous suit, so long as it stood undischarged, was susceptible of execution and it was not open to the Plaintiffs to institute a fresh suit for the attainment of the very object which they had successfully attained in the previous suit. They held that during the time that that decree was undischarged, the Plaintiffs' right to recover the property was suspended and they were entitled to a deduction of the period. On an appeal being preferred the Judicial Committee dismissed the appeal observing that they concurred generally with the reasons given by the Court of Appeal, and held that the Plaintiffs were entitled to a deduction of the period during which they were litigating for their rights. It is not very intelligible under what provisions of the law their Lordships held that the deduction was allowable unless it was under sec. 14 of the Act, the applicability of which article was expressly doubted by the Court of Appeal.

In the case of *Soni Ram v. Kanhaiya Lal* (5) the Judicial Committee disallowed the contention that the period during which there was fusion of the interest of the mortgagor and the mortgagee in one and the same person, the operation of the statute which had already begun to run should be suspended. Their Lordships observed that the language of the statute upon which *Burrell v. The Earl of*

Egremont (6) was decided was essentially different from Art. 148 of Act XV of 1877 and that if such suspension was allowed it would be deciding contrary to the express enactment contained in sec. 9 of the Act.

There are some other decisions of the Judicial Committee in which no extraneous considerations were allowed to prevail, e.g., *Juscurn Boid v. Prithi Chand Lal Choudhury* (7) and *Mani Singh Mandhata v. Nawab Bahadur of Murshidabad* (8). The decision in the latter case suggests the proposition that disabilities not recognised by the Act cannot operate to extend the period of limitation.

These are all the decisions of the Judicial Committee which may be said to directly bear upon the question. In some of the decisions of the Courts in this country reference has been made to some other decisions of that Board as sanctioning the applicability of some similar general equitable principle and I propose to refer to them shortly. In the case of *Prannath Choudhury v. Rooka Begum* (9) the pendency of litigation as to the ownership of equity of redemption, between the heirs of the mortgagee and a party claiming as purchaser, was held to be a "good and sufficient cause" within the exception to the operation of the Bengal Regulation of Limitation III of 1793, sec. 14, why a mortgagee should not have instituted proceedings for foreclosure, within twelve years, the time prescribed by the Regulation. In the case of *Hem Chandra Choudhuri v. Kali*

(4) I. L. R. 35 Cal. 209 (1907).

(5) I. L. R. 35 All. 227; s. c. 17 C. W. N. 605 (P. C.) (1913).

(6) 7 Beauv. 205 (1844).

(7) I. L. R. 46 Cal. 670; s. c. 23 C. W. N. 721 (P. C.) (1918).

(8) I. L. R. 46 Cal. 694; s. c. 23 C. W. N. 531 (P. C.) (1918).

(9) 7 M. I. A. 393 (1859).

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Prosanna Bhaduri (10), it was held that the pendency of a suit for enhancement of rent of a tenure, in which there was a claim for a particular year, suspended the operation of the statute in respect of a subsequent suit for rent for the identical year. The decision in the case of *Baijnath Sahai v. Ramgout Singh* (11) proceeded upon the construction of the words in the third column of Art. 12 of Act XV of 1877, "when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought" and laid down what that point of time was in view of the fact that the Plaintiff believed in good faith that he had secured what he claimed. In the judgment of the Judicial Committee in this case, however, there are indications suggesting that a general rule was being enunciated which would suspend the operation of the statute in favour of a Plaintiff so long as any reasonable doubt existed regarding his position and so long as there was no certainty that the institution of proceedings by him was necessary.

Of the decisions to which reference has been made above, the one cited very largely in the decisions of this Court as laying down a general principle of suspension or extension is that in the case of *Mussammat Rance Surnomoyee v. Shoshee Mookhee Burmonia* (1). It was relied upon in the cases of *Eshan Chandra Roy v. Khaja Assanoolah* (12) and *Deen Doyal Pramanik v. Radha Krishon Deb* (13), in a claim for rent which was instituted after the termination of an action in ejectment. It was extended to

a case where the suit was filed within three years from the date of the Plaintiff's knowledge that rent had not been paid in the case of *Moresh Chundra Chakladar v. Ganga Moni Dasi* (14). It was applied to a case where the circumstances were somewhat similar in the case of *Dhunput Singh v. Saraswati Misra* (15). It was also relied upon in the case of *Lakhan Chandra Sen v. Madhusudan Sen* (4) to which reference has already been made. The principle was further extended as one of more or less universal applicability in the case of *Surniram Marwari v. Barhamdeo Persad* (16). The case was relied upon as laying down a general principle of extinguishment by satisfaction and revival on cancellation of such satisfaction in the case of *Syed Abdulla v. Hurkissen Singh* (17).

On the other hand, the special features of *Rance Surnomoyee's* case (1) were pointed out and the decision therein was treated as not laying down any general rule in the cases of *Watson & Co. v. Dharendra Chandra Mukerji* (18), *Brajendra Kumar Roy v. Rakhal Chandra Roy* (19), *Raj Kristo Singh v. Hurro Sundari Choudhury* (20), *Baroda Kanto Roy v. Chundra Kumar Roy* (21), *Hafizunnessa Khatun v. Bhairab Ch. Das* (22), *W. Sheriff v. Dinanath Mukerji* (23), *Huro Kumar Ghose v. Kali Krishna Thakur*

(1) 12 M. I. A. 244 (1868).

(10) L. R. 30 I. A. 177 (1903).

(11) L. R. 23 I. A. 45; s. c. I. L. R. 23 Cal. 775 (1896).

(12) 10 W. R. 79 (1871).

(13) 17 W. R. 415 (1872).

(1) 12 M. I. A. 244 (1868).

(4) I. L. R. 35 Cal. 209 (1907).

(14) 18 W. R. 59 (1872).

(15) I. L. R. 19 Cal. 267 (1891).

(16) 1 C. L. J. 337 (1905).

(17) 2 C. L. J. 490 (1905).

(18) I. L. R. 3 Cal. 6 (1877).

(19) I. L. R. 8 Cal. 791 (1878).

(20) 13 W. R. 313 (1870).

(21) 23 W. R. 280 (1875).

(22) 13 C. L. R. 314 (1883).

(23) I. L. R. 12 Cal. 258 (1885).

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(24) and *Burmomoyi Dasi v. Brahma-mayi Choudhurnain* (25). In the case of *Syed Abdul Juleel v. Kanchan Dasi* (26), it was pointed out that the Privy Council did not say in *Ranee Surnomoyee's* case (1) that the old cause of action revived but that a new cause of action arose. The doctrine that the landlord is entitled in a suit for rent for the period that he was suing the tenant in ejectment which had been held in the earlier cases as founded on the authority of *Surnomoyee's* case (1) was considerably modified in the case of *Haranath Roy Choudhury v. Goluck Nath Chaudhury* (27). In the case of *Huro Prosad Roy v. Gopal Dass Dutt* (28), Garth, C. J., reviewed the authorities which had purported to proceed upon the decision in *Ranee Surnomoyee's* case (1) and made a remark to the effect that if properly understood it did not support any doctrine of extension or suspension. This last-mentioned case went up to the Privy Council and Sir Robert Collier in delivering the judgment of the Judicial Committee, *Huro Proshad v. Gopal Das* (29), observed that to the operation of the statute the exception which is said to be created by the decision in *Ranee Surnomoyee's* case (1) is rather apparent than real, and pointed out that the decision proceeded upon the fact that the claimant of rent was, till the setting aside of the sale had taken place, in the position of a person whose claim had been satisfied. In a later decision of the Judicial Committee, *Ramgayya Appa Rau v.*

Babba Sriramula (30), *Ranee Surnomoyee's* case (1) was referred to by their Lordships of the Judicial Committee as a suit in which the date at which the rent became due was held to be entirely different date from the close of the period in respect of which that rent was payable. In some of the later decisions of this Court the facts of *Surnomoyee's* case (1) were regarded as somewhat exceptional, e.g., *Bejoy Chand Mahatab v. Mohun Mohan Ghose* (31) and *Nagendra Nath Sen v. Sadharam Mondal* (32).

In numerous other cases a general principle based on *Ranee Surnomoyee's* case (1) has been referred to, notably in the case of *Nagendra Nath Pal Choudhury v. Chandra Sekhar Dalal* (33).

The principle that limitation does not arise as the rights suspended for a time may be revived and enforced when the bar is removed seems to have been adopted in the cases of *Laloo Karikar v. Jagat Chandra Saha* (34) and *Janaki Nath Sinha Roy v. Sir Bijoy Chand Mahatab Bahadur* (35). In the case of *Dinanath Saha Roy v. Jadunath Biswas* (36) a deduction of time during which a previous litigation was pending was allowed but it is not very clear whether on any general principle or by reason of the fact that the Plaintiffs were in the position of persons whose claim had been satisfied.

The dictum of Lord Eldon in *Pulteney v. Warren* (37), "if there be a principle upon which Courts of justice ought to

(1) 12 M. I. A. 244 (1868).

(24) I. L. R. 17 Cal. 251 (1889).

(25) I. L. R. 23 Cal. 191 (1895).

(26) 24 W. R. 143 (1875).

(27) 19 W. R. 18 (1873).

(28) I. L. R. 3 Cal. 817 (1876).

(29) I. L. R. 9 Cal. 255 (1882).

(1) 12 M. I. A. 244 (1868).

(30) I. L. R. 27 Mad. 148 (1908).

(31) 24 C. W. N. 785 (1920).

(32) 25 C. W. N. 954 (1920).

(33) 5 C. L. J. 59 (1906).

(34) 33 C. L. J. 256 (1920).

(35) 33 C. L. J. 336 (1921).

(36) 29 C. W. N. 202 (1924).

(37) [1801] 6 Ves. 73.

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act without scruple, it is this, to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party against whom relief is sought," a dictum which 'was broadly laid down in some of the earlier English cases and was subsequently approved by the House of Lords in the *East India Company v. Campion* (38) has been applied in this Court in the case of *Lakhan Chandra Sen v. Madhusudan Sen* (4) to which reference has already been made and in the case of *Hemendra Mohan Khasnabis v. Dharani Nath Chandra Roy* (39).

A general principle of suspension or extension apart from the provisions of the Limitation Act does not appear to have been resorted to so largely in the cases decided by other High Courts in this country. Reference however has to be made to a Full Bench decision of the Madras High Court in the case of *Muthu Korakkai Chetty v. Madar Ammal* (40), where the question of applicability of general principles not recognized by the Limitation Act incidentally arose. In that case there appears to have been a clear difference of opinion on the question whether the starting point of limitation may be deferred on some principle of suspension extraneous to the Act itself and whether notwithstanding sec. 9 of the Act there may be exceptional cases where such suspension may be allowed after time has begun to run. The view of Sadasiva Ayyar, J., which answers the above question in the affirmative seems to have been approved of by this Court in the case of *Dwijendra Narain Roy v. Jogesh Chandra De* (41) on which the

Appellant relies and to which I shall presently refer.

The facts of that case were these : The Plaintiff had obtained certain documents executed in his favour but the executant having refused to have them registered on the ground that there were material alterations the Plaintiff had to institute a suit under sec. 77 of the Registration Act. The suit was dismissed by the Subordinate Judge, and on appeal to the High Court was remitted to the trial Court for a finding on a certain point. On receipt of that finding the High Court allowed the Plaintiff's appeal and decreed the suit. An appeal to the Judicial Committee was preferred but it was dismissed. In the meantime and after the dismissal of the suit by the Subordinate Judge the executant of the documents executed leases in favour of certain persons who came to be in possession under them. The documents executed in Plaintiff's favour were registered after the decree passed by the High Court. The Plaintiff then instituted a suit for possession and mesne profits against the executant of the documents and the lessees. It was held in that case that the Plaintiff's cause of action arose on the date when the documents were registered and on the registration of the documents his title dated back to the date of the documents, and between those two dates his right was kept in a state of suspended animation. It was laid down that "ordinarily limitation runs from the earliest time at which an action can be brought and after time has commenced to run, there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is animated." It was also observed that "the true test to determine when a cause of action

(4) I. L. R. 35 Cal. 209 (1907).

(38) 11 Bligh. N. S. 158 (1837).

(39) 33 C. L. J. 260 (1920).

(40) I. L. R. 43 Mad. 185 (F. B.) (1919).

(41) 39 C. L. J. 40 (1923).

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accrued, is to ascertain the time when the Plaintiff could have maintained his action to a successful result." These two propositions are the sheet-anchor of the Appellant's contention in the present appeal.

As I have said at the very outset the matter is not altogether free from difficulty and to quote the words of Oldfield, J., in his order of reference in the case of *Muthu Korakkai Chetty v. Madar Ammal* (40) the difficulty arises not from the actual conclusions in the decisions to which reference has been made, but from the way in which the reasons for these conclusions are stated.

Speaking for myself I am not prepared to regard the decision in *Rance Surnomoyee's* case (1) as creating an exception beyond what is provided for by the statutes of limitation in this country. I have already referred to the cases, especially the decision of the Judicial Committee in the case of *Huro Proshad Roy v. Gopal Das Dutt* (29), which state what the precise import of that decision was. In the case of such of the articles of the Limitation Act in which the starting point of time synchronises with the cause of action I am prepared to hold that the test is to ascertain the time when the Plaintiff could have maintained his action to a successful issue. If in such a case, at the time when the cause of action arises there is no person capable of suing upon it the statute does not run; similarly it is necessary that there shall be a person to be sued; and it is also necessary that the cause should be complete, that is, all the facts must have happened which are material to be proved

in order to entitle the Plaintiff to succeed. This should of course be borne in mind in interpreting the intention of the legislature as expressed in the articles of the Act itself or rather in such of them as admit of a consideration of the question as to when a cause of action arises and in such a case I am in entire accord with the view expressed by Seshagiri Ayyar, J., at p. 213 of the Madras Full Bench case to which I have referred. I am aware that in applying the law of limitation the highest Courts, English as well as American, have often imported principles of equity into their consideration on the supposed notion that the provisions of the statutes, as applicable to a particular case or a class of cases, appear to be so unreasonable as to amount to a denial of a right and to call for the interposition of the Court. These authorities or the bulk of them have gradually acquired legislative sanction in the shape of amending, repealing or consolidating statutes. The law, however, as to limitation is not the same in England or America and India and indeed no reason or principle beyond that of sound public policy is discernible as a common feature. Apropos of equitable principles which have sometimes been imported into the statute the following passage may be cited from Angell on Limitation, 5th Edition, p. 24: "There are however cases in which Courts of equity will interpose to prevent the bar of statutes of limitation, as, for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law. That the enactment is positive is not allowed to be used against conscience, and an equitable tribunal will supply and administer within its own jurisdiction, a substitute for an original legal right, of which a party

(1) 12 M. I. A. 244 (1868).

(29) I. L. R. 9 Cal. 255 (1882)

(40) T. L. R. 43 Mad. 185 at p. 189 (F. B.) (1919).

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has been fraudulently and unjustly deprived. The case of *Pulteney v. Warren* (37) established the principle that where a party applies to a Court of equity, and carries on an unfounded litigation, protracted under circumstances and for a great length of time, which deprives his adversary of his legal rights a substitute for the legal right, of which the party, so prosecuting an unfounded claim, has deprived his adversary, should be supplied and administered. Upon the same principle, a Court of equity will give a party interest out of the penalty of a bond, wherever by unfounded litigation the obligor has prevented the obligee from prosecuting his claim, at the time when his legal remedy was available. For such reason, when a party, by unfounded litigation, has prevented an annuitant from receiving his annuity, the Court will, in some cases, give interest upon the annuity. In such cases, Courts of equity do no more than supply and administer, within their own jurisdiction, a substitute for the original right of the obligee, of which he has been unjustly deprived by the misfeasance of the obligor." On the other hand, there is high authority for this proposition: "The Court disclaims all right or inclination to put on statutes of limitation, which are found to be among the most beneficial to be found in our books, any other construction than their words import. It is as much a duty to give effect to laws of this description with which Courts, however, take great liberties, as to any other which the legislature may be disposed to pass. When the will of the legislature is clearly expressed it ought to be followed, without regard to consequences, and a construction derived from a consideration of its reason and spirit should never be resorted

to but where the expressions are so ambiguous as to render such mode of interpretation unavoidable." Also this was said by a high authority in 1880:—"Of late years, the Courts in England and in this country (meaning the United States of America) have considered statutes of limitations more favourably than formerly. They rest upon sound policy and tend to the peace and welfare of society. The Courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of the statutes."

I am of opinion that except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversights there is no scope for the application of any principles of equity in the administering of the statutes of limitation, that in point of fact the Judicial Committee has not, however much the language used by their Lordships in some of the decisions may suggest the same, laid down any such principle as being of universal applicability and that all the decisions of the Judicial Committee as well as most of the cases decided in this country are supportable on grounds which are in no sense founded on any general equitable principle extraneous to or unauthorized by the statute. In cases in which the question arises as to the starting point of time for the purposes of limitation, these decisions are mostly reconcilable with a proper appreciation of what the cause of action means when the starting point is the cause of action or with a proper interpretation of the words used in the third column of the articles in other cases; and in cases where the question of suspension arises, if time has once begun to run it never again ceases to run, but there may be satisfaction of a claim or the cancellation of a cause of action operating to sus-

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pend the rights of the Plaintiff who may, on the removal of the satisfaction or cancellation, avail of a fresh cause of action which arises by reason thereof. The substitution of a new legal right on principles of equity is hardly permissible under the statute law as it stands and a revival of an old cause of action once satisfied or cancelled is foreign to its conception. In applying the principles of limitations the Indian Courts are not permitted to travel beyond the articles and the exceptions and provisos embodied in the Act itself, and that apart from the provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions.

Art. 109 which clearly applies to the case lays down that time would run from the date when the profits are received. In Act XV of 1877 the third column of this article ran in these words: "When the profits are received or where the Plaintiff has been dispossessed by a decree afterwards set aside on appeal when he recovers possession." That article was construed by this Court, in the case of *Peary Mohan Roy v. Khelaram Sirkar* (42) and it was observed in that case that no question arises on the words of the article when the cause of action arose.

I am of opinion that the article does not admit of any consideration as to when the cause of action may have accrued to the Plaintiff, and his claim to profits received beyond three years must be held to be barred. The appeal therefore fails. As regards the cross-objection it seeks to rectify a palpable error and must succeed.

N. G.

(42) I. L. R. 35 Cal. 906: s. c. 13 C. W. N. 15 (1909).

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT FINLAY.

LORD ATKINSON.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1921,

Heard, 8, 11 and

12, December.

1925,

Judgment,

30, January.

VENKATADRI
APPA RAO and
ors., Appellants,

MAHBOOB
SIRFRAZ PARTHA-
PATHE APPA
RAO and ors.,
Respondents.

Limitation Act (IX of 1908), Sch I, Art. 123—Will, disposing of property under litigation and out of possession of testator—Suit against administrator to recover legacy—Limitation—Point of time from which it runs—"Payable," meaning of—Will, interpretation of.

A similar interpretation must be given to the words "payable" and "deliverable" as used in Art. 123 of the Limitation Act. As a share in the property of an intestate would not be "deliverable" until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, so a legacy or share in a legacy does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid.

MUSSAMAT BASSO KUAR v. LALA DHUM SINGH (1) referred to.

The intention of a testator, when not expressly and unambiguously stated in the Will, may be inferred by a Court from other facts stated and referred to in the Will, e.g., that legacies bequeathed by the Will should not be paid until the conclusion of the litigation in which the testator was engaged when the Will was made.

LORD v. LORD (2), RODDY v. FITZGERALD (3) and GORDON v. GORDON (4) referred to.

(1) L. R. 15 I. A. 211 (1888).

(2) 2 Ch. App. 788 (1867).

(3) 6 H. L. C. 876 (1858).

(4) 5 L. R. 2 & L. App. 284 (1871).

VENKATADRI APPA RAO v. MAHBOOB SIFRAZ PARTHASARATHI APPA RAO.

This was a consolidated appeal (No. 25 of 1924) from three decrees, dated the 4th April 1922, of the High Court at Madras, passed in appeals under the Letters Patent, reversing three decrees, dated the 22nd April 1921, of a Division Bench of the said Court which affirmed three decrees, dated the 29th November 1917, of the Court of the Subordinate Judge of Bezawada.

The suits in which these appeals arose were instituted by the Plaintiffs to recover legacies to which they claimed to be entitled under the Will of a Hindu widow named Venkayamma. Venkayamma, whose Will is set out at length in the judgment of the Judicial Committee, died on the 9th March 1909.

Gopala, the executor named in the Will, never acted in that capacity and died shortly after the testatrix.

Rangayya and Venkata, her brothers-in-law, claimed to be her heirs and to be entitled to her *stridhan*, and took possession of certain jewellery and other effects; after protracted litigation these chattels were recovered by the brothers of the testatrix from the present Appellants as heirs and legal representatives of Rangayya and Venkata.

The suits under appeal were brought against the Appellants to obtain payment of legacies. The defence set up was that Venkayamma had no power to bequeath the legacies, and that the suits were barred by limitation. The Subordinate Judge on the 29th November 1917 dismissed the suits on the ground that they were barred by limitation.

He decided :

" That Art. 123 of the Limitation Act cannot apply to this case, inasmuch as the Defendants are not the executors or administrators or their representatives; that, even if Art. 123 applied, the legacies

became payable on the death of Venkayamma, and the suits, not having been brought within 12 or 13 years from that date, are barred by limitation; that Art. 120 of the Limitation Act would apply, and that the suits became barred after the lapse of five years from the date of the death of Venkayamma; that if I am not right in thinking that Art. 120 applies to this case, then Art. 52 will apply, and the right of the Plaintiffs became barred after three years from 1905 and 1907 when Rangayya Appa Rao and Venkata Narasimha Appa Rao and Parthasarathi Appa Rao received the amounts from Court; that the payment of the money by Parthasarathi Appa Rao to Defendants Nos. 1 to 3 does not revive the cause of action, nor does it give a fresh starting point; that, if my views are not correct on that point, the claim, at any rate with regard to two-thirds, received by Rangayya Appa Rao and Venkata Narasimha Appa Rao is barred. I find on issue II that the suits are barred by limitation."

Appeals from the decrees of the Subordinate Judge were heard by the Madras High Court (Sadasiva Ayyar and Phillips, JJ.). The appeal was dismissed on the 22nd April 1921, the two Judges differing.

Letters Patent appeals were filed from the confirming judgment of the senior Judge and were disposed of by a bench consisting of Schwabe, C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.

The learned Judges held that Venkayamma had absolute disposing power over the income that accrued during the period when she held the estate; and that Art. 123 of the Limitation Act applied to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances

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that he is bound to deal with it as the estate of the deceased, and decided that the suits were not barred.

The facts of the case and the arguments are fully set out in the judgment of the Judicial Committee.

Mr. A. M. Dunne, K. C., Dr. Swaminatha, Messrs. B. Dubé and K. V. L. Narasimham for the Appellants.

Messrs. L. DeGruyther, K. C., A. C. Clauson, K. C., L. M. Parikh and P. Chenchiah for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are consolidated appeals from three decrees, dated the 4th April 1922, of the High Court at Madras, which had reversed three decrees, dated the 22nd April 1921, of a Division Bench of that Court, by which three decrees, dated the 29th November 1917, of the Subordinate Judge of Bezwada dismissing original suits numbered 30, 87 and 88 of 1916 had been affirmed. The suits had been instituted in the Court of the Subordinate Judge of Bezwada on the following dates: No. 30 of 1916 on the 26th April 1916; No. 87 of 1916 on the 6th December 1916; and No. 88 of 1916 on the 9th December 1916. It was agreed at the hearing of these appeals that in drawing up the decree of the High Court in original suit No. 30 of 1916, Letters Patent Appeal No. 20 of 1921, that the words "mesne profits" in para. 3 of the decree should have been "income" and their Lordships amended that decree by substituting in it for the words "mesne profits" the word "income." There was no question of mesne profits in the case.

In suit No. 30 of 1916 Sri Rajah Parthasarathi Appa Rao Bahadur was the Plaintiff, and Sri Rajah Venkatadri

Appa Rao Bahadur, Sri Rajah Venkataramayya Appa Rao Bahadur and Sri Rajah Sobhanadri Appa Rao Bahadur and the Court of Wards were Defendants. By an order of the Court of the 6th December 1916, the Court of Wards was discharged from being a Defendant, and the second Defendant was appointed guardian of the third Defendant, who was a minor. The suit was to recover a legacy of Rs. 80,000 bequeathed by Venkayamma, a widow, by her Will of the 30th January 1899, to her sister-in-law Inuganti Kasturammah, a legacy of Rs. 40,000 bequeathed by the same Will to another sister-in-law Inuganti Venkataramanayamma, and shares of the residue of the testatrix's property which she had bequeathed to her brothers Chinna Rao and Buchi Thammayya. The Plaintiff was the assignee of all the above-mentioned legacies, and he claimed them as such assignee. He also claimed interest on those legacies, and other relief.

In suit No. 87 of 1916, Sri Damara Venkata Rajagopala Seet Rayyamma Rao was the Plaintiff, and Sri Rajah Meka Venkatadri Appa Rao Bahadur Garu, Sri Rajah Meka Venkataramayya Appa Rao Garu, and Sri Rajah Sobhanadri Appa Rao Bahadur Garu, by his brother and guardian the second Defendant, were the Defendants. The Plaintiff claimed to recover a legacy of Rs. 40,000 bequeathed to him by the same Venkayamma by her Will, with interest thereon, and other relief.

In suit No. 88 of 1916, Lakkaraju Bapayya was the Plaintiff, and the Defendants were the persons who were the Defendants in suit No. 30 of 1916 and in suit No. 87 of 1916. The plaint in the suit was filed under sec. 26 of the Code of Civil Procedure, 1908, and under

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Or. 1, r. 8, and Or. 7, r. 1, of that Code. The Plaintiff claimed to recover Rs. 2,000 bequeathed to him by Venkayamma by her Will and interest thereon and a decree, and that for such purposes necessary accounts should be taken and that the property of the testatrix should be administered by the Court, and prayed for other relief.

When it may be necessary later in the judgment to refer to any of the parties to this litigation, they will be referred to by their names without any descriptive addition.

Except the Court of Wards, all the original Defendants and the representatives of those who died who have been brought on the record, were nearly related to each other and to Venkataramayya Appa Rao, of whom Venkayamma was the widow.

To understand how these suits arose and the positions of the parties to them, it is necessary to refer briefly to a litigation which began on the 21st October 1895, and to some other facts.

The suits in which these consolidated appeals have arisen were instituted in 1916 in the Court of the Subordinate Judge of Bezwada to obtain payment of legacies which Venkayamma, a Hindu widow, had bequeathed by her Will of the 30th January 1899. She died on the 9th March 1899. The due execution of the Will is admitted, but the suits have been contested by the Defendants on several grounds, of which those which are now in the least material are that the testatrix left no property out of which the legacies could be paid; that the Will has been incorrectly construed by the High Court at Madras; that the suits or one of them is barred by a previous suit which was brought in 1902; and that the suits were not brought within time. In

order to understand those contentions it is necessary to refer at some length to a somewhat complicated history.

Venkayamma, the testatrix, was the widow of Venkataramayya Appa Rao, who had died before 1890. They had one child, a son, Narayya Appa Rao, who died on the 4th August 1895, while he was a minor. He died unmarried and had not made a Will. When he died he was the last male owner of the Medur estate. The Court of Wards had taken charge of the Medur estate during his minority and continued to be in charge of it until December 1895, when a Receiver, appointed by a Civil Court, having jurisdiction, took possession of it. The estate of Medur continued to be in charge of Receivers, duly appointed, until after 1902. The Receivers acted as officers of the Civil Court, and it was their duty to bring and to defend suits affecting the estate, to collect the rents and profits of the estate, to render accounts to the Civil Courts, to invest balances of money which might be in their hands, and to pay monies received by them into a local branch of the Bank of Madras after deducting necessary and legal expenses. The monies paid into the Bank by the Receivers and the Government promissory notes and other securities in which monies derived from the Medur estate were invested were under the control of the Civil Court for the benefit of those who might be entitled to them.

The Medur estate and the Nidadavole estate—with the latter these suits are not concerned—had formed parts of a large Zamindari in the Province of Madras, and the families respectively in which they were vested were nearly related. In December 1890, Rani Papamma Rao, who was the childless widow of the last male owner of the Nidadavole estate,

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went through a ceremony of adopting Narayya Appa Rao as a son to her late husband. As will later be seen, it was held by the Board in 1913 that she had not power to make the adoption and that it was invalid. Until that decision of the Board in 1913 it seems to have been generally considered that the adoption was valid. Shortly after Narayya Appa Rao died in August 1895, disputes arose between Rani Papamma Rao and Venkayamma as to the right to the possession of the Medur estate. The former claimed a right to the possession as the mother by adoption of Narayya Appa Rao; the latter, alleging that the adoption was invalid, claimed a right to the possession as his natural mother. The Court of Wards in September or October 1895, passed a resolution to hand over to Rani Papamma Rao the possession of the Medur estate unless restrained by an injunction of a competent Court before the 1st December 1895, and, thereupon, Venkayamma instituted on the 21st October 1895, in the Court of the Subordinate Judge of Ellore, a suit against Rani Papamma Rao and the Collector of the Kistna District, who was the local agent of the Court of Wards, in which she claimed a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and also claimed to be placed in possession of the Medur estate with all the savings, appurtenances, etc., of the estate. That suit was suit No. 35 of 1895 in the Register of the Court at Ellore.

When Venkayamma died on the 9th March 1899, her suit No. 35 of 1895 was still pending in the Court of the Subordinate Judge, and on the 1st May 1899, on the application of Venkata Narasimha Appa Rao, he and his brother Rangayya Appa Rao were brought on the record of

suit No. 35 of 1895 as Plaintiffs as being the two surviving uncles of Narayya Appa Rao and the nearest legal reversioners to the Medur estate. The Subordinate Judge of Ellore on the 2nd December 1899, made a decree dismissing the suit, and Venkata Narasimha Appa Rao and Rangayya Appa Rao separately appealed from that decree to the High Court at Madras. To those appeals, Parthasarathi Appa Rao, who was a cousin of Narayya Appa Rao's natural father and had claimed a third share in the Medur estate, was made a party. He had claimed that third share in a suit No. 41 of 1899 in the Court of the District Judge of Godavari, in which his claim to a third share in the Medur estate was dismissed by a decree of that District Judge on the 12th December 1903. From that decree of the District Judge of Godavari dismissing his claim to a third share Parthasarathi Appa Rao appealed to the High Court at Madras. The three appeals above-mentioned were heard together by the High Court at Madras, and on the 20th November 1905, the High Court by a decree dismissed the appeals of Venkata Narasimha Appa Rao and Rangayya Appa Rao, and allowed the claim of Parthasarathi Appa Rao to a third share in the Medur estate. From that decree of the 20th November 1905 of the High Court at Madras Venkata Narasimha Appa Rao and Rangayya Appa Rao appealed to His Majesty in Council. Before the appeal came on for consideration by the Board, Rangayya Appa Rao and Venkata Narasimha Appa Rao had died, and Venkatadri Appa Rao, son of Rangayya Appa Rao, and Venkataramayya Appa Rao and Sobhanadri Appa Rao, sons of Venkata Narasimha Appa Rao, were brought on the record as the Appellants.

On the 10th December 1913, the Board

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reported to His* Majesty, so far as is now material, that it ought to be declared that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and that on the death of Venkamma Rao (Venkayyamma) Rangayya Appa Rao and Venkata Narasimha Appa Rao became entitled as reversionary heirs to the Medur estate and the lands with mesne profits and moveable properties appertaining thereto and that the said estate with mesne profits and the moveable properties appertaining thereto ought to be divided into moieties between the Appellants Venkatadri Appa Rao as to one such moiety and Venkataramayya Appa Rao and Sobhanadri Appa Rao, minors, as to the other moiety. His Majesty on the 19th December 1913, having taken that report into consideration was pleased by and with the advice of His Privy Council to approve thereof and ordered that the same be punctually observed, obeyed and carried into execution.

It will be observed that the claim to a third share in the Medur estate which Parthasarathi Appa Rao had made was not allowed, and that the right of Rangayya Appa Rao and Venkata Narasimha Appa Rao to the possession of the Medur estate as reversionary heirs did not arise until Venkayyamma had died on the 9th March 1899.

The result of the appeal to His Majesty in Council established the fact that Venkayyamma had a right to the income received from the Medur estate from the death of her son Narayya Appa Rao on the 4th August 1895, until she died on 9th March 1899, less the expenses of collecting it and less such expenses as were necessarily incurred in maintaining the Medur estate. That in-

come included* any interest which was paid or payable upon any Government promissory notes which the Court of Wards may have held in respect of monies received from the Medur estate before the 4th August 1895, and any interest paid or payable by banks in respect of such part or parts of her income which during her life the bank or banks had received on deposit or otherwise at interest. If Venkayyamma had actually received that income she might have added it to the Medur estate as an accretion, but she did not, and it remained at her absolute disposal by Will or otherwise, and on her death it was part of her estate which was applicable for the payment of such legacies as she might bequeath by her Will.

Owing to the disputes which have been referred to and to the necessary action taken by the Civil Court to protect the Medur estate for the benefit of whoever might be entitled to the possession of it, Venkayyamma never obtained actual possession of the income to which she was entitled, but her estate, which would be available for the payment of legacies bequeathed by her, consisted to a great extent of that income to which she had been entitled, and no one who was not her executor or an administrator of her estate appointed by a Court or a legatee under her Will was entitled to receive what represented that estate or any part of it. After the death of Venkayyamma her estate consisted of the income to which at the time of her death she was entitled and to what represented that income which had been invested or deposited in the Government Treasury, or in a bank or banks, and of any interest which might become payable in respect of such investment as long as it remained under the control and custody of the Court. If

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the Court should hand over to any person not entitled to receive that estate, it or any part of it, such person would be liable to repay it to the person entitled to receive it with such interest in respect of it as it had made, or at least as it might have made if it had been deposited at interest with the Bank of Madras or any other similar Indian bank of position.

On the 30th January 1899, Venkayamma made her Will which, so far as is material, was as follows:—

"Will executed on the 30th day of January 1899 by Sri Rajah Venkata Rajagopala Venkayamma Rao Bahadur Garu, widow of late Sri Rajah Venkataramayya Appa Rao Bahadur Zaminder Varu.

I have been ill for about four months past and now there is much swelling and hard breathing and therefore, being afraid that I will not survive, I, while in a sound state of consciousness and understanding, make the following arrangements:—

1 Out of the jewels and other valuables belonging to me, I have already sold a major portion and spent that amount as well as the amount borrowed from my brother, Sri Rajah Inuganti Venkata Rajagopala Buchi Thammayya Bahadur Garu and from my younger brother, Chiranjivi Sri Rajah Inuganti Rajagopala Venkatarama Chinna Rao, for the expenses of the Medur Estate suit and for our maintenance and other expenses.

2 Out of the minor jewels that are remaining with me at present, the jewels set with diamonds and pearls shall be divided into three shares, and out of those shares, one share shall be given to my elder brother Sri Rajah Inuganti Buchi Thammayya Garu and two shares to my younger brother Sri Rajah Chinna Rao.

3. Further, the remaining gold and silver jewels, utensils, &c., and also cattle, shall be given to my two brothers as specified in paragraph 2.

4. The two silver maces of chobdars and orderlies, which belong to us shall be given to my junior brother-in-law Sri Rajah Venkata Narasimha Appa Rao Bahadur Garu.

5. The Government promissory notes and cash relating to the Medur Estate which have been in the custody of Court till this day, as well as the interest accruing thereon till payment of the amount, shall be divided into four shares, and out of them, one share shall be given to my elder brother Buchi Thammayya Garu, and three shares to my younger brother Chinna Rao.

6. Out of the Government promissory notes and cash of the Medur Estate which are remaining in deposit in Court and the jewels, &c., the amounts specified hereunder shall be first expended and only out of the remaining amount, one share shall, as stated in paragraph 5, be paid to my elder brother and three shares to my younger brother.

Particulars of the expenses to be incurred:—

	Rs.	A.	P.	
1	80,000	0	0	Rupees eighty thousand only to my younger sister-in-law Inuganti Kasturammah.
2	40,000	0	0	Rupees forty thousand to my elder sister-in-law Inuganti Venkataramanayamma Garu.
3	40,000	0	0	Rupees forty thousand to my younger sister Damera Venkat- rajagopa's Seethayamma.
4	12,000	0	0	Rupees twelve thousand to Inuganti Achayya Garu's son Venkata- narasimha Rao.
5	12,000	0	0	Rupees twelve thousand to Inuganti Kondamma Garu's daughter Bangaramma.
6	1,000	0	0	Rupees one thousand to Inuganti Achayya Garu.
7	1,000	0	0	Rupees one thousand to Chelikani Narasimharayanini Garu's sons Suramma and Achayya.
8	1,500	0	0	Rupees one thousand five hundred to the three daughters of Cheli- kani Narasimharayanini Garu.
9	600	0	0	Rupees six hundred to Inuganti Papayya Garu's wife Venkamma Garu.
10	5,000	0	0	Rupees five thousand to our agent Jandhyala Venkatapurnayya Garu, who has been working on our behalf in our Medur Estate Suit with zeal and interest.
11	8,000	0	0	Rupees three thousand to B. Srira- mula Sastrulu Garu, High Court Vakil.
12	1,000	0	0	Rupees one thousand to Adapa Ven- kataswami
13	1,400	0	0	Rupees fourteen hundred to Ven- kataramanna.
14	500	0	0	Rupees five hundred to Thirumala- setti Sobhanadri.
15	800	0	0	Rupees eight hundred to Adapa Pentayya.
16	800	0	0	Rupees eight hundred to Kundali Mangayya.

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- 17 500 0 0 Rupees five hundred to Adapa Rangam.
 18 500 0 0 Rupees five hundred to Ramakrishi
 19 200 0 0 Rupees two hundred to Patti Bama-lakshmi.
 20 200 0 0 Rupees two hundred to Kandukuri Kotayya.
 21 200 0 0 Rupees two hundred to Chelikani China Lakshmaidu.
 22 50 0 0 Rupees fifty to the second daughter of Adapa Venkataramanna.
 23 100 0 0 Rupees one hundred to Sesha-torn.
 24 2,000 0 0 Rupees two thousand to Lakkaraju Bapayya Garu.
 25 2,000 0 0 Rupees two thousand to Voppula Venkatachalam Pantulu Garu
 26 100 0 0 Rupees one hundred to Sri Satyanarayanaswami Varu enshrined in Annavaram.
 27 1,000 0 0 Rupees one thousand for the daily Bhogam (offerings) of Sri Sitaramaswami Varu enshrined in Annavaram

Saripalli Gopalakrishnamma Garu, an inhabitant of Rajahmundry, shall be the executor and give effect to the Will as stated above, from after my death.

This Will is executed with my full will.

(Signed) Sri Rajah Venkata Rajagopala Venkayyamma Rao Bahadur Zamindar Garu."

Nine persons signed an attestation clause in which they stated that the Will was signed by the testatrix as her Will in their presence, who at the same time at her request in her presence and in the presence of each other signed their names as witnesses. The Will having been executed was enclosed in a sealed cover which bore the following endorsement:—

"Will executed on the 30th January, 1899 by Sri Rajah Venkata Rajagopala Venkayyamma Rao Bahadur Zamindarini Garu of Sanivarpeta Garu, to be given effect to after her death"

The Will was presented for deposit on the 2nd February 1899, at the office of the Registrar of Godavari by the agent whom the testatrix had appointed to deposit it at the Registry. After the testatrix had died the Registrar of Godavari,

having satisfied himself that she had died, opened the sealed cover and registered the Will. The sole executor appointed by the Will did not take upon himself the duties of an executor and died shortly after the testatrix.

It was the Will of a Hindu of the Province but not of the town of Madras, and had not been made by her within the local limits of the Ordinary, Original Civil Jurisdiction of the High Court of Judicature of Madras, and did not relate to immoveable property situate within the local limits of that Original Civil Jurisdiction.

After the death of Venkayyamma, a Sub-Magistrate of Ellore took possession of certain jewellery and other things which had belonged to her as her *stridhanum*. He handed over the things to the police, who gave them into the possession of Rangayya Appa Rao and Venkatarasimha Appa Rao, who had no title to them as reversioners or otherwise, and they took possession of them and claimed them as reversioners. Thereupon the two brothers of Venkayyamma, who are mentioned in the first and second clauses of her Will, brought a suit on the 2nd March 1902, in the District Court of Godavari against Rangayya Appa Rao and Venkatarasimha Appa Rao for possession of that property. The first Plaintiff in that suit having died, his son and heir was made a Plaintiff. Finally a decree for possession of the property claimed was made in favour of the Plaintiffs. It is necessary to refer to that suit as one of the contentions of the Appellants in this appeal has been that the suit of 1902 having been brought these suits were not maintainable. That contention was founded on misconception. The causes of action were not the same. The suit of 1902 was for the wrongful conversion

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(trover, it used to be called in England) of goods. The present suits are to obtain payment of legacies, and there is no claim in respect of any of the goods to which the suit of 1902 related.

The other contentions of the Appellants in this appeal were that (a) Venkayamma had no disposing power to bequeath the legacies; (b) that cls. 5 and 6 of the Will had been wrongly construed by the High Court; and (c) that the suit was barred by the law of limitation.

As to the objection that Venkayamma had no disposing power to bequeath the legacies, that question is involved in the contention that cls. 5 and 6 of the Will have been wrongly construed by the High Court. Their Lordships will consider these two contentions together. On the death of her son Narayya Appa Rao on 4th August 1895, she became entitled to the Medur estate and its income to hold for her own life, and that income included the interest on investments of all monies received in respect of the Medur estate collected before the death of her son on the 4th August 1895. To that income she remained entitled until her death on the 9th March 1899. That income or any part of it she could, while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by Will or otherwise.

It has been contended on behalf of the Appellants that the High Court in the decree of the 4th April 1922, in Parthasarathi Appa Rao's Letters Patent Appeal must have misconstrued cls. 5 and 6 of Venkayamma's Will as to those promissory notes in those clauses mentioned

which represented monies received by the Court of Wards before the 4th August 1895, in Narayya Appa Rao's life-time, and included them in the income of the Medur estate mentioned in the 3rd paragraph, as amended by their Lordships, of that decree. There was no misconstruction of cls. 5 and 6 of the Will. Venkayamma was, after the death of her son on the 4th August 1895, entitled to hold during her life as part of the Medur estate those promissory notes or other investments which represented monies received by the Court of Wards in respect of the Medur estate so that she might receive for her own use and as part of her income such interest as might be payable under them, but by her Will she did not bequeath these promissory notes which represented monies which had been received by the Court of Wards before the 4th August 1895, she only dealt with the promissory notes to which she was absolutely entitled as representing monies which had been received after her son's death by the Court of Wards as the Receivers. That is the only reasonable construction of her Will and the High Court in the decree of the 4th April 1922, passed in Letters Patent Appeal No. 20 of 1921, was under no misconception of Venkayamma's position or of her rights.

There remains to be considered the question of limitation. The article of the First Schedule of the Indian Limitation Act, 1908, which applies to the suit in which these consolidated appeals have arisen is Art. 123, which allows twelve years, calculated from the time "when the legacy or share becomes payable or deliverable," for bringing a suit "for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate." The question as to what the word "pay-

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able " means is not without difficulty. It has been contended on the part of the Appellants that the legacies sued for became payable at latest twelve months after the death of Venkayamma, in which case the suits would be barred by limitation. Looking at Art. 123 as one of general application to such suits, it appears to their Lordships that a similar interpretation must be given to the words "payable" and "deliverable" as used in the article, and that a share in the property of an intestate would not be "deliverable" until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and, similarly, a legacy or share in a legacy does not become "payable" until the executor or other person liable to pay it has in his hands money with which it could be paid.

In the present case no one could have had in his possession or control any fund representing the income of the Medur estate, which Venkayamma had had a right to enjoy for her own use but had not received, until it had been finally decided by the Board in 1913 that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and there was no other fund. It was suggested on behalf of the Appellants that the Plaintiffs in these suits might have brought suits for these legacies as soon as Venkayamma had died or within twelve months after her death against her heir, whoever he might then have been, and might have obtained decrees against him for the payment of the legacies when he might be in possession of assets with which the legacies might have been payable. Without expressing any opinion as to whether such a suit could or could not have been maintained against a Hindu heir who had received no property belonging to Venkay-

yamma, their Lordships may quote a passage from the judgment of the Board in *Mussamat Basso Kuar v. Lala Dhum Singh* (1), as to the effect of Art. 97 of Act XV of 1877. The passage is as follows :—

"Barumal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till after the decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not, and it would be a lamentable state of the law if it were found that a debtor, who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all."

In this case no difficulty of applying Art. 123 of the First Schedule of the Indian Limitation Act, 1908, arises when the Will of Venkayamma is considered. It was a carefully drawn Will bequeathing legacies of, in the aggregate, a large sum of money. Venkayamma had already, when she made her Will, commenced her suit which would determine whether she was entitled to any fund out of which any legacies which she might bequeath could be paid. If the adoption of Narayya Appa Rao by Rani Papamma Rao should be finally held to have been valid, Venkayamma and her advisers must have known that there was and would be no fund out of which the legacies could be paid. They could not be paid unless it should be finally decided that the adoption was invalid. She stated in her Will that she had been very ill for four months and was afraid that she would not survive, and that she had sold the major part

(1) L. R. 15 I. A. 311 (1885).

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of her jewels and other valuables and had spent the amount (obtained by the sale of them) as well as the amount of money which she had borrowed from her two brothers, mentioned in her Will, "for the expenses of the Medur estate suit and for our maintenance and other expenses," and in cl. 5 directed that "the Government promissory notes and cash relating to the Medur estate, which have been in the custody of Court till this day, as well as the interest accruing thereon till payment of the amount, shall be divided" in the manner which she directed. And in cl. 6 she directed that "Out of the Government promissory notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amounts specified hereunder shall be first expended and only out of the remaining amount, one share shall, as stated in para. 5, be paid to my elder brother and three shares to my younger brother." And then she set out as expenses to be incurred a full and complete list of the legacies to be paid. The only conclusion which on these facts their Lordships can arrive at is that the testatrix intended that the legacies should be payable and be paid after the final determination of the suit which she had brought for a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid and to establish her right to the income of the Medur estate. That litigation was not finally determined until the judgment of the Board was delivered in 1913, and these suits were instituted in 1916 and were within the time allowed by Art. 123 of the First Schedule to the Indian Limitation Act, 1908.

If any authority were necessary to show that the intention of a testatrix, when not expressly and unambiguously stated in her Will, may be inferred by a Court from

other facts stated or referred to in her Will that legacies bequeathed by the Will should not be paid until the conclusion of litigation in which she was engaged when she made her Will, it may be deduced from the judgment of Lord Justice Turner, L. J., in *Lord v. Lord* (2).

In *Roddy v. Fitzgerald* (3), Lord Wensleydale, in referring to the rules for the construction of Wills, said :

"These rules are perfectly plain and clear. The first duty of the Court expounding the Will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parole evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator."

And then Lord Wensleydale referred to other rules to be followed by Courts in construing Wills.

In *Gordon v. Gordon* (4), Lord Cairns, as to the construction of Wills, said :—

"I take the law on this subject to have been expressed with much accuracy and felicity by Lord Cranworth, than whom no Judge more consistently adhered to sound and strict principles of construction in the interpretation of Wills. In the case of *Abbott v. Middleton* (5) before this House, Lord Cranworth speaks thus: 'Where, by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from

(2) 2 Ch. App. 788 (1867).

(3) 6 H. L. C. 876 (1858).

(4) 5 L. R. E. & I. App. 284 (1871).

(5) 7 H. L. C. 68 (1855).

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merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."

The case of *Lord v. Lord* (2) was referred to by Sir W. S. Schwabe, C. J., and by Coutts-Trotter and by Kumaraswami Sastri, JJ., in their learned judgments in the Letters Patent Appeals.

It appears from the judgments of the Subordinate Judge of Bezwada of the 29th November 1917, and from the judgment of Kumaraswami Sastri, J., of the 4th April 1922, that at different dates between 1903 and 1908 Rangayya Appa Rao, Venkata Narasimha Appa Rao and Parthasarathi Appa Rao each obtained on his own application to the High Court one-third of the amount standing to the credit of suit No. 35 of 1895. They each gave some security. It also appears that after the order of His Majesty in Council of the 19th December 1913, had been made Venkatadri Appa Rao, Venkataramayya Appa Rao and Sobhanadri Appa Rao obtained from Parthasarathi Appa Rao the one-third which he had received. For the amounts received by Rangayya Appa Rao and by Venkata Narasimha Appa Rao their sons, as their heirs and legal representatives, are responsible.

The decrees of the High Court from which these consolidated appeals have been brought, having been amended as to one of them by substituting "income" for the words "mesne profits" were the right decrees to make in the appeals under the Letters Patent, and their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitor: Mr. E. Delgado for the 1st Respondent.

G. D. M.

(2) 2 Ch. App. 768 (1907).

[CIVIL APPELLATE JURISDICTION.]

Full Bench Reference

No. 1 of 1925

IN

APPEAL FROM APPELLATE DECREE

No. 586 of 1923.

WALMSLEY, J.

GHEAVES, J.

C. C. GHOSE, J.

B. B. GHOSE, J.

MUKERJI, J.

1925,

Heard,

29, June.

Judgment,

22, July.

KAILASH CH. MITRA,
Appellant,

v.

BROJENDRA K.
CHAKRAVARTI and ors.,
Respondents.

Rent, suit for—Devolution of tenant's interest upon several persons by assignment and succession—Latter, whether joint tenants or tenants in common—Liability of each for entire rent on account of privity of estate—Suit against some—Decree, effect of, as decree for money only—Defendant's right to insist on other tenants in common being made co-Defendants—Other tenants not added or added after limitation—Suit, if to be dismissed for defect of parties—Necessary parties, who are—Indian Contract Act (IV of 1872), sec. 43—Bengal Tenancy Act (VIII of 1885), Ch. XIV.

Per CURIAM (C. C. GHOSE and MUKERJI, JJ., not agreeing).—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record.

The heirs of a tenant take as tenants in common.

All persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord whether they get into possession by right of succession or assignment, under the privity of estate which exists between each one of them and the landlord in the whole of the leasehold. Either on this ground or because a contract is implied for payment of rent by all tenants in

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common in possession of a leasehold, any one of such tenants may be sued for the entire rent due to the landlord.

A decree in such a suit will not have the effect of a rent decree under Chap. XIV of the Bengal Tenancy Act.

Per MUKERJI, J.—Each one of the persons in whom a share of a leasehold may vest by assignment or inheritance has a privity of estate with the lessor in respect of the whole estate; and each of them would be liable to the lessor on the covenants running with the land and so for the whole rent.

A decree for the entire rent against some of such persons in the absence of the others is not a nullity and is valid and effective as a decree for money. But the Defendants so sued, not on contract but on account of privity of estate, may insist on all the persons jointly liable to be made parties Defendants as they are necessary parties, and if the Plaintiff does not, on being required by the Court, amend the plaint and implead as Defendants all parties who are known to be tenants of the holding, the suit would be liable to dismissal as not properly constituted. If the latter are added as parties Defendants, the suit will not necessarily fail because the Plaintiff may have lost his remedy against the added Defendants.

The suit out of which the appeal arose was for arrears of rent in respect of an intermediate tenure, Khanda Kharid Gour Sundar Singh, held under the superior Taluk Omar Daraj. Plaintiff was a four-annas co-sharer landlord and alleged separate collection. The total alleged rent was Rs. 62-4 and in the Plaintiff's 4 annas share it was stated to be Rs. 15 and odd. Rent was claimed at this rate with cesses Rs. 9 and odd per year and the claim was laid at Rs. 117-4.

On the death of Gour Sundar Singh, the original tenant, a certain share of the tenure devolved upon his heirs and the remainder had vested in a large number of transferees from him. The record-of-rights showed that 21 persons were recorded as owners thereof and the present suit was instituted against two of Gour Sundar's heirs and two out of the many different transferees.

Both the Courts below overruled the contention of the Defendant that the suit was not a properly constituted one for defect of parties and decreed the suit.

The Defendant No. 1 appealed to the High Court and the appeal was heard before a Division Bench composed of Greaves and M. N. Mukerji, JJ., who after hearing the vakils on either side made the following Reference to a Full Bench :—

The ORDER OF REFERENCE was as follows :—

GREAVES AND MUKERJI, JJ.—This appeal arises out of a suit wherein the Plaintiffs as four-annas co-sharers of a certain Taluq sought to recover arrears of rent from the Defendants who, they alleged, were holding under them as tenure-holders. The defence of the Defendants, in substance, was that they were not tenure-holders but co-proprietors of the estate and further that the suit was not maintainable as all the persons who are successors-in-interest of the original transferee Gour Sundar Singh and whose names are recorded as such in the finally published record-of-rights were not made Defendants therein.

The suit was decreed by the Court of first instance, and the said decision has been upheld by the lower Appellate Court. The Defendants have thereupon preferred this appeal, in which the validity of the decisions of the Courts below has been

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challenged upon the two grounds which formed their defence as stated above.

As regards the first of these grounds we are not prepared to accede to the Appellant's contention. This necessitates our dealing with the second ground.

So far as the second ground is concerned, on the finding of the lower Appellate Court it is clear that some of the persons on whom devolved the interest of the original transferee Gour Sundar Singh, by purchase and inheritance, have not been made parties to the suit. The question whether under such circumstances the suit is maintainable is one about which there is a clear conflict of judicial opinion in this Court, and we must necessarily dissent from one or other of the catena of decisions dealing with the point.

The authorities in favour of the view that a suit framed in this way is maintainable are the cases of *Chamat Karini Dasi v. Triguna Nath Sardar* (1), *Subashi Dassi v. Raj Krishna Roy* (2) and *Meajan Mondal v. Jogendra Nath De* (3). A contrary view has been taken in the cases of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (4), *Shaikh Sahad v. Krishna Mohan Basak* (5), *Siba Krishna Sinha v. Jagat Chandra Talukdar* (6) and *Abinash Chandra Roy v. Ful Chand Chaudhuri* (7). In the case of *Krishna Das Roy v. Kalitara Chaudhurani* (8), Chatterjea, J., expressed an opinion that the liability of all

the heirs of a contracting tenant is a joint liability, but Richardson, J., reserved his opinion on that question.

This conflict has been noticed in several cases decided in this Court, amongst which reference may be made to the decision in the case of *Mohendra Nath Bose v. Abinash Chandra Bose* (9), in which the advisability of referring the matter to the Full Bench was recognised. In the present case, the question directly arises and in our opinion it must be decided in order to dispose of the appeal.

The point upon which we must necessarily differ from the one or the other set of decisions referred to above is as to whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record.

We accordingly refer the case to the Full Bench in accordance with the provisions of r. 2, Chap. VII of the High Court Rules, Appellate Side.

Babu Upendra Kumar Roy (with *Babu Mon Mohan Banerjee*) for the Defendant-Appellant.—Sec. 43 of the Indian Contract Act relating to joint promisors did not apply to the case of heirs and transferees of one original contracting party. At the inception of the tenancy in favour of one person no question of joint or several liability arises. On the death of the original tenant his heirs and successors-in-interest in law constitute one body and they can be sued together as one individual or not at all. *Decharms v. Horwood* (23), *Ahinsa v. Abdul Kadir* (24), *Krishna Das Roy v. Kalitara* (8), *Kasi*

(1) S. A. No. 1015 of 1915, decided 18th July 1916. Unreported.

(2) 23 C. W. N. xxvii (1918).

(3) S. A. No. 318 of 1919, decided 18th July 1920, I. L. R. 48 Cal. 518; 63 I. C. 949.

(4) 15 C. W. N. 191 (1910).

(5) 24 C. L. J. 371 (1916).

(6) S. A. No. 1279 of 1916, decided 4th April 1916; 45 I. C. 732.

(7) I. L. R. 50 Cal. 737 (1923).

(8) 22 C. W. N. 289 (1917).

(9) 22 C. W. N. 299 at p. 293 (1917).

(9) 27 C. W. N. 521 (1923).

(23) 10 Bing. 526 at p. 539.

(24) I. L. R. 25 Mad. 26 at p. 85 (1901).

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Kinkar v. Satyendra (4) and *Abinash v. Ful Chand* (7).

Sec. 2 of the Contract Act defines "proposal" which when accepted becomes a "promise." Sec. 43 speaks of a joint promise. The heirs and transferees who come in by succession or on the strength of valid transfers cannot be supposed to have made any contract as is contemplated by the section. [See *Sib Krishna v. Jagat* (6), *Shaikh Sahad v. Krishna* (5) and *Satyabhusan v. Manmotha* (25).]

The covenant to pay rent runs with the land and unless the heirs and transferees enter into a fresh contract, either express or implied, they continue to be governed by the original contract. As there is no fresh attornment individually the liability remains one for which they are responsible in a body.

[B. B. GHOSE, J.—Is that necessary? They become tenants in common by privity of estate and being in possession must be presumed to have made a joint promise to pay.]

No doubt the class of cases which maintain that sec. 43 applies to the heirs have relied chiefly on the 'factum' of actual possession, *Lalit v. Haran* (26), *Subashi v. Raj Krishna* (2) and *Meajan v. Jogen-dra* (3).

But so long as the tenancy continues and there is no surrender or relinquishment the question of possession becomes immaterial for they would be liable for the rent all the same even if not in actual

possession. See *Boali Bibi v. Hamij-uddi Mondal* (22) and *Peary Mohan v. Kumaris Chandra* (27).

There ought to be some distinction between squatters who become tenants at the option of landlords and the heirs who come into possession of a pre-existing tenancy with all its incidents and liabilities, a case of "inherited contract," as described in *Shaikh Sahad v. Krishna Mohan Basak* (5).

Assuming that sec. 43 does apply to the heirs and successors-in-interest the liability is joint and cannot be joint and several—"joint" not in the sense in which it is understood under the common law of England with its distinguishing feature of survivorship but as giving rise to a joint cause of action which is exhausted when a suit has been brought against any one of the joint promisors. Second suit against the others, the previous decree remaining unsatisfied, is barred.

This principle which was laid down in the cases of *King v. Hoare* (28) and *Kendall v. Hamilton* (13) was recognised in India by the High Courts of Calcutta, Madras and Bombay but not by the High Court of Allahabad. See *Hemendra v. Rajendra* (29), *Gurusami Chetti v. Samurti* (30), *Lukmidas v. Purshotam* (31) and *Muhammad Askari v. Radhe Ram* (32).

Sec. 43 does not convert a joint liability into a joint and several liability. In *Krishna Das Roy v. Kalitara Chau-*

(2) 23 C. W. N. xxvii (1918).

(3) S. A. No. 318 of 1919, decided 18th July 1920; I. L. R. 48 Cal. 518; 63 I. C. 949.

(4) 15 C. W. N. 191 at p. 195 (1910).

(5) 24 C. L. J. 371 (1918).

(6) S. A. No. 1379 of 1916, decided 4th April 1918; 45 I. C. 782.

(7) 1, L. R. 50 Cal. 737 (1923).

(25) 37 Ind. Cas. 318 (1915).

(26) 36 Ind. Cas. 949 (1916).

(5) 24 C. L. J. 371 (1918).

(13) L. R. 4 App. Cas. 504 (1879).

(22) 12 C. L. J. 267 (1910).

(27) I. L. R. 19 Cal. 790 (1922).

(28) 18 Meeson & Welsbey 494 (1844).

(29) I. L. R. 3 Cal. 353 (1878).

(30) I. L. R. 5 Mad. 37 (1882).

(31) I. L. R. 6 Bom. 700 (1882).

(32) I. L. R. 22 All. 807 (1900).

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dhurani (8) the observations of Richardson, J., pointing out the distinction between a joint, and a joint and several, liability appear to have been based on the idea of joint liability as understood in England which except in Mitakshara families is unknown in India and apparently ignores sec. 42 of the Indian Contract Act which speaks of the joint liability of the heirs of one joint promisor with the surviving promisor. Whether a liability is joint or joint and several is a question of construction, Halsbury's Laws of England, Vol. VII, Art. 694. And in case of joint and several liability each of the joint promisors must at the same time make the same promise to the promisee, *ibid*, Art. 693. These are the principles applicable in construing express contracts, and in cases of implied contracts the matter is more difficult. Separate considerations must move from the parties separately and individually. See Addison on Contracts, 11th Edition, p. 318. *Satyabhusan v. Manmotha* (25).

In the case of heirs and successors-in-interest there is no room for any such implication unless and until a fresh tenancy is created in their favour on a determination of the old lease. Two or more original contracting parties stand on an altogether different footing and the liability in such cases may be joint and several. See, e.g., *Mohendra Nath Bose v. Abinash Chandra Bose* (9), where a suit against all the heirs of one of the original tenants was held to be a properly constituted suit.

The cases of this Court which have held that sec. 43 is applicable to heirs, etc., have proceeded mainly upon (i) the observations of Jenkins, C. J., in *Chamat-*

kari Dasi v. Triguna Nath Sardar (33), where without explaining the matter, his Lordship says that the liability of the heirs is contractual, and (ii) upon the question of possession.

It will appear that the said observations in *Chamatkari Dasi v. Triguna Nath Sardar* (33) are mere *obiter*, the suit being one in which the effect of a decree against some of the heirs was considered. *Lalit v. Haran* (26) relies upon *Chamatkari Dasi v. Triguna Nath Sardar* (33) and the fact of possession. *Subashi Dassi v. Raj Krishna Roy* (2) gives no detailed reasons. *Meajan Mondal v. Jogendra Nath De* (3) simply follows the earlier decisions and there were special grounds which could support the decision, *viz.*, a previous decree. As submitted above the question of possession is rather immaterial. Nor is the question of rent falling due in the time of the original tenant or in the time of the heirs is of much importance as rent is a first charge on the tenure and nobody who wants to remain in possession can escape the liability to pay the same.

In cases where the landlord sues only the recorded tenant the question of representation is of material importance and if the co-tenants have allowed one of them to represent them in the office of the landlord they must take the consequences of their own act and cannot afterwards be heard to complain. In cases of tenures the landlord gets notice of all transfers on deposit of landlord's fees and in the present case the record-of-rights finally published in the presence of the landlords conclusively proves

(8) 22 C. W. N. 299 at p. 295 (1917).

(9) 27 C. W. N. 521 (1923).

(25) 27 Ind. Cas. 318 (1915).

(2) 23 C. W. N. xiv (1918).

(3) S. A. No. 316 of 1919, decided 18th July 1920, I. L. R. 48 Cal. 518, 65 I. C. 940.

(26) 36 Ind. Cas. 243 (1919).

(33) 17 C. W. N. 395 (1915).

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landlords' knowledge. No case of hardship and inconvenience can be made out for landlords, they can easily obtain information if they choose to do so as to who are the heirs even in case of holdings not to speak of tenures. Landlord here deliberately omitted to join the rest and hence this present suit is fit to be dismissed.

Babu Prokas' Chandra Pakrashi for the Plaintiffs-Respondents.—The heirs of the deceased tenant inheriting from their predecessor by exercising possession and by other conduct must be presumed to have contracted impliedly on the same terms as those of the deceased on the principle of privity of estate. They are in possession as tenants in common by virtue of the existing contract and intention of the parties is to be gathered from possession and their conduct. They are not trespassers. They became jointly and severally liable. To apply one test—the landlord cannot partially evict on breach of any condition by any of the individual joint tenants. Refers to *Krishna Das Roy v. Kalitara Chaudhurani* (8) and *Meajan Mondal v. Jogendra Nath De* (3).

Landlord is bound to sue the registered tenant and not to hunt for them all over the world. *Khetter Mohan Pal v. Prankrista Kaviraj* (17). It was the duty of the heirs to notify their succession. Secs. 15 and 16, Bengal Tenancy Act.

Babu Upendra Kumar Roy in reply.—Record of right in this case was prepared in the presence of the landlord and the question of secs. 15 and 16 does not arise.

[B. B. GHOSE, J.—Does that exonerate the heirs from statutory liability to notify their succession?]

(3) S. A. No. 318 of 1919, decided 18th July 1920; I. L. B. 48 Cal. 518; 63 I. C. 949.

(8) 22 C. W. N. 259 at p. 295 (1917).

(17) 3 C. W. N. 371 (1899).

Some of the heirs are on the record and there is nothing to show that they do not represent the other brothers.

As to the rest, the landlord had statutory notice at the time of each transfer on deposit of landlord's fees.

Babu Ramendra Mohan Majumdar appeared for Defendant No. 2, Respondent, whose interests were identical with the Appellant's.

THE JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—I agree in the view expressed by my learned brother Mr. Justice B. B. Ghose in the judgment which he is going to deliver.

GREAVES, J.—I also agree in the view expressed in that judgment.

C. C. GHOSE, J.—The question that has been referred to the Full Bench is as to whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. In my view, the answer to the question ought to be in the negative. It will serve no useful purpose to discuss the conflicting authorities on the point. It is sufficient for me to observe that I adhere to the view which I expressed in the case of *Abinash Chandra Roy v. Ful Chand Chaudhuri* (7). I have heard nothing during the course of the argument to induce me to depart from the opinion expressed by me in the above case. In my opinion, the suit as framed should be dismissed and the appeal preferred by the Defendants allowed.

B. B. GHOSE, J.—The facts of the case which led to this reference shortly stated are these: The Plaintiff is entitled to 4 as. share of a Taluq under which there is a tenure which formerly belonged

(7) I. L. B. 50 Cal. 737 (1923).

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to one Gour Sundar Singh and which by successive devolutions and assignments has come into the possession of about twenty persons. The Plaintiff has sued for his share of the rent of the tenure for the years 1324 to 1327 B. S., five persons some of whom have acquired their interest by succession and others under assignments from some of the heirs of Gour Sundar. All these persons were in possession during the period in suit along with others who have not been made parties. The only plea which now requires consideration is that the suit is not maintainable as the other tenants have not been made parties. The trial Court passed a decree for money personally against the Defendants and held that the tenure would not be bound by the decree, and on appeal that decree was affirmed by the Subordinate Judge. One of the Defendants preferred a second appeal to this Court. There are two lines of cases in this Court taking contrary views, which has made it necessary for a reference to the Full Bench of the question "whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record."

It would scarcely serve any useful purpose to examine the various conflicting authorities. The question should be decided on well-recognised general principles. It is argued that the tenancy as well as the liability for payment of rent has been inherited by the representatives of the deceased tenant as one body and this body as a whole is liable for the rent on the contract of their predecessor. If the landlord omits to implead anyone of them in his suit for rent, the suit is defective and must be dismissed for not having been brought against the body of

representatives as a whole. This argument seems to me to be grounded on a 'misconception. The heirs did not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They took as tenants in common, each having a definite share in the whole, which he might deal with in any way he pleased. As a matter of fact, as already stated, some of the heirs of the original tenant had assigned their interest to third persons. The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant where there is no express contract, and all persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they got into possession by right of succession or assignment. A tenant in common is entitled to possession of every part of the estate and there is privity of estate between him and the landlord in the whole of the leasehold. The law imposes a liability on a tenant in common based on privity of estate for all covenants running with the land, and as his estate is an estate in the whole of the leasehold, there is no reason why he should not be liable for the entire rent. This view is supported by what is stated in Leake on Contracts, 7th Edn., at p. 931, that each tenant in common being possessed of the whole may be sued separately upon covenants running with the land. Thus whether a contract is implied for payment of rent by all tenants in common in possession of a leasehold, or whether it is held that the law imposes the liability for payment of rent by reason of privity of estate, anyone of such tenants may be sued for the entire rent due to the landlord. This may be either in accordance with the provisions of sec.

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43 of the Indian Contract Act which applies to express as well as implied promises, or under the general law based on privity of estate,

It is hardly necessary to add that a decree in such a suit will not have the effect of a decree for rent under Chap. XIV of the Bengal Tenancy Act.

On the grounds stated above I would answer the question in the affirmative, with the result that the appeal should be dismissed.

MUKERJI, J.—The authorities bearing upon the point involved in this reference have all been noticed and their precise effect accurately summarised in the judgment of my learned brother (Chatterjea, J., in the case of *Mohendra Nath Bose v. Abinash Chandra Bose* (9) and it is unnecessary to discuss them as the question has to be answered upon broad and general principles.

The question is whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. To answer this question, the matter has to be considered from two distinct points of view: *Firstly*, from the point of view of the Defendants' liability, and *secondly* from the point of view of the frame of the suit.

As regards the first of these matters, we start with the position that in view of sec. 88 of the Bengal Tenancy Act, it must be conceded that when a person obtains a share of a tenure either by assignment or by inheritance he becomes a co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned he cannot be deemed to hold any estate in severalty. Each one of the

persons on whom a share of the estate may vest by assignment or inheritance becomes a tenant in common in the whole of the estate by reason of the indivisibility of the estate without the landlord's consent. Each one of such co-tenants has a privity of estate with the lessor in respect of the whole estate. The proposition is thus enunciated in *Poa on Landlord and Tenant*, Sixth Edition, p. 469: "Where, however, the share of the demised premises is not held by the assignee in severalty—as where they become vested in joint tenants or tenants in common, the case is different because he, with others, holds the whole estate, and privity in respect of it exists accordingly between him and the lessor." From this it would seem to follow that each of the joint tenants or tenants in common would be liable to the lessor on the covenants running with the land, and so for the whole rent. The contrary view was contended for in the case of *United Dairies, Ltd. v. Public Trustee* (10). In that case Greer, J., observed as follows:—"The present case was argued before me on the assumption that in English law, whatever may be the case in Ireland, a tenant in common is not liable for the whole rent, but only for a proportionate rent; but I do not think this question appears to be definitely concluded by any of the decisions in the English Courts." The learned Judge exhaustively dealt with the authorities bearing upon the point and explaining the decision in the case of *Merceron v. Dawson* (11) which apparently contains *dicta* to the contrary effect, further observed as follows:—"It seems to me, on the authorities, that it has never been conclusively established that an assignee holding with other tenants under the

(10) [1923] 1 K. B. 471.

(11) 5 B. & C. 478 (1826).

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terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased : and I see no valid reason why tenants in common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants in common has the privity of estate with the landlord in the whole of the land leased." The reasoning of the learned Judge seems to be unassailable and I agree in his conclusions. I am accordingly of opinion that each one of the Defendants in the present suit is liable for the entire rent and there can be no objection to the maintainability of the suit on that ground. I am further of opinion that except in the case of original lessces or persons who were parties to the contract, the provisions of sec. 43 of the Indian Contract Act have no application and need not be resorted to.

Turning now to the other question, namely, whether the suit is maintainable by reason of defect of parties, the point is as to whether all the persons who are under a joint liability are necessary parties to a suit based upon such liability. Here again we start with the following propositions : If lands are let out to two or more tenants their liability to pay the rent is joint and several, except where it is made joint and not several by express agreement ; the liability of assignees of the original tenant or tenants may be a joint liability *inter se* as amongst the assignees, or it may be a joint and several liability if there is an agreement to that effect. The liability of the persons upon whom the rights of the original tenant or tenants devolve on the death of the latter is a joint liability to the extent of the interest which devolves and not a joint and several liability in respect of that interest,

as the whole body of persons who succeed in this way constitute in law but one heir.

Sec. 43 of the Indian Contract Act expressly refers to " promisor " and " promisee." As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several. Or. 1, r. 6, C. P. C., provides that the Plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract including parties to bills of exchange, hundis and promissory notes. Cases of joint liability, or of joint and several liability which do not come within sec. 43 of the Contract Act or Or. 1, r. 6 must be treated as cases for which no exception has been made in this country to the general rule which obtains in English common law and which is in consonance with justice, equity and good conscience. In the words of Lord Redesdale : " All persons materially interested in the subject ought generally to be parties to the suit, Plaintiffs or Defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented." This general rule embraces two classes of parties as Defendants, that is to say, those who are indispensable and necessary parties without whom no decree at all can be rendered, and those who are proper parties whose presence makes the adjudication more complete and effectual. Under the English law where the liability is a joint and several one the Plaintiff will not be compelled to add all the persons so liable as Defendants, *Chalmers v. Guthrie* (12),

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but where an action has been commenced against one or some only of several joint contractors the Defendant or Defendants can apply to have the other joint contractor or contractors added and the proceedings stayed until this is done, *Kendall v. Hamilton* (13). The effect of the latest decisions seems to be that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie*, right to have his co-debtors joined; *Wilson, Balcarres Brook Steamship Co.* (14) and *Robinson v. Geisel* (15). There is, in my opinion, no reason why this general right should be denied in this country to a person under a joint liability where the liability arises not under a contract to which Or. 1, r. 6 is confined and where the persons are neither severally nor jointly and severally but are only jointly liable.

In a case where the liability of the Defendants arises not on contract, but on account of privity of estate, the Defendant may insist on all the persons jointly liable, to be made party Defendants. All such persons, in my opinion, are not merely proper, but also necessary parties. If objection is taken to the maintainability of the suit in their absence, the Court has to follow the provisions of Or. 1, r. 10 (2) of the Civil Procedure Code. In England it has been the essence of the procedure since the Judicature Acts to take care that a suit shall not be defeated by the non-joinder of the right parties. The same rule has been embodied in Or. 1, rr. 9 and 10, C. P. C. These two rules correspond to Or. 16, r. 11 of the Rules of the Supreme Court, 1883, with regard to which the following is what has been said in Chitty and Marks' Yearly Practice of the Supreme Court, 1925 :—" This

Rule has not altered the legal principles with regard to the parties to actions or the right of a Defendant to insist on the necessary parties before the Court. It has however altered the procedure and substituted an application to add the parties improperly omitted or to strike out the parties improperly joined or to stay the proceeding until the necessary parties are added. The Court has now, however, a discretionary power to refuse the order; but in the exercise of this discretion it is guided by the same principles as were applicable to the old plea in abatement."

In my judgment persons who are under a joint liability to pay the rent, are necessary parties in a suit for rent. They are so from more points of view than one. They are necessary for determining whether the liability which is *prima facie* joint is also joint and several; for protecting the Defendant from being made to pay what may have already been paid by others; for safe-guarding against the eventuality of his being defeated in a suit for contribution, as the co-tenant against whom a suit for contribution is brought will not be bound by the result of the earlier suit; for preventing conflicting decisions as to the character and incidents of the same tenancy being arrived at in different suits; and for various other reasons. That a lessor is bound to implead in his suit all the lessees or assignees from the lessees who are known to him is a principle recognised from the earliest times. Bayley, J., in the case of *Merceron v. Dawson* (11) observed thus : " It may be conceded to the Defendant that when the Plaintiff is informed of the persons in whom the whole interest is vested they must be sued jointly." This principle has been seldom

(13) L. R. 4 A. C. 504 (1879).

(14) [1883] 1 Q. B. 422.

(15) [1894] 2 Q. B. 685.

(11) 5 B. & C. 478 (1826).

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dissented from in this country, and there is no reason that I can think of why it should have been departed from. I do not suggest that a decree obtained in the absence of some of the co-tenants is necessarily a nullity; it is a valid decree and is effective only as a decree for money. But, if objection is taken at the right moment as to the maintainability of the suit, I am clearly of opinion that it should be held that the suit is not properly constituted. In *Rup Narain Singh v. Jugoo Singh* (16), it was ruled that a suit for rent from several raiyats on account of a holding which has been let out to them, cannot be brought against one of them, but must embrace all of them as Defendants. This decision was passed before the Indian Contract Act was enacted. Sec. 43 of the Act and the provisions of the Civil Procedure Code relating to parties to an action have abrogated this rule in some measure only. In *Khetter Mohan Pal v. Prankrista Kaviraj* (17), it was assumed as well-settled that upon the death of the original tenant the landlord would be bound to sue so many at any rate of the heirs as had notified their names to him. The same principle appears to have been recognised almost consistently in this Court, and the following cases will show the current of judicial opinion on the point, *Ananda Kumar Naskar v. Haridas Haldar* (18), *Sreemati Jogemaya Dasi v. Girindra Nath Mukerji* (19), *Rammoyi Dasi v. Rupai Pramanick* (20), *Abdul Rouf v. Eggar* (21), *Boaki Bibi v. Hamijuddi Mondal* (22) and

(16) 10 W. R. 304 (1868).

(17) 3 C. W. N. 371 (1899).

(18) I. L. R. 27 Cal. 545 at p. 549; 5 C. W. N. 608 (1900).

(19) 4 C. W. N. 590 at p. 592 (1900).

(20) 13 C. L. J. 267 at p. 269 (1905).

(21) I. L. R. 35 Cal. 182 at p. 184 (1907).

(22) 12 C. L. J. 267 (1910).

Kasi Kinkar Sen v. Satyendra Nath Bhadra (4). I am aware that the rule has been departed from in recent years in some instances, but only on rare occasions and under exceptional circumstances. To depart from this rule gives rise to serious anomalies. To take the case of a permanent tenure, as an instance, it would make nugatory the provisions of sec. 17 of the Bengal Tenancy Act and deprive the transferee of a share of his right to recognition which he is entitled to under the law.

It follows from what I have said above that in my opinion the suit as framed was not maintainable without impleading as Defendants all the parties who are known to be the tenants of the holding. The Plaintiff cannot take shelter under the plea of ignorance as to who the persons are: their names are entered in the finally published record-of-rights. The suit however cannot be dismissed on that ground. The Court must proceed under Or. 1, r. 10 (2), C. P. C., to make an order for the addition of such of these persons as are not already on the record as Defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. On such amendment being made the suit should be tried out in accordance with law, it being noted that the suit will not fail merely because the Plaintiff may have lost his remedy against the added Defendants.

In any judgment, therefore, the decree passed by the Courts below should be set aside, and the suit remanded to the Court of first instance to be dealt with as indicated above, and all costs hitherto incurred including the costs of this Reference should abide the result.

In accordance with the judgment of

(4) 15 C. W. N. 191 (1910).

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the majority the appeal is dismissed with costs before the Divisional Bench but without any order as to costs in respect of this Reference.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 353 OF 1925.

<p>SUHRWARDY, J. PANTON, J. 1925, 10, July.</p>	}	<p>E. J. JUDAH and ors., Petitioners, v. THE KING-EMPEROR, Opposite Party.</p>
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Indian Penal Code (Act XLV of 1860), secs. 23, 24, 378, ill. (1), 380—Theft from a building—Elements necessary to constitute offence—Necessity of proof that removal was with the intention of causing wrongful gain to one or wrongful loss to another—Kettle given for repairs to artisan forcibly removed by owner after time stipulated for finishing repairs—Offence, if committed by such act—Contract Act (IX of 1872), secs 55, 170—Time, when essence of the contract—Reasonable time—Repairer's lien, when repair done in part

One of the accused gave a kettle for repairs to the complainant who promised to finish the repairs within six or seven days. Some days after the stipulated time the accused who gave the kettle to the complainant went to his shop accompanied by two others and demanded return of the kettle which the complainant refused to part with unless he was paid for the repairs already done. The accused refused to pay the amount, took away the kettle from the almirah of the complainant and walked out with it. All the three were convicted under sec. 380, I. P. C.:

Held—That in order to sustain a conviction under sec. 380 it was necessary to prove that the accused took away the kettle from the possession of the complainant with the intention of causing wrongful gain to himself or wrongful loss to the complainant.

That on the facts and circumstances the conviction under sec. 380 could not stand.

The repairs had been partly done and the kettle as so repaired was useless, so that the complainant had no lien over the kettle under sec. 170 of the Contract Act. The kettle moreover was not repaired within the time stipulated, and even if time was not of the essence of the contract, the accused had not acted dishonestly in demanding and taking back the article after the lapse of reasonable time.

This was a Rule granted on the 11th May 1925 against the order of the Chief Presidency Magistrate of Calcutta (Mr. T. Roxburgh), dated the 27th April 1925.

The facts of the case will appear from the judgment.

Mr. Pugh (Counsel) and Babu Promode Kumar Ghose for the Petitioners.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

SUHRWARDY, J.—The three accused in this case have been convicted under sec. 380, I. P. C., and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 75 each or in default to one month's rigorous imprisonment. The case for the prosecution is that the accused No. 1 gave a kettle for repairs to the complainant who has an electric repair-shop at 7/1, Middleton Street, 11 or 12 days before the occurrence (as stated by the complainant) or on the 28th March as stated by the accused in the petition filed in this Court. The complainant promised to finish the repairs within 6 or 7 days. On the 18th April the accused went to the shop and

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demand return of the kettle. The complainant refused to part with it as the repairs were not complete and ultimately agreed to return it to the accused if he was paid Rs. 5 for the repairs already done. I may mention here that the amount fixed for the repair of the kettle was Rs. 6. The accused refused to pay the amount, took away the kettle from the almirah and walked out with it. He was accompanied by the other accused and all of them were tried and found guilty as stated above. In order to sustain a conviction under sec. 380, I. P. C., it must be found that the accused dishonestly took the property out of the possession of the complainant, and "dishonestly" has been defined as meaning "with intent to cause wrongful gain to one person and wrongful loss to another person." It is necessary therefore to prove in this case, all the other facts being admitted, that the accused took away the article from the possession of the complainant with the intention of causing wrongful gain to himself or wrongful loss to the complainant. The matter stands thus: The complainant took the article for repairs on promise to finish them within 6 or 7 days. Not having done the work within the time stipulated, the accused went to his shop and took, admitting for argument's sake, forcible possession of the article. Did he, in these circumstances, commit the offence of theft? My answer to the question is in the negative. It is argued on behalf of the prosecution that the complainant had a lien on the kettle and the accused having removed it from his possession has committed an offence as defined in sec. 378, I. P. C., and illustrated in illustration (j) to that section. The learned trial Magistrate also relied upon illustration (j) to find dishonest intention

of the accused. Illustration (j) runs thus:—"If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of his possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly." Apparently the framers of the Code had in their mind the provisions of the law of contract as embodied in sec. 170 of the present Contract Act, which creates a lien in favour of the bailee over goods on which he has spent labour or skill and for which he is entitled to remuneration. The learned Deputy Legal Remembrancer in support of the conviction argues that the complainant had a lien of Rs. 5 on the kettle for the amount of work done. This raises the intricate question of civil law relating to "*quantum meruit*." In the first place, who has to determine that the complainant is entitled to Rs. 5? In the second place, as has been held in the case of *Skinner v. Jager* (1), where a certain sum is fixed for the repair of an article and there is nothing to indicate that the repairer would be entitled to receive remuneration for a part of the repair, he has no right to retain the article until he receives his remuneration for the amount of work done. There is no evidence in this case that there was any agreement or understanding, implied or express, between the parties, that if the kettle is repaired even in such a way as to be useless (the complainant admits it is useless in its present state), the complainant will be entitled to remuneration for the amount of work done. I am of opinion that complainant had no lien over the kettle and sec. 170, Contract Act, does not apply.

(1) L. L. B. 6 All. 189 (1885).

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We have been referred to the case of *Queen-Empress v. Gangaram Santram* (2), and upon the authority of that case it is argued that in order to constitute theft it is enough if the property is removed from the possession of a person who has an apparent title or colour of a right to it. On the facts of that case, though scantily reported in the report, the decision may be justifiable. But on the plain reading of the section of the Indian Penal Code, I think it must be clearly established that the accused did not commit the act with the intention as defined in sec. 24, I. P. C. It will be preposterous to lay down as a general rule of law that a person who is entrusted to repair a certain article is entitled to claim lien or to refuse to part with it after doing a certain amount of work which makes no improvement thereupon and the owner is not entitled to recover it from him without paying for such work as has been done. If I give a piece of cloth to a tailor to make a coat and he sends only a sleeve but does not do the rest of the work within the time stipulated or within a reasonable time, I have no right, according to the view urged on behalf of the Crown, to take back the cloth until I have paid for the work done. In the present case the complainant failed to perform his part of the contract, namely, to do the work within 6 or 7 days and the accused was justified in asking for a return of the article if the work was not done within a reasonable time. The learned Deputy Legal Remembrancer refers to certain sections of the Contract Act which deal with certain circumstances where time is of the essence of the contract. In a case where time is not of the essence of the contract, it must be performed within a reasonable time. In simple every day

(2) I. L. E. 9 Bom. 135 (1894).

transaction like the present it is not inconsistent with law to look to the common sense side of the matter. Kettle is an article of every day use. A man may require to have this household article repaired with as little delay as possible. According to the accused, it was retained by the complainant for 20 days and according to the complainant for 11 or 12 days. Conceding that the accused acted improperly in demanding and taking back the article, they have not certainly acted dishonestly. Their intention was not to cause wrongful loss to complainant or wrongful gain to themselves but to recover their thing after lapse of reasonable time. In my opinion the conviction cannot stand. I hold that the conviction of the Petitioners under sec. 380 is bad in law. I must express, however, my strong disapproval of the conduct attributed to the Petitioners—conduct unworthy of gentlemen which they claim to be. The conviction of the Petitioners and the sentences passed upon them are set aside. The fines, if paid, will be refunded.

PANTON, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SUMNER.

LORD BLANESBURGH.*

SIR JOHN ELGE.

MR. AMEER ALI.

LORD SALVESEN.

1925,

Heard, 23, January,

28 and 30, April.

Judgment,

22, May.

SURA LAKSHMIAH
CHETTY and ors.,
Appellants,KOTANTARAMA
PILLAI, Respondent.

Benami—Presumption of advancement—Purchase of property in name of wife—Case that purchase made to effectuate ante-nuptial agreement—Pr of

SURA LAKSHMIAH CHETTY v. KOTHANDARAMA PILLAI.

by oral evidence—Contemporaneous written evidence to corroborate same.

A purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by the husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.

GOPEEKRIST v. GUNGAPERSAUD (1), UZHUR ALI v. ULTAH FATIMA (2) and BILAS KUNWAR v. DESRAJ RANJIT SINGH (3) referred to.

Semble:—An ante-nuptial agreement may be orally proved in an Indian case but generally when it is disputed it would be unsafe to decide in its favour upon oral evidence alone unless there is contemporaneous written evidence to corroborate the oral evidence.

This was an appeal (No. 8 of 1924) from a decree, dated the 15th August 1922, of the High Court at Madras, which reversed a decree, dated the 31st August 1921, of the same Court in its Original Jurisdiction.

The suit was brought by the Respondent, a minor son of Chockalingam, a Hindu inhabitant of Madras, and he claimed by his next friend to be entitled to two houses in Madras. Chockalingam carried on a mercantile business in Madras with his grandfather and on the death of the latter he took under his protection his partner's family including a daughter Lakshmi whom later he

married. Lakshmi died in giving birth to the Plaintiff. The houses in dispute were purchased by Chockalingam in May 1909 in the name of his wife Lakshmi and the question for determination was whether they were the property of Chockalingam, and as such, assets in the hands of his trustee in bankruptcy or whether they were in fact the property of Lakshmi and as such devolved on the Plaintiff as her heir on her death. Evidence was adduced that the purchase money was provided by Chockalingam and there was also evidence that the houses in dispute were purchased for the purpose of being settled on Lakshmi at her marriage. The trial Judge negatived the idea of a marriage settlement and held that the conveyance was taken *benami* in the name of Lakshmi, and was of opinion that the present suit was an attempt to save some property for the family on Chockalingam's insolvency. He accordingly dismissed the suit.

On appeal the learned Judges (Schwabe, C. J. and Wallace, J.) were of opinion that the onus of proving that the conveyance to Lakshmi was not the absolute transfer which it purported to be rested on the Appellants, and that no particular motive for a *benami* document had been made out. The appeal was originally argued *ex parte*, but later the Respondent obtained leave to enter appearance and be heard.

Messrs. DeGruyther, K. C. and Dubé for the Appellants.—The question at issue is whether or not the purchase by Chockalingam was *benami* and for that purpose the first consideration is from where did the purchase money come.

See Mayne's Hindu Law, para. 441.

The case made in the High Court was that this was a portion of the property settled by Chockalingam on his marriage,

(1) 6 M. I. A. 53 (1854).

(2) 13 M. I. A. 232 (1869).

(3) L. R. 42 I. A. 202; S. C. I. L. R. 37 All. 557; 19 C. W. N. 1207 (1915).

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so that, admittedly Chockalingam, being settlor, was the person who provided the money. That is also borne out by the evidence. Once, the origin of the purchase money is proved the burden of proving ownership is on the person in whose name the property stands.

The exception by way of advancement in favour of wife or child does not apply in India.

Dhurm Dass Pandey v. Mt. Shama Soondri Dibiah (5), *Gopeekrist v. Gungapersaud* (1), *Uzhu Ali v. Ultaf Fatima* (2), *Ram Narain v. Muhammad Hadi* (4), *Bilas Kunwar v. Desraj Ranjit Singh* (3) and *Kerwick v. Kerwick* (6).

At the conclusion of the above argument their Lordships intimated that they would take time to consider the advice that they would tender to His Majesty.

On 6th March 1925, *Mr. Narasimham* applied for leave to enter appearance and be heard on behalf of the Respondent. Leave was granted and the appeal was re-heard on 28th and 30th April 1925.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellants.

Mr. K. V. L. Narasimham for the Respondent contended that the transaction was not *benami* but was a *bonâ fide* settlement of property by Chockalingam on his future wife and title to it passed to her. There was no motive at the time of the transaction for making a *benami* purchase, and it has not been proved that the purchase money came from Chockalingam.

Their Lordships' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 15th August 1922, of the High Court of Madras, which reversed a decree, dated the 31st August 1921, of the same Court made in its Ordinary Original Civil Jurisdiction, which had dismissed the suit.

The suit in which this appeal has arisen was brought in the High Court of Madras on the 19th November 1918, by the Plaintiff, a minor, by his next friend, against the Official Assignee of Madras and three money-lenders. One of the money-lenders died, and his legal representative was brought on the record as a Defendant. The Plaintiff is the Respondent in this appeal.

The Plaintiff is the son of V. S. Chockalingam Pillai, a Hindu of the Villala caste, by his wife, Lakshmi Ammal, who died before the suit was brought. The Plaintiff is the sole heir of his late mother, and he claims the property to which the suit relates as her heir. On the 30th September 1918, the Plaintiff's father, Chockalingam, was adjudged insolvent by the High Court of Madras under the Presidency-Towns Insolvency Act, 1909, Act III of 1909. The Plaintiff claims in his suit, with other reliefs, a declaration that a piece of land with a dwelling-house and buildings thereon, being Nos. 4 and 5, Nainiappa Naick Street, are his exclusive property as the heir of his mother, and that his father, Chockalingam, had no beneficial or other interest in those properties, which could have vested in the Official Assignee or have been assigned by him in mortgage. 4 and 5, Nainiappa Naick Street will, in this judgment, be referred to as the property in question.

The land and buildings then thereon

(1) 6 M. I. A. 53, 72 (1854).

(2) 13 M. I. A. 237, 244 (1869).

(3) L. R. 42 I. A. 202, 204: s. c. I. L. R. 37 All 557 19 C. W. N. 1207 (1915).

(4) L. R. 26 I. A. 38: s. c. 3 C. W. N. 113 (1898).

(5) 3 M. I. A. 229, 240 (1843).

(6) L. R. 47 I. A. 275: s. c. I. L. R. 48 Cal. 260 (1920).

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were purchased by Chockalingam on the 12th May 1909, and by the sale-deed were conveyed by the vendors to Lakshmi, who had been married to Chockalingam some years previously. The question upon the answer to which this suit depends is whether Chockalingam had purchased that property in 1909 for his wife Lakshmi in performance of an ante-nuptial agreement alleged to have been made by him to settle a house upon her, or whether the purchase was made in her name as *benamidar* for Chockalingam. There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. See *Gopeckrist v. Gungapersaud* (1); *Uzhur Ali v. Ulfat Fatima* (2) and *Bilas Kunwar v. Desraj Ranjit Singh* (3). If the Plaintiff failed to prove that ante-nuptial agreement and that it was in performance of it that the property in question was purchased by Chockalingam in Lakshmi's name, his suit fails.

Chockalingam has not been called by either side to give evidence in the suit, and his absence from the witness-box has not been satisfactorily explained.

The facts, so far as they can be ascertained by their Lordships from the record, are as follows:—Chockalingam and Vinayatheertha Pillai, who died in 1898

or in 1899, were trading as pea merchants in partnership at 6, Mint Street, in Madras. When that partnership commenced their Lordships do not know. It does not appear what the interest of the partners respectively was in the house, 6, Mint Street, or in the partnership. But 6, Mint Street was the property of the partnership. Vinayatheertha left surviving him two young children, a son Vadivelu, who was living when the witnesses were giving their evidence in the suit, and a daughter Lakshmi, and his mother Kathayee, who gave evidence in this suit. After Vinayatheertha died his mother Kathayee carried on the family business in partnership with Chockalingam at 6, Mint Street, and Kathayee and the two young children of Vinayatheertha continued to live in that house together with Chockalingam. Chockalingam married Lakshmi, according to the plaint in or about 1907, or, according to the evidence of witnesses who were relations of Lakshmi, in 1909. At the time of the marriage Chockalingam had two wives living, one of whom was living with him, and he also had a son living. According to the evidence of Kathayee and two relations of Lakshmi, if it may be credited, when Chockalingam asked for Lakshmi in marriage, Kathayee, acting on the advice of relations, said to him that she would give him Lakshmi in marriage if he would make a provision for her, but not otherwise, and asked him what provision he would make for Lakshmi, and he said that, if the Mint Street house were sold, another house might be purchased and be given to Lakshmi. Thereupon she, Kathayee, gave Lakshmi to Chockalingam in marriage. That was the ante-nuptial agreement which is alleged by the Plaintiff to have been made. A railway company

(1) 6 M. I. A. 53 (1854).

(2) 13 M. I. A. 232 (1869).

(3) L. R. 42 I. A. 202; a. c. I. L. R. 37 All. 567; 19 C. W. N. 1207 (1915).

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was negotiating for the purchase of the Mint Street house, and purchased it for the price of Rs. 10,315-8 from Chockalingam and Kathayee, and paid the price to them. It is to be presumed that the money then paid by the railway company to Kathayee was, or part of it was, received by her for and on behalf of her grandson Vadivelu, who does not appear to have had any other person to look after his interests.

In 1904 Chockalingam had purchased, apparently with his own money, houses 12 and 13, Memorial Hall Street, in Madras, and he, in 1909, mortgaged those houses for Rs. 9,000, and their Lordships consider it probable that Chockalingam, on the 12th May 1909, had other property apart from his interest in the pea dealing partnership and in the Mint Street house, and there is no reason shown why all the purchase money of the property in question was not Chockalingam's own money. Certainly none of it is shown to have been Lakshmi's.

Mr. Justice Phillips, who tried the suit, did not believe the evidence that there had been an ante-nuptial agreement, and he found that the purchase of the property in question on the 12th May 1909, in the name of Lakshmi, was a *benami* transaction and that she was merely *benamidar* for her husband Chockalingam. Mr. Justice Phillips in his judgment made a statement with which their Lordships agree. He said :—

"We do not know what really happened to Vinayatheertha's property when he died or what share he had in the business or whether really he did leave any property which was undisposed of at the date of Lakshmi's marriage. There is no evidence about these facts on either side though the Plaintiff's family ought to know all that can be known about this."

It will be remembered that Vinayatheertha had died in 1898 or in 1899, and the property in question was purchased in

May 1909. Mr. Justice Phillips rightly found as to the money which was invested in the purchase of the property in question that if the purchase money did not belong to Chockalingam it did not belong to Lakshmi, but belonged to her brother Vadivelu. Mr. Justice Phillips by his decree dismissed the suit. From that decree the Plaintiff appealed under the Letters Patent.

The appeal under the Letters Patent was heard by Sir W. S. Schwabe, C. J., and Mr. Justice Wallace. The Chief Justice stated in his judgment :—

"that the question to be decided is whether a purchase of property by one Chockalinga, an insolvent, in the name of his wife, Lakshmi, was a settlement on her on her marriage or was a *benami* transaction, she being *benamidar* for him. The evidence called was all one way, namely, that the property was purchased out of funds belonging 6/11 (six-elevenths) to Chockalinga and 5/11 (five-elevenths) to Lakshmi's infant brother Vadivelu, as the heir to his father, formerly a partner of Chockalinga."

If there was such evidence as to the respective shares of Chockalingam and Vadivelu, the attention of their Lordships has not been drawn to it, and if there had been such evidence it would not show that Lakshmi had acquired a beneficial title to the property. Vadivelu was a minor on the 12th May 1909, and could not make a present of his property to his sister, Lakshmi. Mr. Justice Wallace agreed with the judgment of the Chief Justice.

They accepted the evidence that the alleged ante-nuptial agreement had been made and gave the Plaintiff the decree which he claimed. From their decree this appeal has been brought.

It would, no doubt, have been prudent on the part of Kathayee and Lakshmi's relations to have insisted before Lakshmi was given in marriage to Chockalingam, who was an old man with two wives and a son living, that he should agree to settle

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some property on her. It is obvious to their Lordships that Lakshmi had no property of her own. She was not the heir to any property and could have had no expectations of succeeding to any property. Possibly, Chockalingam may have been asked to promise to make a settlement on Lakshmi, but the question is: Did he agree to do so? It appears to their Lordships that most probably the story of this alleged agreement to make a settlement was first thought of after Chockalingam's insolvency in order to save for the Plaintiff some part of the property of the insolvent. The property in question was purchased in May 1909, and Lakshmi lived until 1912 and if Chockalingam had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her.

In their Lordships' opinion it would be unwise to accept as proved such an oral agreement as is alleged on the part of the Plaintiff except on the clearest and most satisfactory evidence of credible witnesses, and after giving the most careful consideration to the evidence in this suit their Lordships agree with Mr. Justice Phillips and find that Chockalingam did not agree to make any settlement upon Lakshmi and that she had no beneficial interest in the property in question and was a mere *benamidar* for Chockalingam.

If it were necessary in this case to ascertain by evidence whether her position was that of a beneficial owner of the property in question and not that of a mere *benamidar* for Chockalingam, the transaction which will now be referred to would be material evidence. See *Ram Narain v. Muhammad Hadi* (4)

(4) L. R. 26 I. A. 39; s. c. 3 C. W. N. 113 (1898).

and the cases already cited. The property in question was purchased on the 12th May 1909. On the 25th July 1909, Chockalingam and Lakshmi jointly gave what was apparently treated as an equitable mortgage to S. Krishna-swami Ayyangar of the property which had been purchased on the 12th May 1909, in her name, which they stated was "in our possession and enjoyment." On the 30th March 1910, Chockalingam and Lakshmi jointly granted a lease of the property in question to Sirakalai Pillai. On the 4th December 1912, Lakshmi died. On the 18th March 1914, Chockalingam on his representation that he "is in possession of and is entitled to" the property in question obtained in the Registration Department the Collector's certificate. On the 21st February 1918, Chockalingam mortgaged the property in question to C. Vythialingam Pillai and in the deed of mortgage it was stated that he had purchased the property in question out of his own self-acquired earnings and was absolutely entitled to it. As to these transactions by Chockalingam after the 12th May 1909, it is only fair to the Plaintiff to bear in mind that his mother was, until she died, under the influence of her husband Chockalingam, and seems to have had no independent advice, and that the Plaintiff was a minor of tender years without anyone, except his great-grandmother, an aged woman, to protect the interest, if any, which he may have had. But those transactions show how Chockalingam dealt with the property in question.

Their Lordships do not decide that an ante-nuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nup-

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tial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence. In this case there was no such evidence.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs and the decree appealed against should be set aside with costs and the decree of Mr. Justice Phillips be restored.

Solicitor : Mr. John Josselyn for the Appellants.

Solicitor : Mr. H. S. L. Polak for the Respondent.

G. D. M.

[INSOLVENCY JURISDICTION.]

CASE No. 51 OF 1922.

BUCKLAND, J.
1925,
21, July.

In the matter of
KANHYA LAL SEWBUX :
Exp.—RAM GOPAL
PODDAR.

Presidency Towns Insolvency Act (III of 1909), Sch II, r. 11—Original Side Insolvency Rules, r. 128—Admission of a debt in the composition deed, if sufficient proof.

The mere fact that a sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof of the debt required by r. 128 of the Insolvency Rules.

The facts of the case will appear from the judgment.

Mr. K. P. Khaitan for the Petitioner Ram Gopal Poddar.

Mr. S. N. Banerjee (Sr.) for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—This is an application made on behalf of Ram Gopal Poddar, one of the creditors of the insolvent, Kanhya Lal Sewbux, for an order that the trustee

under the composition may be directed to pay him Rs. 19,159-6-0. On the 17th December 1923 an order was made approving the terms of composition annexed to the order, under which Babu Shedmull Dalmia of 69, Cotton Street, a creditor to the extent of Rs. 47,216 was appointed to be the trustee. The terms of composition recite two mortgages, one in favour of Shedmull Dalmia amounting to Rs. 35,000, and the other in favour of the applicant for Rs. 15,000, and it says that these sums shall be paid first of all as soon as sufficient funds come into the hands of the trustee.

It is alleged that the trustee has paid away considerable sums to unsecured creditors out of the assets, of which at present Rs. 20,000 are still in his hands. The trustee admits a certain amount of assets and that he has paid sums to unsecured creditors, but says that he has paid them out of his own pocket.

It is objected that the applicant's mortgage which is dated 7th March 1922 has not been proved, and that until that has been done he is not entitled to be paid. This is based upon r. 128 of the Insolvency Rules of this Court, which provides that "every person claiming to be a creditor under any composition or scheme, who has not proved his debt before the approval of such composition or scheme, shall lodge his proof with the trustee thereunder, if any, or, if there is no such trustee, with the Official Assignee who shall admit or reject the same." The rule concludes that no creditor shall be entitled to enforce payment under a composition unless he has proved his debt and proof has been admitted. I have also been referred to the second schedule, r. 11, of the Insolvency Act, which says :—"If a secured creditor does not either realize or sur-

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render his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

The point is not altogether easy of determination, because the order approving the composition is made under the Act after it has been submitted by the Official Assignee to the creditors, and in the presence of the insolvent. In such circumstances, it may reasonably be argued that proof is not necessary, and that the order is admitted.

On the other hand, there is no provision either in the Act or in the rule contemplating any such position. The mere fact that the sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof. This appears from the latter part of r. 128.

Having regard to the terms of the Act and the terms of the rule, although possibly it may be superfluous, it seems to me that it is the duty of the secured creditor to lodge his proof which should be done with the trustee, now that the composition has been approved and there is a trustee.

It is not necessary at this stage to anticipate what may follow hereafter. It has been said that the object of insisting on proof is to obtain the benefit of the security for the unsecured creditors. That may be so. All I have to determine at present is whether or not before the money can be paid out the debt has to be proved, and in my opinion it should. I decide no more than that and as matters stand the applicant cannot obtain the

order and I dismiss the application with costs.

Mr. P. D. Himatsingka, Solicitor for Ram Gopal Poddar.

Messrs. Khaitan & Co., Solicitors for the Opposite Party.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 61 of 1923.

WALMSLEY, J.

MUKERJI, J.

1925,

Heard, 18 and

19, June.

Judgment,

6, July.

KANAI LAL GHOSH and
ors., Defendants,
Appellants,

v.

BAJANTA BEHARI SEN,
Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 11, 12 — Dairpatni lease—Stipulation in kabuliya hypothecating other properties to secure payment of rent and performance of obligations of lease—Stipulation, if ceases to be operative upon transfer of lease — Effect of transfer on liability to pay rent, etc., and on personal covenants—Stipulation, if offends against rule of perpetuities.

When the transfer of a permanent tenure is complete under sec. 12 of the Bengal Tenancy Act, then, if the vendor's liability is one consequent on the privity of estate, that liability ceases.

KRISTO BALLAV GHOSE v. KRISTO LALL SINGH (2) and GIRISH CHUNDER GUHA v. KHAGENDRA NATH CHATTERJEE (3) referred to.

The same principle having been applied to the original lessee, the liability of the lessee for the rent ceases upon such transfer.

HEMENDRA NATH MUKERJI v. KUMAR NATH ROY (4) referred to.

But the fact that the original lessee

(2) I. L. R. 16 Cal. 647 (1889).

(3) 16 C. W. N. 64 (1911).

(4) 12 C. W. N. 478 (1908).

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ceases to be tenant upon such transfer does not absolve him from his personal covenants.

RUPOHAND GHOSE v. NARENDRA KRISHNA GHOSE (5) referred to.

Where the lessee by his kabuliyat hypothecated certain other properties to secure the due payment for all time of the rent reserved and the performance of the other obligations arising thereunder, and there was nothing in the kabuliyat to indicate that the security would be extinguished on the lessee's liability to pay the rent ceasing with the transfer of the lease:

Held—That security created by the kabuliyat upon the hypothecated properties was not extinguished in consequence of the transfer and the acceptance of rent by the lessor from the transferee.

BIJOY CHAND MOHATAB v. SARAT CHANDRA ADHYA (8) distinguished.

That such a security is not repugnant to the rule of perpetuities and can be validly created.

This was an appeal preferred on the 24th November 1923 against a decree of the Subordinate Judge of Zillah Hughly (Babu Kumudini Kanta Ray), dated the 10th August 1922, reversing a decree of the Munsif of Chinsura (Moulvie Sayidur Rahaman), dated the 26th May 1921.

The predecessor of Defendant No. 1 had granted a *darpatni* lease of a 4 as share in three villages to Plaintiff's brothers Khetro Mohan Sen and Bipin Bihari Sen and the terms of the lease were embodied in a *kabuliyat* executed by the latter, the material provisions whereof were as follows:—

"We shall without objection provide the rent instalment by instalment, failing

therein you will be entitled to recover the arrears, according to the law which is in force, or will be in force, from the said *darpatni mehal* and from the properties hypothecated as specified in Sch. (*kha*) or from our other moveable and immoveable properties in our own name or *benami*, to that we or any of our heirs or representatives shall have no objection at any time whatsoever If you suffer any damage by our acts then you will be entitled to recover same from whatever moveable or immoveable properties we or our heirs or representatives shall have in our name or *benami* and from the properties hypothecated and specified in Sch. (*kha*) and to that we or they shall not be entitled to raise any objection. . . If this *darpatni mehal* be sold for arrears of rent due to us or in execution or is transferred in any other way, our representatives shall be bound by all the terms of this *kabuliyat*.

Being in possession as *darpatni talukdar* and maintaining intact the boundaries and regularly paying the rent, we with our sons, grandsons and heirs and representatives shall in great felicity enjoy and possess the *darpatni* interest with powers of gift and sale. . . . In case we do anything injurious to you, we and our heirs and representatives shall be bound to compensate you therefor and to secure the said damages and the performance of all the stipulations of this *kabuliyat* we give as security the properties in Sch. (*kha*) below owned and possessed by us. . . ."

The properties of sch. (*kha*) of the *kabuliyat* were 7 mouzahs belonging to three brothers. Though the *kabuliyat* had been taken by Khetro Mohan Sen and Bipin Bihari Sen, the lease appears to have been taken for the benefit of all three brothers. On a partition between

(5) 19 C. W. N. 112 (1914).

(8) 29 C. L. J. 476 (1919).

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the brothers, the seven hypothecated mouzahs fell to Plaintiff's share. The Plaintiff and his co-sharers had previously transferred the *darpatni* interest in the three villages to Defendant No. 2 by a conveyance wherein it was *inter alia* stipulated that the vendee should furnish substituted security for the performance of the covenants of the *darpatni kabuliyat*. The Plaintiff recovered a decree against the Defendant No. 2 for specific performance of this stipulation but the security which Defendant No. 2 was prepared to furnish in pursuance of the decree was not accepted by Defendant No. 1. The Plaintiff thereupon instituted the present suit for a declaration that in consequence of the transfer by him of the *darpatni* lease to Defendant No. 2, his liabilities under the lease had ceased and that as a consequence thereof the hypothecated properties stood released from the charge imposed upon them by the *kabuliyat* for the due performance of the terms and covenants of the lease. The trial Court dismissed the suit, but on appeal by the Plaintiff, the lower Appellate Court decreed it mainly upon the authority of *Bijoy Chand Mohatab v. Sarat Chandra Adhya* (8), holding that "the permanent tenure having passed out of the hands of the Plaintiff and his co-sharers, their liability to pay rent ceased. The mortgage or charge on the 7 villages mentioned in the schedule to the plaint which was given as security for the rent was thereupon extinguished."

The Defendant No. 1 having in the meanwhile died, the Appellants as his successors-in-interest preferred this second appeal.

Babu Nagendra Nath Ghose for the Appellants submitted that the liabilities

of the original lessee under the lease do not cease with the assignment of the lease. The assignee becomes primarily liable for the rent and on the covenants running with the lease owing to *privity of estate*. The lessor remains liable in respect of these as surety and directly for the performance of the other covenants. See 18 Halsbury, 592. The assignee ceases to be liable the moment he transfers his interest—his liability depending on *privity of estate* and not on *privity of contract* which is the foundation of the lessee's liability. The law is and should be the same here. *Kristo Ballav Ghose v. Kristo Lall Singh* (2) makes no departure from that law, since it expressly absolves persons who were liable only by reason of *privity of estate*—"mesne tenants," as we might call them for shortness. See *Rupchand Ghose v. Narendra Krishna Ghose* (5). Liability of the lessor under the contract of lease remains. The Privy Council decision in *Surpati Roy v. Ram Narayan Mukerji* (9) really does not carry matters any further. No question arose in that case as to the liability under the original contract of lease and the *darpatnidars* in question in the case were apparently "mesne tenants." *Bijoy Chand Mohatab v. Sarat Chandra Adhya* (8) turned upon the language of the lease in that case which seemed to contemplate the continuance of the hypothecation only so long as the original lessees remained liable for the rent, and no longer.

Further, the lessees gave the 7 villages as security for the performance of the

(2) I. L. R. 16 Cal. 642 (1889).

(5) 19 C. W. N. 112 (1914).

(8) 29 C. L. J. 476 (1918).

(9) I. L. R. 50 Cal. 680; s. c. 28 C. W. N. 517 (P. C.) (1923).

(8) 29 C. L. J. 476 (1918).

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covenants of the lease into whosoever hands the leasehold property came, the lessee, his assigns and successors, for all time. The security given for such a purpose cannot possibly be extinguished by simple transfer.

Babu Panchanon Ghose for the Respondent submitted that *Bijoy Chand Mohatab v. Sarat Chandra Adhya* (8) was on all fours with the present case. It did not proceed specially on the terms of the lease in that case. It lays down a proposition of general application. Besides the terms of the lease in this case are very similar to those in *Bijoy Chand Mohatab v. Sarat Chandra Adhya* (8). The cases on sec. 12 of the Bengal Tenancy Act make a distinct departure from English law. Permanent tenancy is unknown in English law. That may well be the reason why the cases have laid down broadly that upon transfer by the lessee of a permanent tenancy his liability for rent ceases. *Hemendra Nath Mukerji v. Kumar Nath Roy* (4) shows that there is cessation of liability even in the case of the original lessee and this case was approved by the Privy Council in *Surpati Roy v. Ram Narayan Mukerji* (9). Even under English law the lessee ceases to be liable for the rent after the lessor has accepted the assignee as tenant, whether expressly or impliedly, *e.g.*, by acceptance of rent; 18 Halsbury, p. 588, note (e). Moreover a mortgage which sought to secure damages to be caused by heirs, transferees or successors for all times would be void for remoteness. Mookerjee on Perpetuities, pp. 131 to 133.

Babu Nagendra Nath Ghose in reply.—The terms of the lease in question in

Hemendra Nath Mukerji v. Kumar Nath Roy (4) created no personal obligation. The rent was expressly made recoverable out of the leasehold land. Just as there may be a mortgage without personal liability (conditional mortgage) so there may be a lease without personal liability. What personal liability arose in such a case arose from privity of estate. That is why the only question which was argued in that case was whether or not the release by some of the original lessees in favour of another was effective as a transfer so as to rid the releasors of their liability upon the privity of estate. The note (e) to p. 588 of 18 Halsbury says that the lessor ceases to be liable *in debt*. This is no more and no less than saying that he ceases to be primarily liable but becomes, so to speak, a surety for the assignee who becomes the debtor. The rule of remoteness does not apply to a mortgage to secure performance of obligations presently created. It applies only to attempts to create contingent or future interests which may not vest within the permissible duration.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—The facts necessary to be stated for the purposes of this appeal are these: In 1309, the Plaintiff and his co-sharer obtained a *darpatni* settlement of 4 as. share of three villages from the predecessors of Defendant No. 1 and executed a *kabuliyat* in their favour hypothecating the said 4 as. share of the 3 villages as well as 7 other mouzahs as security for the payment of the *darpatni* rent and for the performance of obligations and discharge of liabilities incidental to the *darpatni*. In 1312 they sold the said *darpatni* to the Defendant No. 2;

(4) 12 C. W. N. 478 (1908).

(8) 29 C. L. J. 476 (1918).

(9) I. L. R. 50 Cal. 680; s. c. 28 C. W. N. 517 (P. C.) (1923).

(4) 12 C. W. N. 478 (1908).

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and the Defendant No. 1 recognized the transfer and accepted rent from the Defendant No. 2. In the *kobala* by which the *darpatni* was sold there was a stipulation that the Defendant No. 2 would furnish security to the Defendant No. 1 or to the Plaintiff and his co-sharer in order to replace the security given by the Plaintiff and his co-sharer. On the Defendant No. 2 failing to furnish the said security the Plaintiff, to whom the 7 mouzahs in suit were subsequently allotted on partition between him and his co-sharer, instituted a suit against the Defendant No. 2 making the Defendant No. 1 *pro formâ* Defendant, for specific performance, and obtained a deposit of security in cash; but the Defendant No. 1 did not accept the said security. The Plaintiff then instituted the present suit praying for a declaration that the said 7 mouzahs were no longer subject to any charge.

The Munsif dismissed the suit, but the Subordinate Judge on appeal reversed that decision and granted the Plaintiff a decree declaring that the charge no longer subsisted. From that decree the present appeal has been preferred by the heirs of the Defendant No. 1.

The Appellants' contention, which was the defence to the action, is that the liability of the lessee to the lessor continued notwithstanding the transfer, as based on the privity of contract between the parties; that the lessor had also a remedy against the transferee for rent and on the covenants running with the land, the transferee was under a liability based on privity of estate; that although the lessor has his remedy as against the transferee who is to be treated as primarily liable, the original lessee remains in the position of a surety and he cannot get rid of his liability merely by transfer.

It is contended further that even if the liability to pay the rent be held to cease in consequence of the transfer the security remains in force and the charge is not extinguished.

The Respondent urges that the lessee ceases to be liable for the rent as soon as the transfer is complete, and in any event if the lessor has accepted the transferee, whether expressly or impliedly, *e.g.*, by acceptance of rent; that there having been acceptance of rent in the present case the original lessee's liability for rent has altogether ceased; and that to hold under such circumstances that the security still remains in force would be to offend against the rule against perpetuities.

Now, there is no dispute that the *darpatni* is a permanent tenure governed by the provisions of the Bengal Tenancy Act, *Mahammed Abbas Mandal v. Broja Sundari Debya* (1). Under sec. 11 of the Bengal Tenancy Act, it is capable of being transferred in the same manner and to the same extent as other immovable property. Sec. 12 provides a limit as to the mode in which the transfer is to be made. As soon as the document by which the transfer is made is registered—and the registration is not to take place until a condition precedent mentioned in sec. 12 is fulfilled—the transfer is complete. When the estate is transferred and the vendor ceases to have any estate, then if the vendor's liability is a liability consequent on privity of estate, that liability ceases. *Kristo Ballav Ghose v. Kristo Lall Singh* (2) and *Girish Chunder Guha v. Khagendra Nath Chatterjee* (3). The same principle has been held to apply in the case of trans-

(1) I. L. R. 18 Cal. 360 (1891).

(2) I. L. R. 16 Cal. 642 (1889).

(3) 16 C. W. N. 64 (1911).

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fer by the original lessee, *Hemendra Nath Mukerji v. Kumar Nath Roy* (4). It is clear therefore that after the transfer the Plaintiff was no longer liable for the rent, and the Defendant No. 1 was thenceforward to look to the Defendant No. 2 for the same.

The next question is as to whether, when the liability for payment of the rent ceased, the security continued and the charge remained in force. The Appellants' contention is that it did, and that though as a consequence of the transfer the transferee became by operation of law the tenant of the tenure and the transferor ceased to be a tenant, the transferor was not necessarily absolved from the liability which was created by the contract. In support of this contention reliance has been placed upon a passage in the judgment of the Court in the case of *Rupchand Ghose v. Narendra Krishna Ghose* (5). The passage indicates that the fact that by transfer the transferor ceases to be a tenant does not imply that he is absolved from liability under the terms of the contract between him and the lessor, and that it is conceivable that a person may cease to be a tenant and yet continue liable to the landlord under his personal covenant.

The Respondent urges that if it is held that the security remains in force in spite of the transfer, it would mean that the lessor would be competent to impose a restriction on transfer of a permanent tenure which is transferable by law and that in that case the security might continue for ever and thus offend against the rule against perpetuities.

As regards the first of these objections, in my opinion, it is not well-founded on principle. In the case of *Dinabandhu*

Roy v. W. C. Bonnerjee (6), it was held by this Court that a transfer of a tenure made in terms of the provisions of the Bengal Tenancy Act is not binding on the landlord, if there is a contract between the landlord and the tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished, and if such security has not been given; and that in such a case the original tenant is still liable for the rent. Permanent leases no doubt are transferable under sec. 11 of the Bengal Tenancy Act; but a provision in a lease of a permanent tenure for forfeiture or re-entry in case of assignment in violation of its terms would not be invalid. In *Keshab Lal Nay Majumdar v. Harasit Ch. Ghose* (7), it was held by this Court that the provisions of sec. 10 of the Transfer of Property Act saving conditions restraining alienation in leases where the conditions are for the benefit of the lessor, are not inconsistent with the provisions of sec. 11 of the Bengal Tenancy Act, and that the two provisions of the two Acts are not inconsistent or repugnant to each other but are capable of standing together. It follows therefore that the lessor is competent to insist on a stipulation that he would not be bound by the transfer unless the transferee keeps the security in force. The whole question then resolves itself into one as to whether such an intention or its contrary may be gathered from the *kabuliyat*. The learned Subordinate Judge has proceeded upon the decision in the case of *Bijoy Chand Mohatab v. Sarat Chandra Adhya* (8), which he treats as an authority for the proposition that

(6) I. L. R. 19 Cal. 774 (1892).

(7) 12 C. L. J. 126 (1910).

(8) 29 C. L. J. 476 (1918).

(4) 12 C. W. N. 478 (1908).

(5) 19 C. W. N. 112 at p. 114 (1914).

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the liability to pay the rent having ceased, the charge created for payment of rent is automatically extinguished. The decision in that case, however, rested upon the terms of the *kabuliyat* on which the case was based and not upon any such general principle. The *kabuliyat* in that case provided that so long as the lessees were not released from the liability to pay the rent, the lessees shall not be able to transfer in any manner the property mortgaged as security for the rent. It was held in the case that on the transfer being completed the lessees' liability to pay the rent ceased and therefore the security was at an end.

The relevant passages in the *kabuliyat* in the present case are the following—
 "... We shall without objection provide the rent instalment by instalment. If we fail therein you will be entitled to recover the arrears, according to the law which is in force, or which will be in force, from the said *darpatni mehal* and from the properties hypothecated as specified in Sch. (*kha*) or from our other moveable and immoveable properties which stand in our names or *benami*. To that neither we nor our heirs or representatives shall have any objection at any time whatsoever If you suffer any damage by our acts then you will be entitled to recover the same from whatever moveable or immoveable properties we or our heirs or representatives shall have in our own name or *benami* and from the properties hypothecated and specified in Sch. (*kha*) and to that neither we nor they shall be entitled to raise any objection If this *darpatni mehal* be sold for arrears of rent due by us or in execution or is transferred in any other way, our representatives shall be bound by all the terms of this *kabu-*

liyat Being in possession as *darpatni talukdar* and maintaining intact the boundaries and regularly paying the rent, with our sons, grandsons, heirs and representatives shall in great felicity enjoy and possess the *darpatni* interest with powers of gift and sale In case we do anything injurious to you we and our heirs and representatives shall be bound to compensate you therefor, and in order to secure the said damages and for the performance of all the stipulations of this *kabuliyat* we give as security the properties in Sch. (*kha*) below owned and possessed by us"

These conditions created a charge on the 7 mouzals for all times to come for the due payment of the *darpatni* rent and the performance of the other obligations arising under the *kabuliyat*, and there is nothing in the *kabuliyat* which may go to indicate that the security would be extinguished on the lessees' liability to pay the rent ceasing with the transfer. That this was the intention of the parties is also suggested by the term in the *kobala* by which the Plaintiff and his co-sharer transferred the *darpatni* to the Defendant No. 2 by which the latter was required to furnish security to the Plaintiff and his co-sharer or to the Defendant No. 1 in order to replace the original security. This intention is also evidenced by the fact of the institution of the suit for specific performance, the result of which however is not binding on the Defendant No. 1.

As regards the contention that a security of this description which is to last for all times to come is repugnant to the rule against perpetuities, I am not prepared to regard the contention as well-founded. This rule affects only the creation of a future interest in property and the restricting of transfer of property

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by tying it up. The rule has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money. The creation of this charge was a part of the consideration for the *darpatni* lease, and I am unable to see how it could be extinguished merely because the lessee chose to transfer his interest under the lease. The position therefore is this: The liability to pay the rent subsists so long as the relationship of landlord and tenant exists. This relationship as between a landlord and his lessee, the permanent tenureholder, ceases on the latter transferring the whole of his tenure. The lease may create further rights and liabilities as between the parties thereto and where it does, they do not cease automatically on the termination of the relationship.

For these reasons I am of opinion that Plaintiff by merely transferring the *darpatni* to the Defendant No. 2 could not get rid of the charge created by him under the *kabuliyat*, and that the mere acceptance of rent by the Defendant No. 1 from the Defendant No. 2 has not extinguished the same. The Plaintiff, in my opinion, is not entitled to the declaration sought for by him.

The decree of the learned Subordinate Judge should be set aside and that of the learned Munsif restored and the Plaintiff's suit dismissed with costs in all the Courts.

WALMSLEY, J.—I agree.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 569 of 1921.

WALMSLEY, J.

SUHRAWARDY, J.

1923,

Heard, 14, May.

Judgment,

22, May.

O. S. MEAH,

Defendant, Appellant,

v.

DURGA CHURN DUTTA

and ors., Plaintiffs,

Respondents.

Application for setting aside auction sale held under Act XI of 1859 on the ground that there were no arrears—Onus of proof, on whom lies—Civil Procedure Code (Act V of 1908), Or. 47, r. 7—Review of judgment, appeal from—Parties, if can re-open in Appellate Court questions dealt with in the reviewing judgment though the review was limited to one question only.

The Plaintiffs applied for setting aside an auction sale held under the provisions of Act XI of 1859 on the ground that the Collector had no authority to sell the estate as there were no arrears, and further that the processes were not duly served and there were other acts of fraud. The trial Court decreed the suit on the ground that there were no arrears. On review, the trial Court held that there were arrears of revenue but he upheld the Plaintiffs' allegations of fraud. On appeal by the Defendant purchaser, the Appellate Court held that the review was limited to the one question whether there were arrears of revenue and the Defendant purchaser was to have proved it, and that he could not deal with the questions of fraud, etc.:

Held—That the onus was on the Plaintiffs to prove that there were no arrears of revenue to justify the sale.

Held further—That the Plaintiffs were protected by r. 7 of Or. 47, C. P. Code, and whether the order granting review was limited in its scope or not, it remained open to the Plaintiffs after the second judgment of the first Court to re-open in

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the Court of Appeal the questions of fraud and suppression of processes.

This was an appeal preferred on the 10th February 1921 against a decree of the District Judge of Zillah Chittagong (Mr. W. A. Seaton), dated the 20th September 1920, affirming a decree of the Subordinate Judge of that District (Babu Kumudini Kanto Ray), dated the 24th July 1919.

The facts material to this report will appear from the judgment.

Babus Ram Chandra Majumdar and Chandra Sekhar Sen for the Appellant.

Babus Jogesh Chandra Ray and Narendra Coomar Das for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is preferred by the first Defendant, the purchaser at an auction sale held under the provisions of Act XI of 1859.

The estate sold was a residuary share bearing Touzi No. 2017 of the Chittagong Collectorate. The Plaintiffs alleged that there were no arrears due from the estate and, granted that there were arrears, that the processes required by the Act were not duly served.

The first Court decreed the suit in February 1918 on the ground that there was no arrear of revenue on account of which the sale could be held. The purchaser then preferred an application for review of judgment, and this was allowed on April 1918. Both sides adduced additional evidence, and then the learned Subordinate Judge held that there were arrears for which the estate could be sold, but that there was collusion between the Appellant and one of Plaintiffs' co-sharers, and consequently he directed the Appellant to reconvey the property to the Plaintiffs.

Then the Defendant purchaser preferred an appeal and on his behalf it was urged before the Appellate Court that the order allowing a review of judgment was limited to the question whether as a fact there were arrears of revenue on account of which the estate could be sold. The learned Judge accepted this argument and confined his attention to that question. He then dealt with the evidence about the *kists* and about the entries in the Touzi Department's ledgers, and he agreed with the view taken in the second judgment of the first Court that the *Pous kist*, if unpaid, became "arrears" within the meaning of sec. 2 of the Act and that if such arrears remained unpaid on February 1923, the latest date for payments as fixed under sec. 3, there could be a valid sale; but he held that it was for the auction-purchaser to prove that there were arrears, and that he had produced no evidence to that effect. Consequently he dismissed the appeal.

It will be convenient to deal first with the main ground on which the purchaser attacks the Judge's decision. It is this,* that the learned Judge was wrong in laying upon the purchaser the burden of proving that there were arrears of revenue, instead of requiring the Plaintiffs to prove that there were no arrears. It is conceded for the Respondents that the authorities quoted by the Judge do not bear out his view, but the learned pleader for the Respondents says that the view is correct. Among other things he said it was a matter within the special knowledge of the purchaser. That argument appears unsound; if anybody has special knowledge it must be the late owners. The question, however, does not turn upon special knowledge, but on the ordinary rule that a Plaintiff must make out a case. If the Plaintiffs want

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the Court to hold that the Collector had no authority to put the machinery of Att XI into force after 25th February, they must make out a *prima facie* case to that effect, and they must do so by showing that actually there were no arrears unpaid on 25th February. If that were the only question it might be possible for us to treat the statements made in the plaint as admissions that arrears were left outstanding. Another aspect of the case, however, has been put before us. The result of the review has been that the other arguments advanced by the Plaintiffs have never been considered by the Appellate Court. Their case was that there had been fraud in the matter of service of processes, and fraud in the failure of their co-sharers, acting in connivance with the purchaser, to deposit money given to them by the Plaintiffs for deposit in the Collector's office. The learned Judge held that he could not deal with these questions, because the order granting review of judgment was confined to the question whether there were arrears, and he took this view, although the Judge of the first Court had again dealt with all questions.

This is very unsatisfactory. The Plaintiffs appealed to the District Judge against the order granting review of judgment, but it was held that no appeal lay. It is said that they appealed to this Court but whether it was an appeal or an application under sec. 115, Code of Civil Procedure, they were unsuccessful. Does it follow that the Plaintiffs are unable to put before the Appellate Court the argument that the first Court was wrong in holding that notices were duly served, and that the Defendant was not a party to any fraud? It appears to me that the Plaintiffs are protected by r. 7 of Or. 47, and that whether the order

granting review of judgment was limited in its scope or not, it remained open to the Plaintiffs after the second judgment of the first Court to re-open in the Court of appeal the questions of fraud and suppression of processes.

It is very desirable, now that the litigation has lasted so long, that all the matters in controversy should be threshed out.

The order that I think we should make is this: The judgment and decree of the lower Appellate Court are set aside, and the appeal will be re-heard: the purchaser will be the Appellant as he has been throughout: the question whether there were arrears outstanding on 25th February will be dealt with on the footing that the burden of proof lies on the Plaintiffs to prove that there were no arrears: the Respondents will be entitled to support the decree passed in their favour by the first Court by showing that the processes were not properly served, or that on account of fraud or irregularity the sale cannot be allowed to stand.

The costs of this hearing will abide the result.

SUHRAWARDY, J.—I agree.

J. N. R.

Appeal allowed:

Appeal remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 172 of 1923.

GREAVES, J. MUKERJI, J. 1925, 30, April.	}	RAMESHWAR MARWARI, Plaintiff, Appellant, v. UPENDRANATH DAS SARKAR, Defendant, Respondent.
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Contract Act (IX of 1872), sec 23—Agreement to stifle criminal prosecution—Elements necessary to be proved to vitiate contract—Bond executed in consideration of non-compoundable criminal case

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being withdrawn—Contract Act (IX of 1872), secs. 15 and 16 Coercion, what is—Undue influence, if necessarily to be inferred from the relation of creditor and debtor.

Where in a suit for the recovery of money due on a bond the defence was the bond was not executed by the Defendant out of his own free will but was extorted from him by the pressure of a criminal case of criminal breach of trust which was withdrawn in consideration of the execution of the bond:

Held—That in order to show that the object of the agreement was to stifle the criminal prosecution it was necessary to prove that there was an agreement between the parties, express or implied, the consideration for which was to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what was to be done in the particular case and that the contracting parties should enter into a bargain to that effect.

That for the defence to prevail it was necessary to show that there was really a criminal case in respect of a non-compoundable offence pending at the time when the agreement was entered into and that one of the objects for which the agreement was entered into was to stifle the prosecution in that case.

That so long as there was no agreement not to prosecute, there was nothing to prevent a creditor from taking a security for payment of his debt, even if the debtor was induced to give the security by a threat of criminal proceedings.

That the finding that the Defendant was threatened by the Plaintiff's brother that the criminal case would not be withdrawn if the bond was not executed was not sufficient to bring the case within sec. 15 of the Contract Act which defines coercion.

That as regards undue influence the relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter.

This was an appeal preferred on the 13th July 1923 against the decree of the Subordinate Judge, 2nd Court of Zillah Hughly (Babu Atul Chandra Banerji), dated the 12th May 1923.

The facts of the case will appear from the judgment.

Babus Baranashibashi Mukerjee and Gopendra Krishna Banerjee for the Appellant.

Mr. Amarendra Nath Bose and Babu Hiralal Chakravarty (for Babu Suresh Chandra Mukherjee) for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—This appeal arises out of a suit instituted by the Plaintiff for recovery of a sum of Rs. 7,662-8 annas due on an instalment bond executed by the Defendant on the 13th May 1899 in favour of the Plaintiff and his deceased brother Ram Kumar Marwari. The suit has been dismissed by the learned Subordinate Judge and the Plaintiff has, thereupon, preferred this appeal. The execution of the bond was not denied by the Defendant in his written statement but several objections were taken by him as to why the Plaintiff should not be granted a decree on the bond. Apart from the objections of a formal nature; the first objection was that the bond was not executed by the Defendant out of his free will; the second objection was that the sum of Rs. 18,051 that was mentioned in the bond as being the amount for which the Defendant had been found liable on adjustment of accounts was not

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really due to the Plaintiff as the accounts had not been properly adjusted; and the third objection was that the bond had been executed by the Defendant at a time when there was a case of a criminal breach of trust pending against him at the instance of the Plaintiff and the bond was executed, because it was stipulated that if it was executed the criminal case would be withdrawn. These objections were substantially dealt with by three of the issues that were framed in the suit, namely, Issues Nos. 6, 7 and 8. The learned Judge in his judgment has taken up all these issues together. He has found that there was no proper adjustment of accounts. He has also found that the Plaintiff and his brother took the law into their own hands and forced the Defendant to execute the bond and that the Defendant executed the bond under pressure of a criminal prosecution. In dealing with the case as he has done it seems to me that the learned Judge has not kept in view the distinction between the different lines of defence upon which the Defendant relied for the purpose of avoiding the liability under the bond. I propose to deal with these defences separately.

Taking the last one first, namely, as to whether the bond was executed for a consideration or object which was unlawful, that is to say, as having been entered into with a view to stifle a criminal prosecution and so, as being opposed to public policy, it appears to me that the facts that are necessary to be established in order to bring the case under sec. 23 of the Indian Contract Act have not been established in the present case. The Defendant has not produced any of the papers relating to the said criminal case. An application was filed on his behalf asking for time in order to enable

him to file copies of the proceeding in that case, and time was granted to him for that purpose. Thereafter, nothing further was done and all that appears upon the record with regard to this matter is the oral evidence of the Defendant himself which is to the effect that Ram Kumar, the Plaintiff's brother, and one Srilal instituted a case against him for criminal breach of trust and warrant of arrest was issued against him and that he, therefore, executed the bond in order to get rid of the criminal case. He says further that as he executed the bond the criminal case was withdrawn. He admits in cross-examination that he received no summons in connection with the criminal case and also that no warrant of arrest was served upon him but that there was a search for his *khatas* in the house in which he lived. This is all the evidence on the side of the Defendant. On the other hand, the witness examined on behalf of the Plaintiff proved that Ram Kumar did not institute the criminal case. This witness however was not in a position to say whether any of the other partners instituted the case. Now in order to show that the object of the agreement was to stifle the criminal prosecution it is necessary to prove that there was an agreement between the parties, express or implied, the consideration for which was to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, and that the contracting parties should enter into a bargain to that effect. This is what was laid down in the leading case of *Collins v. Blanton* (1) and other cases, amongst which reference may

(1) [1767] 1 Sm. L. C. 11th Ed. 369.

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be made to those of *Keir v. Leeman* (2) and *Williams v. Bayley* (3). On the particular facts of the case before us it will have to be shown that there was really a criminal case in respect of a non-compoundable offence pending at the time when this agreement was entered into and it will also have to be shown that one of the objects for which this agreement was entered into was to stifle the prosecution in that case. It cannot be said that these facts have been established in the present case. As is well-known the same transactions may give rise to a civil as well as a criminal liability and an agreement to settle a dispute amicably will not be invalid unless the object of the agreement is to stifle a criminal prosecution. This rule enunciated in the cases to which I have referred has been adopted in our Courts as well. See *Rai Charan Purkait v. Amrita Lal Gain* (4).

Then as to the question whether the document was executed by the Defendant out of his own free will. In this connection reference must be made to the provisions of sec. 14 and also, upon the facts of the present case, to secs. 15 and 16 of the Indian Contract Act, because the consent in the present case is said to have been vitiated by coercion and undue influence. The learned Judge has found that the Defendant had been forced and coerced to execute the bond. He has come to this conclusion upon the evidence that was before him to the effect that the Defendant was threatened by the Plaintiff's brother that the criminal case which had already been instituted against him would not be withdrawn. Now these facts, even if established, would not bring the case within sec. 15 of the Con-

tract Act, which defines coercion. As regards undue influence the contract would be vitiated if it has been induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. It is however urged that there are facts from which this domination of the will may be justly presumed. We have been referred to certain circumstances for the purpose of coming to the conclusion that the case comes within sub-sec. (3) to sec. 16 of the Contract Act. These circumstances are that although the Defendant was only a partner to the extent of 1/3rd share in the business, yet by the bond he acknowledged a liability to the extent of Rs. 18,000 or Rs. 19,000, which, it is stated, is much in excess of the amount for which he was really liable. It has also been stated that the stipulation in the bond for payment of interest on default of payment of any of the instalments as well as other stipulation with regard to stock-in-trade show that the transaction was an unconscionable one. As I have already stated the Defendant himself was examined in the case; but in his examination-in-chief I do not find that he made the least attempt to make out a case of undue influence at all. In cross-examination he states that at the time when the bond was executed the matter was settled by one Devendra Nath Ghose, who is apparently an independent man and coal merchant and also by his own eldest brother, one Prem Chand Sar-

(2) 9 Q. B. 371 Exch. (1844).

(3) [1866] L. R. 1 H. L. 200.

(4) 11 C. L. J. 131 (1909).

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kar. The terms of the bond may be considered to be stringent but there is no reason to suppose that the bargain was an unconscionable one. I am, therefore, of opinion that it has not been proved that there was any undue influence in consequence of which the Defendant was made to execute this bond. So long as there is no agreement not to prosecute, and as I have said there are no materials in this case upon which it may be held that there was such an agreement, there is nothing to prevent a creditor from taking a security for the payment of his debt, even if the debtor is induced to give the security by a threat of criminal proceedings: *Flower v. Sadler* (5) and *Jai Kumar v. Gauri Nath* (6).

The argument advanced before us to the effect that there was no proper adjustment of liabilities does not commend itself to me inasmuch as I am unable to find that there was either coercion or undue influence or want of free consent for any other reason, which may be taken to have vitiated the transaction. Unless the bond can be impugned on that ground the admission made by the Defendant himself as to his liabilities must be taken to be binding on him.

For these reasons, I am of opinion that the judgment of the learned Subordinate Judge cannot be supported and that it should be set aside and that a decree should be entered in favour of the Plaintiff for a sum of Rs. 7,662-8 annas with interest pending the suit at the rate of six per cent. per annum.

The Plaintiff-Appellant will be entitled to his costs in this Court and in the Court below.

GREAVES, J.—I agree.

* S. C. M.

(5) 10 Q. B. D. 572 C. A. (1882).

(6) I. L. R. 28 All. 718 (1906).

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 753 OF 1923.

SUHRAWARDY, J.

PAGE, J.

1924,

4, January.

KAMAL MANDALINI,
Petitioner,

v.

PARAMASUKH CHAKRA-
BUTTY, Opposite
Party.

Suit, maintainability of—Amount of expenses which a Criminal Court directs a complainant to pay to a witness, if may be recovered by suit—Criminal Procedure Code (Act V of 1898), secs. 544, 547, if apply.

A suit lies for the recovery of money which the Criminal Court directs the complainant to pay to a witness called by him for expenses incurred by him.

The power to order payment of expenses to a witness is vested in the Criminal Courts not by any provision in the Code of Criminal Procedure, but under the general rules of the High Court. There is no other way of recovering the amount than by a suit.

This was a Rule granted on the 29th June 1923 against the judgment of the Munsif of Bolepur (Babu Aditya Ch. Dutt), dated the 27th March 1923.

The facts of the case will appear from the judgment.

Babu Mohes Chandra Banerjee for the Petitioner.

Babu Surendra Nath Ghosal for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—This Rule arises out of a suit brought by the Plaintiff for recovery of a certain amount due to him on account of the diet expenses allowed to him by the Criminal Court in a case in which the Defendant was the complainant and the Plaintiff was cited as a witness on his behalf. The Munsif of

KAMAL MANDALINI v. PARAMASUKH CHAKRABUTTY.

Bolepur exercising Small Cause Court jurisdiction decreed the suit.

An objection is taken before us that the Small Cause Court Judge had no jurisdiction to take cognizance of the suit under the Provincial Small Cause Courts Act and it is based mainly on sec. 547, Cr. P. C. The facts are as follows:—The Plaintiff was cited as a witness on behalf of the Defendant in a certain criminal case in which the Defendant was the complainant. The Plaintiff applied to the Court that he might be allowed the amount incurred by him as expenses for attending the Court on behalf of the complainant. On that petition the learned Sub-Divisional Officer passed the following order: "Complainant to pay." The sum allowed was Rs. 16-10-6. On the date on which the above order was passed the complainant paid Rs. 5. The Plaintiff has now sued for the balance of Rs. 11-10-6.

It is argued on behalf of the Petitioner that the only remedy open to the Plaintiff was to request the Criminal Court under sec. 547, Cr. P. C., to recover this amount as if it was a fine. In my judgment, that section does not apply. It provides that any money (other than a fine) payable by virtue of any order made under the Code. . . . shall be recoverable as if it were a fine. The learned vakil for the Petitioner has failed to point out any provision in the Code under which this order of payment of diet money to a witness on the side of the prosecution was made. He has fallen back upon sec. 544, Cr. P. C. and contends that the order might have been made under that section. But that section deals with an altogether different state of things. It empowers the Court to order that the expenses of the complainant and his witnesses should be paid by the Government

under circumstances that may be considered proper by the Court. It does not empower the Court trying a complaint to order payment of diet money of a witness produced before it by the parties. That power is vested in the Court under the general rules of the High Court. It is therefore clear that the money in suit is recoverable by the Plaintiff and that a suit may be brought for that amount unless the Petitioner shows any authority to the contrary which he has failed to do. It is not contended that it offends any rule of public policy nor is it shown how the Civil Court loses its ordinary jurisdiction to entertain a suit for recovery of money payable by the Defendant and which cannot be recovered in any other way. Some light upon this matter may be obtained from the decision of this Court in the case of *Nemai Chandra Ghose v. Ajahar Chowdhury* (1). I do not think that there is any substance in this Rule. It must accordingly be discharged with costs. We assess the hearing fee at one gold mohur.

PAGE, J.—I agree. I do not think it necessary in this case to go the length of laying down any general proposition of law as to the alleged right of a witness in a criminal case to obtain travelling expenses from the complainant because in this case it is perfectly clear from the judgment that the complainant, who is now the Defendant, arranged with the Plaintiff that the Plaintiff should give evidence in the suit. Pursuant to that agreement the Plaintiff attended the Court and a certain order was made by the Court that the complainant should pay to the Plaintiff a certain sum. A part of that sum was immediately paid but the rest has not been paid. In these circumstances I, speaking for myself, without de-

(1) 8 C. W. N. 178 (1908).

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ciding any question of law of a general nature, in the circumstances of this case, think that there is no substance in the application. The Rule is therefore discharged.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

APP. NO. 210 OF 1925

AND

REV. NO. 4 OF 1925.

SANDERSON, C. J.

PANTON, J.

1925,

Heard, 27 and

28, May.

Judgment,

28, May.

CHANDRA KUMAR SEN

v.

SM. MATHURIYA DEBYA.

Criminal Procedure Code (Act V of 1898), sec. 476B Order by Subordinate Judge refusing to make a complaint—Appeal to District Judge—Limitation—Limitation Act (IX of 1908), Art. 154.

Under sec. 476B any person whose application for the making of a complaint under sec. 476 has been rejected or against whom such a complaint has been made may appeal to the superior Court mentioned in the section and under Art. 154 of the Limitation Act, the period of limitation for filing such appeal when the Appellate Court is not the High Court is thirty days.

An order under sec. 476B made in an appeal filed out of time was set aside by the High Court.

This was an appeal against an order of the District Judge of Chittagong (Mr. J. W. Nelson), dated the 31st January 1925, directing criminal proceedings to be instituted against the Appellant. A rule was also issued in connection with the said order.

The facts of the case will appear from the judgment.

Messrs. N. K. Bose, Probodh Kumar

Das and Chandra Sekhar Sen for the Appellant and Petitioner.

Mr. Paresh Chandra Sen for the Opposite Party.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT WAS as follows :—

SANDERSON, C. J.—This is a Rule obtained on behalf of Chandra Kumar Sen on the 23rd of April 1925, calling upon the District Magistrate and the Opposite Party to show cause why the order complained of should not be set aside or such other order passed in the matter as to this Court might seem fit and proper.

The order complained of was made by the learned District Judge of Chittagong on the 31st of January 1925, whereby the learned Judge directed that criminal proceedings should be instituted against Chandra Kumar Sen and Bijoy Singh Hazari for offences under secs. 209 and 466 of the Indian Penal Code and for abetment of these offences.

This Rule deals with the case of Chandra Kumar Sen only.

I think it is necessary to mention certain dates. It appears that an application was made to the learned Subordinate Judge for filing a complaint against the Petitioner Chandra Kumar Sen. That application was disposed of on the 1st of October 1923. By that time the amendment of the Criminal Procedure Code created by the Act of 1923 had come into force and the learned Subordinate Judge declined to make a complaint under sec. 476 of the Code of Criminal Procedure as amended.

There was an appeal to the District Judge by the complainant. That was filed on the 7th of August 1924. It was not disposed of until the 31st of Janu-

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ary 1925 by the learned District Judge, when, as I have already stated, the appeal was allowed, and the learned Judge decided that criminal proceedings should be instituted against Chandra Kumar Sen for the offences which I have already mentioned.

The point upon which the learned Advocate, who appeared for the Petitioner, relied was that the appeal to the learned Judge was out of time and the learned Judge had no jurisdiction to entertain the appeal and to make the order. This point was taken before the learned Judge apparently, for he said as follows:—“It is urged in his case” (that is, the case of Chandra Kumar Sen) “that the appeal is barred by time as the Subordinate Judge passed orders on the 1st of October 1923 that he would not proceed against Respondents Nos. 2 and 3. I do not think that I am bound by any rule of limitation in a case of this kind. When an offence in connection with the administration of civil justice comes to the notice of the District Judge it is open to him to lodge a complaint in the Criminal Courts although a subordinate Civil Court may not have thought it necessary to take action.” The learned Judge then proceeded to say that the case was of such gravity that he would be failing in his duty if he did not institute a complaint.

With much respect to the learned Judge I am of opinion that the provisions of the material sections do not support the conclusion at which he arrived.

Sec. 476 of the Code of Criminal Procedure deals with the procedure, which is to be adopted in cases referred to in sec. 195, sub-sec. (1), cl. (b) or cl. (c), by a Court, with regard to offences which appear to have been committed in or in relation to a proceeding in that Court:

and, sec. 476A confers certain powers upon a superior Court where the subordinate Court has omitted to take action. It is desirable to refer to the terms of the section, which are as follows:—

476A. “The power conferred on Civil, Revenue and Criminal Courts by sec. 476, sub-sec. (1), may be exercised in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of sec. 195, sub-sec. (3), in any case in which such former Court has neither made a complaint under sec. 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provision of sec. 476 shall apply accordingly.”

In my judgment that section does not apply to this case, because there was an application made to the learned Subordinate Judge, and the learned Subordinate Judge rejected the application for the making of the complaint.

The next sec. 476B gives certain rights of appeal not only to the person against whom a complaint has been directed but also to the person whose application for a complaint has been rejected. The words of the section are as follows:—476B. “Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under sec. 476 or sec. 476A or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of sec. 195, sub-sec. (3) and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or as the case may be, itself make

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the complaint which the subordinate Court might have made under sec. 476, and if it makes such complaint the provisions of that section shall apply accordingly."

Therefore, it appears to me that the scheme of the sections is that, if the subordinate Court has neither made a complaint under sec. 476 nor rejected an application for the making of a complaint, then the superior Court may take action and make a complaint. But where, as in this case, the subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code, is by way of an appeal to the superior Court.

This matter came before the learned District Judge by way of appeal, and in view of the above-mentioned sections, the learned District Judge, in my judgment, should have considered whether the appeal was filed within the time specified.

The article in the Limitation Act which applies to this matter is Art. 154, and the material section of the Act is sec. 3 which provides that "subject to the provisions contained in secs. 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Under Art. 154, the period of limitation for an "appeal under the Code of Criminal Procedure, 1898, to any Court other than a High Court," is "thirty days" and the time from which the period begins to run is "the date of the sentence or order appealed from."

It is therefore, clear that, as the order appealed from was made on the 1st of

October 1923 and the appeal was not filed till the 7th of August 1924, the appeal was out of time.

This rule therefore must be made absolute, and the order of the learned District Judge of the 31st January 1925, directing criminal proceedings to be instituted against Chandra Kumar Sen must be set aside.

No order need be made as regards the appeal (No. 210 of 1925) in connection with the same matter.

PANTON, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM ALI AHABAD.]

LORD ATKINSON.

LORD CARSON.

SIR JOHN EDGE.

1925,

Heard, 2, 3 and

6, April.

Judgment,

7, May.

MURTI BHAGWANI
KUNWAR and anr.,
Appellants,

v.

MUBAN SINGH and
ors., Respondents.

Hindu law—Mitakshara joint family—Presumption of jointness—Separation to be proved—Entries in village and revenue papers defining shares, effect of—Act XIX, N.-W. P., of 1873, effect of—Widow of coparcener allowed to hold property by way of maintenance, if proves separation—Dealing by her contrary to agreement, if creates title by prescription.

It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. The presumption until the contrary is proved is that the family continues joint.

A mere definition of shares in revenue and village papers, unless it was proved that such definition of shares was with a view to a then partition, would not, by itself, be conclusive evidence even that an actual partition was then intended. It

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by itself affords a very slight indication of an actual separation and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated.

The North-Western Provinces Land-Revenue Act, XIX of 1873, did not make the definition of shares of co-sharers in the settlement khewat prepared in 1873 conclusive of a separation.

NAGESHAR BAKSH SINGH v. GANESHA (1), BHAGOJI v. BAPUJI (2) and GAJENDAR SINGH v. SARDAR SINGH (4), referred to.

The presumption was not rebutted in this case by proof of an agreement or compromise by which the widow of a prominent member of the joint family was allowed to possess and enjoy joint family properties for her life by way of maintenance.

The widow could not acquire title to the properties by prescription, whether she acted in accordance with the compromise or contrary to it.

This was an appeal (No. 94 of 1923) from a decree, dated the 18th March 1920, of the High Court at Allahabad, which reversed a decree, dated the 30th November 1916, of the Court of the Subordinate Judge of Cawnpore.

The parties were Hindus governed by the Mitakshara and were descended from a common ancestor, Padum Singh, who on his death left two sons Hira Singh and Madho Singh. The Appellants were in the line of the latter and the Respondents (Plaintiffs) in that of the former.

The question for determination was whether the Appellant Musammât Bhagwani Kunwar's father Gulab Singh was joint or separate from the Plaintiffs at the time of his death.

The Subordinate Judge found against the question of jointness and dismissed the suit but that finding was reversed by the High Court who held that the Plaintiffs were entitled to possession by right of survivorship.

The facts are fully dealt with in the judgment of the Judicial Committee.

Messrs. DeGruyther, K. C. and Parikh for the Appellants.

Sir George Lowndes, K. C. and Mr. Wallach for the Respondents.

The arguments were mainly directed to the evidence.

The following authorities were referred to in addition to those mentioned in the judgment.

Khunni Lal v. Gobind Krishna Narain (5) and Obhoy Churn Ghose v. Gobind Ch. Dey (6).

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by Defendants from a decree, dated the 18th March 1920, of the High Court at Allahabad, which reversed a decree, dated the 30th November 1916, of the Subordinate Judge of Cawnpore, by which the suit had been dismissed.

The suit in which this appeal has arisen is a suit in which the Plaintiffs claimed a decree for the proprietary possession of an eight-anna share in each of the villages of Auria (Auria Tikra) and Aurangpur Gahdewa and certain fractional shares in four other zamindari villages in the Cawnpore District by dis-possession of the Defendants, who were in possession and denied the title of the Plaintiffs. The Subordinate Judge dismissed the suit; the High Court on appeal

(1) L. R. 47 I. A. 57 (1919).

(2) I. L. R. 13 Bom. 75 (1896).

(4) I. L. R. 18 All. 176 (1896).

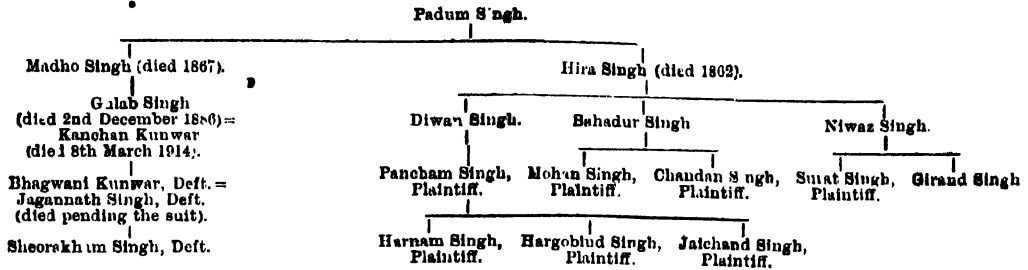
(5) L. R. 38 I. A. 87; a. c. 15. O. W. N. 545 (1911).

(6) I. L. R. 9 Cal. 237 (1889).

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gave the Plaintiffs the decree for the possession which they claimed. The parties were Hindus of the Thakur Gaur caste and were subject to the law of the Mitakshara. The following pedigree will suffi-

ciently show how the parties were related, but their Lordships do not know which of the brothers Madho Singh and Hira Singh, or of the brothers Diwan Singh and Bahadur Singh, was the elder :—



The suit was brought on the 12th November 1914, in the Court of the Subordinate Judge of Cawnpore after the death of Musummat Kanchan Kunwar. When the suit was brought Bahadur Singh was about 80 years of age and Niwaz Singh was about 76 years of age. As Diwan Singh was not a party to the suit, although his son Pancham Singh was a Plaintiff, their Lordships have assumed that Diwan Singh was then dead. The most material question in the suit is whether Gulab Singh was, when he died, joint with, or separate from, his cousins Diwan Singh, Bahadur Singh and Niwaz Singh.

Padum Singh and his sons Madho Singh and Hira Singh admittedly had constituted a joint Hindu family. Padum Singh died before his sons, and at his death Madho Singh and Hira Singh were joint. It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. That material time in this case must have been before the death of Gulab Singh. Hira Singh had died in 1862, and Madho Singh had died in 1867. Gulab Singh died sonless in 1886. The case of the

Plaintiffs was, and is, that Gulab Singh was until he died a member of the joint family, which, until he died, consisted of the then living male descendants in the male line of Padum Singh. The case of the Defendants, Appellants, is that Madho Singh and Hira Singh had separated, and consequently that Gulab Singh was separate from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh. It happened in 1896 or in 1898 that the then members of the joint family separated. That separation did not take place at a material time so far as this suit is concerned, but the learned Subordinate Judge incorrectly held that the separation in 1896 or 1898 shifted the burden of proof, and that it was for the Plaintiffs to prove that Gulab Singh was joint when he died in 1886. How far that misunderstanding of the law affected the Subordinate Judge in his consideration of the evidence in this suit, it is impossible to say, but he found on the evidence that Gulab Singh was separate at the time of his death. The High Court found on the evidence that Gulab Singh was, when he died, a member of the joint family.

Their Lordships will later express the conclusion at which they have arrived as to whether there had or had not been a separation before Gulab Singh died, but

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before doing so they will refer to another question which must be considered, although they agree with the conclusions at which the Courts below were in agreement on that subject. Their Lordships will now briefly state what that other question is.

The property in question in this suit came into the possession of Kanchan Kunwar shortly after the death of her husband Gulab Singh. The question which their Lordships will first consider is how and in what right did Kanchan Kunwar obtain and hold possession. That property had been entered in the revenue and village papers in the name of Gulab Singh, and Kanchan Kunwar, as his widow, claimed to be entitled to the possession of it. That claim could not be maintained unless Gulab Singh had died as a separated Hindu. That claim by Kanchan Kunwar was, in fact, made, and she got possession, but, according to the case of the Plaintiffs, she was allowed by Diwan Singh, Bahadur Singh and Niwaz Singh, who were then of age, to take possession under an agreement of compromise made between her and them, by which she was allowed possession of the property for her life for her maintenance, and not as property of which she had any right to the possession.

Gulab Singh was older than his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, and after Hira Singh and Madho Singh had died he was the head of the family, and appears to have acted generally as the family manager, and some villages which were purchased after the death of Madho Singh with the income of the ancestral villages of the family were purchased in the name of Gulab Singh. During Gulab Singh's life-time his wife Kanchan Kunwar must have occupied a position of some importance in the family,

and after her husband's death she doubtless wished to manage her own affairs independently of any interference by her husband's relations.

It has not been asserted in argument before their Lordships in this case, or, so far as they are aware, in any case before the Board, and they believe that it could not with truth be asserted before an Indian Court, that a widow of a soulless prominent member of a Hindu joint family is never allowed by the family to occupy possession of some of the family's land for her life for her maintenance. Their Lordships find that Kanchan Kunwar obtained possession of the lands in question under that agreement of compromise for her life for her maintenance, and not in any right of hers as Gulab Singh's widow. The agreement of compromise was an oral agreement, but there is documentary evidence which is only consistent with such an agreement, and to some of that documentary evidence reference will now be made.

During Gulab Singh's life-time his name had been entered in the revenue papers as that of the owner in possession of shares in some villages, and the names of his cousins Diwan Singh, Bahadur Singh and Niwaz Singh had been entered in the revenue papers as the names of the owners in possession of shares in the same or other villages. When Gulab Singh died it was necessary that application for mutation of names should be made to the revenue authority of each village in the revenue papers of which his name had been entered as the owner of a share or shares. Such applications are made by or on behalf of the person or persons claiming to be entitled to the share or shares of the deceased share-holder, and when opposed an inquiry is held by an official of the revenue authority.

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An application for mutation of names was made on Gulab Singh's death in the case of each village in which his name was entered in the revenue papers as the holder of a share. Those applications were made by Diwan Singh, Bahadur Singh and Niwaz Singh, and as Kanchan Kunwar was known to be a claimant for mutation of name her deposition was taken. Their Lordships will now refer, by way of illustration, to what happened in the case of the village of Aurangpur Gahdewa, in respect of which the name of Gulab Singh was entered in the settlement khewat of 1873 as the owner of an eight-anna share.

"No. 741C.—APPLICATION OF BAHADUR SINGH, ETC.

"Name of village—Aurangpur Gahdewa, pargana Bilhour. Head—mutation on the ground of succession.

"Substance.—Application for expungement of the name of Gulab Singh, deceased, and entry of the names of Bahadur Singh, Diwan Singh and Newaz Singh, cousins, in respect of an 8-anna zamindari share under sec. 97, Act No 19 of 1873

"SHOWETH.—

"That Gulab Singh, zamindar of an 8-anna share in village Aurangpur Gahdewa, pargana Bilhour, died on the 7th of Aghhan Sudi, Sambat 1942. These three cousins, Bahadur Singh, Newaz Singh and Diwan Singh, are the heirs in possession of the property of the deceased in equal shares. He has left no issue besides these applicants. It is, therefore, prayed that the name of the deceased may be removed from, and those of these heirs entered in, the public records.

"PETITIONERS.—Bahadur Singh, Diwan Singh and Newaz Singh, heirs of Gulab Singh, zamindar of village Aurangpur Gahdewa, pargana Bilhour. Dated the 12th February 1887.

"Filed by Diwan Singh and written by Ram Narayan.

."(Sd.) DIWAN SINGH, in autograph.

"This application was made to-day by Diwan Singh.

"Held—Let the Registrar Kanungo first make a report as to the correctness of the share. 12th February, 1887.

"Signature of Naib-Tahsildar."

The application is in the vernacular. The term which has been translated as "heirs" must mean not heirs in the English acceptance of the term but the persons who claimed as surviving co-sharers of Gulab Singh to have their names entered.

On the 4th April 1887, Kanchan Kunwar made her deposition before the Kanungo. So far as is material it was as follows :—

"Gulab Singh, my husband, the zamindar of mauza Aurangpur Gahdewa, pargana Bilhour, died a natural death, four months ago. The deceased left no son. Regarding the entry of name in respect of the property left by the deceased husband, some points have been agreed to be settled between Diwan Singh, Bahadur Singh and Nawaz Singh and me. For the settlement of the same I have sent for Jagannath Singh, my son-in-law, from mauza Katra, district Banda. On his arrival, the points will be settled mutually in a week and then my general-attorney, Roshan Lal, will present himself and will make statement about the mutation of names in this case. So long as the points are not settled mutually, I cannot make any statement about the entry of name in respect of the property of the deceased."

Subsequently Musammat Kanchan Kunwar made another deposition in the presence of the Kanungo in relation to entering the names in respect of Aurangpur Gahdewa, which, as translated, was, so far as is material, as follows :—

"The points which were to be settled between Diwan Singh and others and me have all been settled and, under the mutual agreement, the entire property left by my deceased husband in mauza Aurangpur Gahdewa, pargana Bilhour, has been allot-

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ted to me and put in my possession. Therefore, the name of the deceased may be struck off and my name entered in respect of the entire property left by the deceased in the said village. Diwan Singh, Bahadur Singh and Niwaz Singh, the heirs of the deceased, have no connection with the property in the said village in my life-time.

"Signature of Qanungo."

The words "Diwan Singh, Bahadur Singh and Niwaz Singh, the heirs of the deceased, have no connection with the property in the said village in my life-time" can only mean that Kanchan Kunwar was allowed to be in possession for her life for her maintenance. The learned Judges of the High Court in their judgment observed in reference to that deposition of Kanchan Kunwar:—

"It may be remembered that there is always a reluctance among members of a Hindu family to confer on female members an absolute interest in property belonging to their husbands or fathers, and had it been intended that Kanchan Kunwar was to have an absolute interest in the property which was to be recorded in her name, that fact would have been distinctly stated in the depositions not only of Kanchan Kunwar herself, but also of the male members of the family whose statements were also recorded in the mutation proceedings. We are, therefore, unable to hold that Kanchan Kunwar acquired an absolute interest under the compromise which was effected after the death of Gulab Singh."

Musammat Kanchan got possession of the shares in the villages in question under that agreement of compromise and she never had any other right or title to them, and she could not under the circumstances obtain against the co-sharers of the joint family any title by prescription. It has, however, been suggested in this appeal that she had acquired a title by prescription. Whether she acted in accordance with that agreement of com-

promise or contrary to it is immaterial; she had no other title to the villages in question and could grant or convey no title of any kind to the villages which would be effective for any purpose beyond the term of her own life.

Musammat Kanchan Kunwar, as appears by her deposition of the 4th April 1887, wished to consult her son-in-law Jagannath Singh on the subject of the agreement of compromise. As will now appear, her son-in-law, Jagannath Singh, who was a Defendant in this suit and is now dead, but is represented by his son Sheorakham Singh, must have had with his wife Bhagwani Kunwar, who was Kanchan Kunwar's daughter, much influence over Kanchan Kunwar. On the 12th May 1892, Musammat Kanchan Kunwar by a deed purported to give the eight-anna share in the village Auria to her daughter Bhagwani Kunwar. In that deed Musammat Kanchan Kunwar asserted that on the death of Gulab Singh she had entered into proprietary possession of the eight-anna share, and that on her death her daughter "would succeed to the whole of the estate of my husband Gulab Singh under the Hindu law."

Their Lordships may here observe that Kanchan Kunwar, in a written statement which she had filed in Court on the 26th January 1888, in a suit in which she was a Defendant, had alleged that "the property of Gulab Singh deceased was taken by Bahadur Singh, Diwan Singh and Niwaz Singh, and they became liable for the entire amount payable and for collection of the outstanding debts, while this Defendant got for her maintenance the shares in the zamindari property specified at the foot. In those circumstances the Defendant and the shares specified at the foot should be exempted." At the foot of her written statement she speci-

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fied the shares in the six villages in question in this suit, including the eight-anna share in mauza Auria.

On the 12th August 1892, Musammat Kanchan Kunwar executed a deed of mortgage in favour of her son-in-law, Jagannath Singh, by which she purported to mortgage all the rest of the property of which she had been allowed under the agreement of compromise to take possession for her life for her maintenance. In that deed she asserted that all the properties she was mortgaging "are up to this time owned and possessed by me as proprietor without the participation of any one else, and I have no co-sharer or coparcener therein." On that mortgage Jagannath Singh brought a suit for foreclosure on the 14th February 1907, against Musammat Kanchan Kunwar, and on the 7th March 1907, obtained a decree for foreclosure. On the 15th November 1907, that decree for foreclosure was made absolute. Their Lordships have no hesitation in finding that the deed of gift of the 12th May 1892, the mortgage of the 12th August 1892, and the suit for foreclosure of the 14th February 1907, were all collusive and fraudulent, and were intended to make evidence that Musammat Kanchan Kunwar had held the lands in dispute as absolutely her own with as complete a right to dispose of them as a Hindu separated childless man might have to dispose of his self-acquired property. Musammat Kanchan Kunwar, her daughter and her son-in-law must have known perfectly well that she had no right to make the deed of gift or the mortgage.

As their Lordships have already mentioned, the Subordinate Judge in his judgment, which was delivered on the 30th November 1916, found that Gulab Singh was separate at the time of his

death, and the High Court found on appeal that there had been no separation. Gulab Singh had died twenty-eight years before the suit was instituted, and on the question whether the family had been joint or separate in 1886 each Court had to rely mainly on such documentary evidence as had been produced. It appears to their Lordships from the judgment of the Subordinate Judge that he had been much influenced in finding that Gulab Singh was separate when he died from the fact that Bahadur Singh and Niwaz Singh had not given evidence in the suit. He must have forgotten that it had been proved on the 15th March 1916, by Mohan Singh that his father Bahadur Singh was 79 or 80 years old, and was quite helpless or unable to give evidence, and that his uncle Niwaz Singh was 76 or 77 years old, and that his tongue was paralysed and he was unable to speak or make a statement. The Subordinate Judge was also very much influenced in his finding by the fact that the day-books, also referred to as cash-books, which contained the family accounts had only been produced, and that the ledgers which had been kept by the family had not been produced, and he obviously did not accept as reliable the evidence as to what had become of the ledgers. The explanation of the non-production of the ledgers was given by Mohan Singh, who, when he gave his evidence, was 49 years old and could not have been more than 17 years old when Gulab Singh died. This is how Mohan Singh explained why the ledgers had not been produced:—

"I have not filed the ledgers of all the day-books filed by me inasmuch as they are not with me. I brought them to file them in the Court at Cawnpore. The said ledger was kept in the house of Manmunno Babu and Karan Babu. Manmunno Babu is elder and Karan Babu is younger. I used

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to keep all my luggage and papers in a room of those very persons, i.e., Manmunno Babu and Karan Babu. The house of Manmunno Babu and Karan Babu fell down owing to heavy rain this year in the month of Bhadon and consequently those ledgers got buried under the same house. Those ledgers were kept in two 'bastas.' I did not make a search for them in my house. The ledgers which got buried were kept by me in the room of Manmunno Babu and Karan Babu in 1904. The account-books and the papers which were filed by me in the case instituted in 1904 and taken back from the Court were kept by me in that very house of Manmunno Babu, three or four years ago. The papers which were filed by me in the case instituted in 1904 were the same papers as were taken out of the room of Manmunno Babu and filed in this case. I did not file the ledgers in this case because they had become rotten. (Subsequently the witness stated:) When the case was instituted they were not rotten. Now this year in the month of Bhadon and Kunwar when the house fell down on account of heavy rain they were rotten."

That is not an impossible explanation and it may be true. The High Court considered Mohan Singh's explanation as far from satisfactory, but Sir Grimwood Mears, C. J., and Mr. Justice Banerji, who heard the appeal in the High Court, stated in their judgment that "the absence of the ledgers does not, in our opinion, detract from the value of the entries in the cash-books to which we have referred." The learned Counsel who argued this appeal on behalf of the Appellants commented strongly on the non-production of the ledgers and contended that if they had been produced they would have shown that the family had separated. What the ledgers would have shown if they had been produced their Lordships do not know, but the entries in the family cash-books which were put in evidence are clear and unambiguous, and

point to the only legitimate conclusion that the accounts were the accounts of a joint family.

The main contention of the learned Counsel for the Appellants was that the entries of the names of the owners in possession of the shares in the villages which were made at the settlement of 1873 should be regarded as conclusive on the question as to whether Gulab Singh, Diwan Singh, Bahadur Singh and Niwaz Singh were joint or separate, and at great length he drew their Lordships' attention to those entries. From those entries it appears that at the settlement of 1873 Gulab Singh was the owner in possession of shares in certain villages, but whether it may be inferred from those entries or from any of them that he was the separate or sole owner of any of the shares is quite another matter. Their Lordships will now give some examples from village khewats of the settlement of 1873 to show how the names of co-sharers were entered as the owners of shares. In doing so they will omit particulars which are immaterial. In the settlement khewat of mauza Aurangpur Gahdewa of 1873 the entry is "Name of lambardar, Gulab Singh; names of co-sharers, Gulab Singh, son of Madho Singh, Thakur Gaur, *gotra* Barduaj, resident of Baranpur Kanjri, pargana Sheorajpur; Amount of share, 8 annas; Remarks, This is owned by a single man." The entry in the settlement khewat of 1873 of mauza Baranpur Kanjri is "Names of sharers . . . Gulab Singh, son of Madho Singh, half, and Bahadur Singh, Dewan Singh and Niwaz Singh, sons of Hira Singh in equal shares $\frac{1}{2}$," and bracketed opposite that particular entry is " $\frac{1}{2}$ rd. . . ." The entry in the settlement khewat of 1873 of mauza Baranpur is "Names of co-sharers, Gulab Singh,

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son of Madho Singh, caste Thakur Gawr, resident of Baranpur Kanjri, 10 pie, 1 *fif*, 7 kirant, 2 jau, 4 tund, 9 dant, and Bahadur Singh, Dewan Singh and Niwaz Singh, sons of Hira Singh, caste and residence as aforesaid, 5 pies, 4 *fifs*," and as to the "shamlat" of the mauza the entry is "... Gulab Singh, the amount of the ancestral share being 5 pies, 4 *fifs*, and Diwan Singh, Bahadur Singh and Niwaz Singh, in equal shares, 5 pies, 4 *fifs*. . . ." The entry in the settlement khewat of 1873 of mauza Siurajpur is "Names of 'lambardars,' Gulab Singh and Ram Sahai 'lambardar'; Names of co-sharers, Gulab Singh, son of Madho Singh, caste and residence as mentioned above, 11 pies, 8 *fifs*, 9 kirants, 7 jaus, 2 tunds and 5 dants. Bahadur Singh, Diwan Singh and Niwaz Singh, sons of Hira Singh, caste and residence as aforesaid, in equal shares, 5 pies and 4 *fifs*. . . ." The entry in the settlement khewat of 1873 of mauza Mau is "Name of lambardar, Sheo Charan Lal and Niwaz Singh, lambardars; Names of co-sharers, Niwaz Singh, Bahadur Singh and Dewan Singh," sons of Hira Singh, caste Thakur Gaur, 'gotra' Bharduaj; residents of Baranpur Kanjri, pargana Sheorajpur, in equal shares, 5 annas, 4 pies." Remarks . . . Niwaz Singh lives jointly with his two brothers. No adjustment of account is made . . . Their Lordships do not draw from the above entries or from any other similar entries which were made in the revenue settlement of 1873 to which they were referred by the learned Counsel any inference that Gulab Singh had separated from his cousins Diwan Singh, Bahadur Singh, and Niwaz Singh, or that there had been any separation in the joint family. But if the learned Counsel's prolonged argument on the entries was

in any way sound, Gulab Singh must have separated from his cousins before the settlement of 1873 was held.

In *Nageshar Bakhsh Singh v. Ganesha* (1), in an appeal from Oudh, in which the learned Counsel already referred to had argued the case for the Appellant then before the Board, it was in that case decided by the Board that a definition of shares in revenue and village papers, by itself, affords a very slight indication of an actual separation in a Hindu family, and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated. In the judgment delivered in that case by the Board, the Board referred with approval to a judgment of Birdwood, J., of the High Court at Bombay, in *Bhagoji v. Bapuji* (2), that "at the hearing the lower Appellate Court should have its attention directed to the ruling in *Fatma v. Darya Sahib* (3) in which it was held that the collector's book is kept for purposes of revenue and not for purposes of title. The fact of a person's name being entered in the collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person." The same observation appears to their Lordships to apply to entries of the names of persons in settlement khewats as the names of co-sharers in a mauza.

Immediately following the quotation in reference to the judgment of Birdwood, J., the Board in the case of *Nageshar Bakhsh Singh v. Ganesha* (1) said: "The Board refer in particular to the judgment of Sir John Edge in *Gajendar*

(1) L. R. 47 I. A. 57 (1919).

(2) I. L. R. 13 Bom. 75 (1885).

(3) 10 Bom. H. C. 187 (1873).

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Singh v. Sardar Singh (4). In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only in Allahabad, but in India as a whole. The main proposition is, of course, widely familiar—namely, that ‘given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father.’ The learned Judge further refers to ‘experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares;’ and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect: ‘A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such a definition referred had separated.’ ”

This Board cannot read Act XIX of 1873, the North-Western Provinces Land-Revenue Act, 1873, which applied to the settlement of 1873, as making the definition of the shares of co-sharers in a settlement *khewat* conclusive of a separation in a joint Hindu family.

If an actual partition of the joint family property by Madho Singh and Hira Singh, or by Gulab Singh and his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, had been proved, it would be evidence that they had altered their title to it as joint owners and had become separate owners; but a mere definition of

shares in revenue and village papers, unless it was proved that such definition of shares was with a view to a then partition, would not, in their Lordships’ opinion, by itself be conclusive evidence even that an actual partition was then intended.

The attention of their Lordships has been drawn to the matters from which the Subordinate Judge and the High Court drew different conclusions on the question whether Gulab Singh had died as separate from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, and they agree with the High Court and its reasons for finding that there had not been any separation. Those reasons with which their Lordships agree are epitomised by the High Court in the concluding paragraph of the High Court judgment, and are as follows:—

“Upon a consideration of the case as a whole and of the evidence which has been adduced by the parties, we have come to the conclusion that all the *indicia* of a joint Hindu family are present in this case. There was first of all the nucleus of joint ancestral property which belonged to Padam Singh. There is next the presumption of Hindu law that the sons of Padam Singh, who originally must have been joint, continued to be joint so long as they lived, until the contrary was shown. No evidence has been given to prove that they ever separated or that after their death a separation took place between Gulab Singh and the sons of Hira Singh. We have then the facts that property was acquired sometimes in the name of one member and sometimes in the name of another; that debts incurred in the name of one member were discharged by another, that debts were incurred and mortgages were taken in the names of members of both branches jointly; that a common account was kept relating to the income and expenditure of the family; that in these accounts the expenses of funerals and of religious and other ceremonies connected with different members of the family were

(4) I. L. R. 18 ALL. 173, 179, 180 (1893).

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jointly entered; that there were common servants who made collections and otherwise served all the members of both branches; that the affairs of the family were looked after by the different members, whether the property stood in the name of any particular member or not; and that there is nothing to prove that an actual separation ever took place. In view of all these circumstances we are unable to hold that the family was a separate family and to agree with the conclusion of the Court below. In our opinion it has been satisfactorily established that the family of the sons of Padam Singh was a joint family at the time of Gulab Singh's death, so that upon the death of Gulab Singh's widow the property in dispute passed to the Appellants, the surviving male members of the family."

The Appellants in the High Court were the Plaintiffs.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitor: Mr. Douglas Grant for the Respondents.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]
(Special Bench). .

SANDERSON, C. J.
O. C. GHOSE, J.
BUCKLAND, J.
1925,
19, June.

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Attorney, disciplinary jurisdiction over—Breach of duty by attorney, not involving moral turpitude—Attorney's duty as officer of Court and to his client—Incorporated Law Society, action by, to bring the matter to the attention of the Court—Competence of the Society.

An attorney obtained Rs. 3,250 from the Sheriff on the express understanding that the money was due to the landlord, a certain charitable trust, for a godown rented by his client for 10 months at

Rs. 325 per month, to keep furniture attached before judgment on behalf of his client, but instead of paying the full amount to the trust, the attorney paid the money to his client for payment to the trust, but subsequently upon instruction from his client wrote to the trust denying liability in the matter on the ground that his client did not engage the godown but that as a matter of grace, on instruction from his client, he was sending Rs. 474 which his client considered was a very handsome donation to charity:

Held—That the attorney ought not to have made himself a party to the course adopted by his client by addressing the letter to the trust, but should have insisted on the client paying the money to the trust or refunding it to the Sheriff. Being an officer of the Court, he owed a duty to the Court as well as to his client. There was a breach of duty, which the attorney owed to the Court, though his conduct did not involve any moral turpitude

Held further—That when the matter was brought to the notice of the Incorporated Law Society, it was competent to and proper for the Society to bring the matter to the attention of the Court.

This was a Rule nisi obtained by the Incorporated Law Society, Calcutta, calling upon two attorneys to show cause why their names should not be struck off the rolls of attorneys of this Court or why they should not be suspended from practising as such attorneys till such time as this Court might deem fit. On 12th February 1925, one of the trustees of the Parsi Charitable Fund wrote a letter to the President, Incorporated Law Society complaining against the attorneys, the material allegations whereof were that the attorneys in question had withdrawn

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a sum of Rs. 3,250 from the Sheriff on the express understanding that the amount was to be paid to the trust as rent of a godown which had been hired from the trust, but that when the trust asked the attorneys to make the payment they had sent a cheque for Rs. 474 repudiating liability for any amount but offering to pay the same as a matter of grace, the same being in their client's opinion a very handsome donation to the charity. The said sum of Rs. 474 was stated to be the balance of the moneys realised by the sale of the furniture which having been attached before judgment on behalf of the client had been kept in the godown rented from the trust, "after deducting expenses he (the client) had been put to."

The Council of the Society considered the matter at a meeting and they were not "satisfied that this conduct of the attorneys was in blameless conformity with the standard of conduct prevalent in the profession of attorneys." The Honorary Secretary of the Society asked for an explanation from the said attorneys, and the reply was: "If any statement made by Mr. Gora through us in our letter of the 21st of May 1924 is considered inconsistent with any statement made by us on his behalf in our letter of the 9th of May 1924, that is a matter for Mr. Gora to explain when called upon to do so. It is no part of our business to reconcile the consistency or inconsistency of statements made by a client."

On receipt of this reply the Council reconsidered the matter and on the 13th March 1925 through its Secretary enquired whether any steps had been taken by the attorneys to obtain from their client the restoration of the money drawn for him by them. The answer was as follows:—

"We are to-day in receipt of your

letter of yesterday's date and we fail to appreciate the purpose of your interference in this matter and your letters to us on the subject."

As we have pointed out the dispute is one between Mr. Sakloth and Mr. Gora two Parsi gentlemen neither of whom belongs to our profession. The Sheriff held certain money which was payable to Mr. Gora and at Mr. Gora's request we obtained it for him and paid it to him as shown by the receipt we have sent you. There was no occasion for us to take any steps to obtain from our client restoration of money that belonged to him as suggested by you. And may we enquire on whose behalf you suggest we should have applied for restoration of the money and to whom it should have been restored?

The academic question with which your letter closes, however interesting it may be to your Council, has nothing whatever to do with this case but our answer to it is the answer which any gentlemen among you would give to the same question. May we add that we regard the question as an impertinence and resent it as such."

Under cl. 38 (d) of the Articles of Association of the Incorporated Law Society the matter was brought before the Court and the Rule *nisi* was granted.

The first attorney denied in his affidavit that he was guilty of any breach of faith either to the Court or to the Sheriff and that he failed in his duty as an attorney. The letter dated 21st May 1924 to the trustees was written in accordance with his client's instructions. The second attorney alleged that he had nothing whatsoever to do with the matter though he was a partner of the first attorney in the firm.

Mr. N. N. Sircar (with Mr. B. K. Ghosh) appeared for the Society.

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Mr. L. P. E. Pugh (with *Mr. T. Ameer Ali*) appeared for the first Attorney.

Mr. H. D. Bose (with *Mr. R. Westmacott*) appeared for the second Attorney.

Mr. Pugh.—I will not take any objection but I should point out that the Incorporated Law Society here have not the same status as the Incorporated Law Society in England. The English Society could take action itself but here the Society was a sort of common informer.

Mr. Sircar.—On the materials before the Court there is no doubt that the attorneys are guilty of improper conduct.

[BUCKLAND, J.—*Mr. Sircar*, you should formulate definite charges against the attorneys.]

Mr. Sircar.—The charges are that it was improper conduct on the part of the attorneys to make over money to a client in such a way that he is enabled to deal with it otherwise than in accordance with law. It was the duty of the attorneys to have an undertaking from the client for returning whatever money was not wanted for the purpose for which it was taken and lastly, when attorneys obtained money from Court as officers of the Court on the representations that it was required for payment of rent, it was not proper to pay a small sum by way of charity. These are the charges the Incorporated Law Society is making against the attorneys. I will leave the matter with your Lordships for any action you might take under the circumstances.

Mr. Pugh.—The matter is an extremely simple one and but for the somewhat acrimonious correspondence between the parties would not have come to Court.

[SANDERSON, C. J.—Look at the letter dated 21st.

Mr. Pugh.—I have never known that

disciplinary proceedings would be taken for writing a letter.

BUCKLAND, J.—That is not the point.

SANDERSON, C. J.—It must have been understood that the client was to pay the landlord. Surely it was the duty of the attorneys to point that out to the client.]

Mr. Pugh.—It does not occur to me in that way.

[SANDERSON, C. J.—I am surprised how the attorney came to write that. The best that the attorneys can do is to state that a mistake was made and that they will rectify the position.

GHOSE, J.—What is there to prevent their saying that they made a mistake as to the course which was adopted and that they will refund the money to the Sheriff.]*

Mr. Pugh.—My client admits that they made a mistake as to the course adopted by them and that they will undertake to refund the money to the Sheriff. My clients express their regret for what has happened.

Mr. Sircar.—There is one other thing to which I will refer. The attorneys used the word "impertinence" in their letter, dated 14th March 1925, to the Incorporated Law Society but if they withdraw that I will not ask for costs against them.

[GHOSE, J.—Why should not your clients withdraw that?]

Mr. Pugh.—It is very foolish to quarrel with words, but if your Lordship so thinks I withdraw the word.

[SANDERSON, C. J.—I do not understand why you say, "If your Lordship thinks." Your clients withdraw or they do not.]

Mr. Pugh.—My clients withdraw the word.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is a Rule

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which was issued against two attorneys of the Court and which was based upon allegations contained in a petition, presented by the President of the Incorporated Law Society, Calcutta.

In view of the course, which has been adopted by the learned Counsel, who appeared for the attorney, whose name stands first on the record, it is possible for me to deal with this matter shortly.

It appears that one Gora, the Plaintiff in a suit of *Gora v. Templeton*, instituted in the High Court, obtained an attachment of certain furniture before judgment.

The furniture was in some premises in Calcutta which were rented at about Rs. 600 per month. Apparently it was thought desirable on the part of the Plaintiff that the furniture should be removed to premises which could be obtained at a less rental. The result was, that by an arrangement made by or on behalf of the Plaintiff and the person representing a certain trust, the furniture was removed to and stored at premises belonging to the trust, namely, 84, Dhurumtolla Street.

The Sheriff, who had attached the furniture, had nothing to do with this arrangement.

The furniture was lying in the premises 84, Dhurumtolla Street for about ten months and was then sold. The proceeds of the sale were in the hands of the Sheriff. A claim was then made by the owners of the premises upon the Plaintiff for rent at the rate of Rs. 325 per month.

The attorneys, against whom this rule was issued and who were acting for the Plaintiff, wrote to the Sheriff on the 9th of May 1924 as follows:—"Perhaps you may remember that our client rented the premises No. 84, Dhurumtolla

Street for storing the furniture attached herein and the landlord has submitted his bill at Rs. 325 per month. We shall be much obliged if you will kindly send us your cheque for Rs. 3,250 out of sale proceeds to enable our client to discharge the liability. We enclose herewith a copy of the said bill."

Accordingly a cheque for Rs. 3,250 was sent to the attorneys by the Sheriff and a receipt was given dated the 13th of May. The terms of the receipt were as follows:—"Received from the Sheriff of Calcutta by cheque No. 61 on the Imperial Bank of India the sum of Rupees (3,250-0-0) three thousand two hundred and fifty only being the rent of the premises No. 84, Dhurumtolla Street from November 1922 to August 1923 in the above cause."

The cheque or its equivalent was handed by the attorneys to their client and they obtained a receipt from him in these terms: "Received from (the attorneys) the sum of Rs. 3,250 being amount realized by them from the Sheriff of Calcutta for payment of rent of premises No. 84, Dhurumtolla Street which I undertake to settle with the landlord."

It seems clear that the sum of Rs. 3,250 was obtained by the attorneys from the Sheriff upon the representation that the money was due to the landlords of 84, Dhurumtolla Street, for the rent of the premises and that if it were received from the Sheriff it would be paid in full to the landlords.

When the attorneys handed the money to their client I have no doubt that it was expected that the client would pay the amount in full to the landlords. I think that is obviously the meaning of the receipt which the Plaintiff gave to the attorneys.

It turned out however that the

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attorneys' client did not propose to pay the Rs. 3,250 to the landlords.

In my opinion, it was then the duty of the member of the firm of attorneys, who had this matter in hand, to have told his client in effect: "You must either pay this money (3,250) to the landlord in full or the money must be returned to the Sheriff."

Instead of that being done the attorney, upon the instructions of his client, wrote to the trustees of the Society a letter, the material part of which is as follows:— "Our client is informed by the Sheriff that you have sent in a bill to him in respect of the rent of the premises and he tells us that the Sheriff repudiates all liability in the matter on the ground that he did not engage the premises. Our client also denies liability on the ground that he did not engage them but as a matter of grace he instructs us to send you as we do herewith a cheque for Rs. 474, the balance remaining in his hands out of the monies realized by the sale after deducting the expenses he has been put to. Our client considers this sum a very handsome donation to charity in the circumstances."

In my judgment, that is a letter which ought not to have been written and the attorney ought not to have made himself a party to the course adopted by his client. The money had been obtained from the Sheriff on the express understanding that the money was due to the owners of the premises and that the whole amount would be paid to them in respect of the rent of the premises. But for that representation the money would not have been paid to the attorney by the Sheriff. Having regard to the way in which the money was obtained from the Sheriff and the purpose for which it was obtained, apart from other considerations, it is

clear that the Plaintiff in this suit was not entitled to retain the balance in his hands. The attorney, being an officer of the Court, owed a duty to the Court, as well as to his client, and in my judgment the attorney made a serious mistake in the course which was adopted. If the money was not to be used for the payment of the rent, it should have been returned to the Sheriff. The learned Counsel, who appeared for the attorney, has stated that the attorney now recognises that a serious mistake was made.

It is not suggested that there was any moral turpitude on the part of the attorney: I am of opinion however that there was a breach of the duty which the attorney owed to the Court.

I understand that at some date, subsequent to the above-mentioned letter, the Plaintiff sent a cheque for Rs. 800 to the owner of the premises but that sum was not accepted and the cheque was not cashed. The result is that at present no part of the Rs. 3,250 has been used for the payment of the rent. The attorney, through his learned Counsel, has undertaken to return the sum of Rs. 3,250 to the Sheriff to-day, and, through his learned Counsel he has expressed his regret for the mistake, which was made.

In these circumstances and in view of the above-mentioned undertaking, my learned brothers and I are of opinion that with regard to the first attorney, on the record, it is not necessary for this Court to take any further steps or to make any order in respect of the Rule, which accordingly is discharged.

With regard to the second attorney on the record, it is clear that at the time when the material incidents of this case occurred, he was not in India and he was in no way responsible for the matters, upon which the Rule was based. If that

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act had been known to the Court at the time the application for the Rule was made, I feel sure that the Rule would not have been issued in his case. In the case of the second attorney on the record, therefore, the Rule is discharged.

The learned Counsel who appeared for the Incorporated Law Society stated that if the first attorney would withdraw certain passages in the correspondence to which objection was taken, the Law Society would not ask for costs. The passages have now been withdrawn. Consequently we make no order as to costs.

There remains one more matter to which I must refer having regard to certain remarks which were made by the learned Counsel who appeared for the first attorney on the record, with regard to the action which was taken by the Incorporated Law Society.

My learned brothers and I are of opinion that when the matter, which we have been considering, was brought to the notice of the Incorporated Law Society, it was competent to and proper for the Society to bring the matter to the attention of the Court.

GHOSE, J.—I agree.

BUCKLAND, J.—I agree.

Mr. B. K. Basu, Solicitor represented the Incorporated Law Society.

Messrs. Morgan & Co., Solicitors for the first Attorney.

Mr. T. Jones, Solicitor for the second Attorney.

P. D.

Rule discharged.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE.

No. 95 of 1924.

GREAVES, J.

MUKERJI, J.

1925,

Heard, 6, May.

Judgment,

13, May.

NAGENDRA NATH ROY

and ors., Defendants

Nos. 1 to 3, Appellants,

v.

JUGAL KISHORE ROY

and ors., Plaintiffs,

Respondents.

*Indian Contract Act (IX of 1872), secs 69, 70—
Suit for contribution—Deposit made by Plaintiff
to prevent execution sale of property in which he
erroneously believed he had interest—Deposit by
permission of Court—Right to reimbursement—
Principles governing such cases.*

The Plaintiff sued for contribution in respect of payment made by him to save from sale in execution of a decree a property, in which the Plaintiff claimed he had an interest along with the Defendant. The payment had been made with the permission of the Court which had expressly found that the Plaintiff had the right to make the payment:

Held—That though the Plaintiff failed to prove that he had a share in the property, that did not dispose of the question as to the applicability of sec. 69 of the Contract Act:

Where payment is made by a person who puts forward a bona fide claim to the property in dispute he is entitled to the protection afforded by sec. 69 of the Contract Act, even though it ultimately transpires as a result of litigation that he had not in fact or in law the interest for the protection whereof the payment was made.

That in the circumstances of the case the Plaintiff should succeed on the provisions of sec. 69 of the Contract Act.

That even assuming that sec. 69 did not apply the case came within sec. 70 of the Contract Act.

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Sec. 70 lays down three circumstances as necessary to found the right of demand, viz., 1st, that the act should be lawfully done for another, 2nd, that it should not be the doer's intention to do it gratuitously and, 3rd, that the other party should enjoy the benefit of it.

The existence of an interest is generally a test as to the lawful character of a payment but even if an interest were not shown to exist payments on account of another, if lawfully made, would generally be provided for by sec. 70 of the Act.

That all the circumstances required by sec. 70 existed in the case and the Plaintiff was entitled to be reimbursed.

It is necessary to be very circumspect in the application of the general principle of justice, equity and good conscience, but the terms of sec. 70 are wide enough to afford ample room for the application of this principle in a fit case.

This was an appeal preferred on the 26th February 1924, against a decree of the Subordinate Judge of Zillah Asansole in Burdwan (Babu Nalini, Kanta Bose), dated the 16th January 1924.

The facts of the case will appear from the judgment.

Mr. Bankim Chandra Mukerjee and Babu Charu Chandra Ganguly, for the Appellants.

Babu Surendra Nath Ghoshal for the minor Respondent.

Babu Krishna Kishore Basak for Respondents Nos. 2 and 3.

THE JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of a suit for contribution instituted on the allegation that the Plaintiff and the Defendants who are governed by the

Mitakshara law were the lessees of a colliery named the Palashdiha colliery; that the landlords obtained a decree for arrears of rent in respect of the said colliery and brought to sale another colliery named the Lachipur colliery belonging to them in execution of the said decree, that the father of the Appellants, that is to say, the Defendant No. 1 Ashutosh Roy, purchased the same in the name of his son Nagendra Nath Roy, the first Appellant, that the Plaintiff's mother, as guardian of the Plaintiff, in order to save the property deposited Rs. 3,771-0-6 p. with the permission of the Court and had the sale set aside, and that therefore the Plaintiff is entitled to recover the said amount, together with costs of the deposit and interest amounting in all to Rs. 6,081-8 annas 6 pies.

The Defendants Nos. 2 and 3 who are the father and the uncle of the Plaintiff admitted the Plaintiff's claim and the Defendants Nos. 4 to 6 compromised the case with him. The only contesting Defendant was the Defendant No. 1, the father of the present Appellants. The defence of this Defendant was that the parties were not governed by the Mitakshara law, that the Plaintiff had no share in the property and so was not interested in making the payment, that the Defendants Nos. 2 and 3 really made the payment in the name of the Plaintiff and that the payment was a voluntary one, and consequently the Plaintiff was not entitled to be reimbursed.

The learned Subordinate Judge has granted the Plaintiff a decree as against the Appellants for a half of the amount of Rs. 3,571-0-6 p. and also of Rs. 50, together with interest and costs, the said half representing the Appellant's 8 annas share in the property. He has also passed a decree against the Defendants

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Nos. 2 and 3 on their own admission for an amount proportionate to their share. Against this decree the present appeal has been preferred.

The first objection urged on behalf of the Appellants is to the effect that the learned Subordinate Judge was wrong in holding that the parties are governed by the Mitakshara law. On this point the evidence is very scanty on either side and what is there on the record is exceedingly conflicting. All that is proved in this case is that the parties are Chhatris by caste, and it follows from this fact that at some time or other they must have migrated from outside Bengal. When this migration took place or where the ancestors of the parties came from, it is not possible to ascertain. It is proved that the parties are related to the Roys of Palashdighi and it is said that the latter claimed to be governed by the Mitakshara law, but it has been shown on the other hand that they failed to establish the claim. An up-country Misra Brahmin is said to be the priest of the family, but his services are availed of only on more important occasions and on other occasions Bengali priests officiate. This is all the evidence and in my opinion it is wholly insufficient for discharging the burden which undoubtedly lies on the Plaintiff, who as well as the Defendants are inhabitants of Bengal, to prove that they are governed by the Mitakshara law.

The Respondent urges that the Appellants are not entitled to re-open and re-agitate the question in view of the fact that when the Respondent put in the money, the pleader for the auction-purchaser Nagendra Nath Roy, who is the Appellant No. 1, stated that he had no instruction to oppose the making of the deposit. To this, however, the answer

is that the Appellant Nagendra Nath Roy has been brought on the records of this case, not in his capacity as 'auction-purchaser but as one of the heirs of Ashutosh Roy who was one of the judgment-debtors in the decree in execution of which the sale took place, and Nagendra Nath Roy was not present in those proceedings in his present capacity as representative of the deceased judgment-debtor and moreover it does not appear that any of the judgment-debtors under the said decree had notice of the deposit that was about to be made. Under the circumstances I am of opinion that the Appellants are not precluded from urging that the parties are not governed by the Mitakshara law. In my judgment the Plaintiff has failed to prove that he had in fact any interest in the property. The learned Subordinate Judge has allowed the Plaintiff's claim under sec. 69 of the Contract Act, on the ground that he had an interest in the payment of the money as he had a share in the property that had been sold, but in this finding of fact I am unable to agree. This however does not dispose of the question as to the applicability of sec. 69, for it has been laid down in a series of cases that where payment is made by a person who puts forward a *bond fide* claim to the property in dispute he is entitled to the protection afforded by sec. 69 of the Contract Act, even though it ultimately transpires, as a result of litigation, that he had not in fact or in law the interest, for the protection whereof the payment was made [*Bindubasini Dasi v. Harendra Lall Roy* (1) and *Radhamadhab Samonta v. Sashtiram Sen* (2)]. This extended view of the expression "in-

(1) I. L. R. 25 Cal. 305; s. c. 2 C. W. N. 150 (1897).

(2) I. L. R. 26 Cal. 526 (1899).

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interested in the payment of the money" has been adopted in consonance with the exposition of the law embodied in sec. 69 of the Contract Act to the effect that the expression is comprehensive enough to include cases of apprehension of any kind of loss or inconvenience and is not restricted to cases of individuals, who are sure to suffer actual detriment assessable in money value. Sec. 69 of the Indian Contract Act lays down that "A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

In a suit under this section it is essential that there should be firstly a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last-mentioned person. If these circumstances exist, the fiction of an implied request from the Defendant to the Plaintiff to make the payment may be properly imported into the case so as to bring it within the section and thus the right to reimbursement is created.

A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without any actual agreement to that effect. Sir Frederick Pollock in his book on the Indian Contract Act expressed an opinion that sec. 69 of the Act lays down in one respect a wider rule than appears to be supported by any English authority, and that the words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or at any rate of any detriment capable of

being assessed in money, while that was not enough in the common law, to found a claim to reimbursement by the person interested, if he makes the payment himself. This view has been judicially adopted by Stanley, C. J., in the case of *Tulsa Kunwar v. Jogeswar Prasad* (3) and by the Madras High Court in the case of *Subramaniam Iyer v. Rungappa Reddi* (4) and by this Court in the case of *Pankhabati Chaudhurani v. Nani Lall Singh* (5).

Now, what are the facts in the present case? The Plaintiff claiming to have a share in the properties sold under the decree of the landlords applied for permission to deposit the decretal dues and compensation for setting aside the sale. There is nothing to indicate that he did not *bonâ fide* believe at the time that he had such a share. The pleader for the auction-purchaser intimated to the Court that he had no instructions in the matter. The Plaintiff adduced evidence and proved to the satisfaction of the Court that he had the interest he claimed and that he was entitled to have the sale set aside on deposit of the decretal amount and compensation. The Court granted the permission and the Plaintiff thereupon made the deposit and it does not appear that any objection was taken at any subsequent stage to the Plaintiff's assertion of the right that he claimed. Under these circumstances it may fairly be held that the Plaintiff should succeed on the provisions contained in sec. 69 of the Contract Act. This view is in accord with what was said with regard to that section in the case of *Sarafatali v. Issan Ali* (6).

(3) I. L. R. 28 All. 583 (1906).

(4) I. L. R. 33 Mad. 232 (1909).

(5) 18 C. W. N. 778 (1913).

(6) I. L. R. 45 Cal. 691 at p. 695 (1917).

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Assuming however that sec. 69 is not applicable, the question arises as to whether the claim can be supported on the principles contained in sec. 70 of the Contract Act.

This section lays down three circumstances as necessary to found the right of demand, viz., 1st, that the act should be lawfully done for another, 2nd, that it should not be the doer's intention to do it gratuitously, and 3rd, that the other party should enjoy the benefit of it.

Now as regards the first of the above-mentioned three circumstances, the word "lawfully" has been the subject of judicial interpretation in several cases in which some points of diversity are noticeable.

In the case of *Damodara Mudaliar v. Secretary of State for India* (7), the Government had repaired a tank from which were irrigated lands in the zamindari of the Defendants and also *raiya-wari* villages held under the Government which had been severed from the zamindari and it was not found that there was any request, either express or implied, on the part of the Defendants to the Government to execute the repairs, but it was found that the Defendants knew that the repairs which were necessary for the preservation of the tank were being carried out and did not wish to execute them themselves except as contractors and that they had enjoyed the benefit of the work done. Sir Arthur Collins, C. J., and Shephard, J., pointed out that the statement of the law as contained in this section is derived from the notes to *Lamp-bigh v. Braith Wait* (8) and perhaps indirectly from the Roman law, and goes further than what is justified by the English cases. They held in that case that

there certainly may be difficulties in applying a rule stated in such wide terms as expressed in sec. 70, that according to the section, it was not essential that the act should have been necessary in the sense that it was done under circumstances of pressing emergency or even that it should have been necessary to be done for the preservation of property, and that the section could therefore be extended to cases in which no question of salvage arises, and further observed thus: "It is not limited to persons standing in particular relations to another, and except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done," and also "it is plain that the section ought not to be read so as to justify the officious interference of one man with the affairs or the property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered. In the present case there can be no doubt that the Government acted lawfully in repairing the tank. The act was lawful whether done with a view of benefiting all the villages under the tank or the Government villages only, whether or not done with the intention of the charging the zemindars. Having regard to the fact that zemindars knew of the intention to execute the repairs and did not disapprove, we think that if the repairs were done for the zemindars, they were done lawfully for them." This decision has been considered in several later decisions of the same Court. But its authority in so far as the aforesaid propositions are concerned has remained unchallenged. In the case of *Chedi Lal v. Bhagwan Das* (9), which was a case of satisfaction of a mort-

(7) 1 L. R. 18 Mad. 88 (1894).

(8) 1 Sm. L. C. 185.

(9) 1 L. R. 11 All 234 (1888).

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gage decree by a person not subject to any legal obligation thereunder, Straight, J., observed: "But I presume that the legislature intended something when it used the word 'lawful' and that it had in contemplation cases in which a person held such a relation to another as either to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done. Here there was in my opinion no such relation between the parties as would create any such right or from which it could be reasonably inferred. If the Plaintiffs, as mere volunteers, choose to put their hands into their pockets and to pay a sum of money not for the Defendants but for themselves, that was their own look-out and they cannot now claim the benefit of sec. 70." In the same case Mahmud, J., remarked: "I need only add that any other view of the law would amount to saying that the effect of sec. 70 of the Contract Act is to enable a total stranger, without any express or implied request on behalf of a debtor, to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. I do not think that the section could have been intended to involve such results." In the case of *Raja Baikuntha Nath Dey Bahddur v. Udai Chand Maht* (10) Mookerjee, J., observed that the word "lawfully" in sec. 70 is not a mere surplusage, and it must be considered in each individual case whether the person who made the payment had any interest in making it; and if not, the payment cannot be said to have been made lawfully. In the case of *Panchcouri Ghose v. Haridas Jati* (11), Sir Lancelot Sanderson, C. J., with the con-

currence of Mookerjee, J., qualified the above proposition by stating that "any interest" must be a "lawful interest," and held that deposit of money by a person as a mortgagee on the strength of a forged mortgage bond with an ulterior object of subsequently getting hold of the land of the person for whom the payment was made was not a lawful payment within the meaning of sec. 70. In a later case, viz., that of *Sarafatuli v. Issan Ali* (6), Mookerjee and Walmsley, JJ., held that sec. 70 was applicable to the case of a person who is wrongly made a party to a mortgage suit, as one of the representatives of a mortgagor, and a decree being obtained therein, satisfies the decree in full, and in the suit for contribution which he institutes it is found that he had no interest in the property, and observed that the exposition of the law as laid down in the cases of *Raja Baikuntha v. Udai Chand* (10) and *Panchcouri v. Haridas* (11) was not in conflict with the view that was now taken. In the case of *Gopeswar Banerjee v. Brojo Sudari Devi* (12), where a Hindu reversioner made a payment to stop a sale under the Public Demands Recovery Act of property then in possession of a Hindu widow to whom he was reversioner, it was held that the payee had no such interest as might make the payment a lawful payment within the meaning of sec. 70. It may perhaps be doubted as to whether in the last-mentioned case too limited a meaning has not been given to the word "lawful." In some of these cases stress has been laid upon the dictum of the Judicial Com-

(6) 1. L. R. 45 Cal. 691 (1919).

(10) 2 C. L. J. 311 (1905).

(11) 25 C. L. J. 325 (1916).

(12) 1. L. R. 49 Cal. 470: s. c. 25 C. W. N. 1029 (1921).

(10) 2 C. L. J. 311 (1905).

(11) 25 C. L. J. 325 (1916)

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mittee in the case of *Ram Tahal Singh v Bireswar Lall Sahu* (13), which runs in these words: "It is not in every case in which a man has been benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice consideration of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." This dictum it should be remembered was pronounced in a very special case in which the facts were very peculiar and in connexion with a suit which came into existence before the law was codified in the Indian Contract Act.

In the case of *Suchand Ghosal v. Balaram Mardana* (14), where a tenant whose interest in a holding had not been affected by certain sales, he not having been a party to the decrees, deposited money to set aside the sales, without protest from any party or the Court, Sir Lawrence Jenkins, C. J., observed that as the Plaintiff in making the deposits acted with the approval of the Court, what he did was done lawfully and further observed thus: "The terms of sec. 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, specially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious." .

In the present suit, of course, we are not satisfied that the Plaintiff has been able to prove that parties are governed by the Mitakshara law. That however does

not matter, for his right to make the deposit was expressly gone into and found in his favour by the Court and he made the deposit under the permission of the Court. The payment made was thus a lawful payment according to the dictum of Sir Lawrence Jenkins, C. J., in the case of *Suchand Ghosal v. Balaram Mardana* (14) quoted above. It is not a case in which the deposit was allowed to be made without an adjudication of the Plaintiff's right as was the case in *Panchouri v. Haridas* (11) (see the observations of Coxe, J., at the bottom of page 327). The position of the Plaintiff in this case is very much like that of a person who obtains a decree declaring his right to deposit the money and then makes the deposit, and subsequently the decree is found to be unfounded or wrongly passed as was the case in *Bindubasini Dasi v. Harendra Lall Roy* (1) and is entirely different from that of a person who has merely a claim which is subsequently found to be without foundation.

It was not a payment made by a wrongdoer simply for his own purposes as in the case of *Binda Koer v. Bhonda Das* (15), nor made fraudulently or for the purpose of manufacturing evidence of title to the land as in the cases of *Jinnat Ali v. Fateh Ali* (16), *Desai Himat Singji v. Bhavabh'ai* (17) and *Bama Sundari v. Adhar Chandra* (18), nor a mere voluntary or officious payment as was the case in *Yogamlal v. Naina Pillai* (19) and *Gordhan Lal v. Darbar Shri Surajmalji*

(1) I. L. R. 25 Cal. 305 : s. c. 2 C. W. N. 150 (1897).

(11) 25 C. L. J. 325 (1916).

(14) I. L. R. 38 Cal. 1 (1910).

(15) I. L. R. 7 All. 680 (1885).

(16) 15 C. W. N. 332 (1911).

(17) I. L. R. 4 Bom. 642 at p. 653 (1880).

(18) I. L. R. 23 Cal. 26 (1894).

(19) I. L. R. 33 Mad. 15 (1909).

(13) L. R. 2 I. A. 131 : 23 W. R. 305 (1875).

(14) I. L. R. 38 Cal. 1 (1910).

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(20), nor are there any materials on the record upon which it can be said that the payment was made with a sinister object such as was the case in *Janki Prosad Singh v. Baldeo Prosad* (21).

In my opinion the existence of an interest is generally a test as to the lawful character of a payment, but even if an interest were not shown to exist payments on account of another, if lawfully made, would generally be provided for by sec. 70 of the Act.

As regards the other two requisites of the section it is sufficient to state that there is nothing to indicate that the Plaintiff intended to make the payment gratuitously, but all the circumstances point to his having made the deposit in order to save the property and to his having intended to look to the Defendants for contribution proportionate to their interest. It has been urged that the Plaintiff has not been able to prove that he had any separate funds. There is however some evidence that he has his own funds and what is more important is the undisputed fact that the payment was made by the Plaintiff. It has not been contended and on the authorities it cannot be contended that the word "does" in sec. 70 does not include payment of money. As regards the Appellants having enjoyed the benefits of this payment, there can hardly be any question, for there is the fact that Ashutosh Roy in his capacity as judgment-debtor did, in fact, get back his share in the properties which had been lost to him by the sale. Beyond the fact that at the sale the property was purchased in the name of the Appellant No. 1 there is nothing upon which it may be held that the deposit was made against the

wishes of the judgment-debtors or that they ever repudiated it as having been made against their interest.

This, in my opinion, is a case, in which it may very well be said that the payment was a lawful one, that it was not gratuitous or the result of an officious interference of a person who had no reason to think that he had an interest in making it, and that the Appellants have admittedly enjoyed the benefits of the payment, that it was lawfully made at the time he made it, that he did so in good faith in the belief that he had an interest and not only that, he was also able to satisfy the Court under whose permission he was to act that he had such an interest. The case comes well within the principles laid down in a series of cases in which the right to be reimbursed in similar circumstances has been recognised, of which reference may be made to those of *Nalini Krishna Bose v. Monmohon Bose* (22), *Smith v. Dina Nath* (23), *Upendra Chandra v. Tara Prasanna* (24) and *Chandra Sekhar Kar v. Nafar Chandra Kundu* (25). Some of these cases were decided without reference to sec. 70 of the Contract Act; and in the last-mentioned case it was observed that it is consistent with general principles of equity that those whose funds are used to meet the legitimate demands of others, when the latter have the benefit of such payments, are entitled to ask the latter to pay to the extent of the benefit, that they cannot retain the benefits and plead non-liability, and that where the codified law does not cover the case, the Court should apply the general law, legal and

(20) I. L. R. 28 Bom. 504 (1902).

(21) I. L. R. 30 All. 167 (1908).

(22) I. L. R. 7 Cal. 578 (1881).

(23) I. L. R. 12 Cal. 218 (1885).

(24) I. L. R. 30 Cal. 794: s. c. 7 C. W. N. 609 (1903).

(25) 4 C. L. J. 555 (1906).

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equitable. It is no doubt necessary to be very circumspect in the application of this general principle of justice, equity and good conscience, but the terms of sec. 70 are wide enough to afford ample room for the application of this principle in a fit case. Upon the facts to which I have already referred, the present case seems to me to be one in which it will be just to apply the provisions of that section.

One other argument deserves notice. It has been said that there are suits pending between the Plaintiff's father and uncle, viz., the Defendants Nos. 2 and 3 on the one hand and the Appellants on the other, as to the liabilities of the former in respect of joint family funds in their hands and as the money which the Plaintiff advanced was not his own money, Plaintiff should not be allowed a decree, but that all the liabilities should

be adjusted in the said suits. I do not however see any reason why the Plaintiff should not be given a decree in the present case on the strength of the findings of which I have arrived. This decree will not stand in the way of the Appellants showing, if they may, in these suits that the money which the Plaintiff advanced as being his own, really belonged to the joint family, and getting credits therefor in the usual way if they succeed in showing the same.

The result is that while I do not agree in the reasons given by the learned Subordinate Judge I hold that the decree passed by him is substantially correct. The appeal therefore fails and is accordingly dismissed with costs (one set). The hearing fee is assessed at five gold mohurs.

GREAVES, J.—I agree.

S. C. M.

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Welcome to the Bench and the Bar.

We accord our hearty welcome to the Bench, the Bar, the judiciary and the members of the legal profession all over India, on the resumption of our duties at the beginning of the legal year and offer them our humble services and help in the administration of justice which is the noblest of all functions of the State, on which its whole superstructure rests and which after all is the corner-stone of citizen's rights and of personal and popular liberty.

The late Mr. Bhupendra Nath Basu.

Since the Courts closed during the Dusserah Vacation when we took our annual holiday, one of our foremost public men who was also one of the leading solicitors of Calcutta has passed away. Mr. Bhupendra Nath Basu who after a long and meritorious career both in the profession and public life broke down some months ago, breathed his last on Tuesday the 16th of September. Death has indeed levied a heavy toll this year on the great men of Bengal and following so closely upon the death of Sir Ashutosh Chaudhuri and Sir Ashutosh Mookerjee, the death of Mr. Basu is not only a great blow to Bengal but to the whole of India. A man of strong personality, of liberal views and broad sympathies, Mr. Basu was for many years one of the leaders of public opinion in this country. Not to speak of his own province, all India to-day feels poorer at his loss and the guiding hand of the veteran statesman will be missed every-

where. While appreciating the benefit that India has derived from the British rule, he never hesitated to urge upon the Government the just claims of his countrymen and in spite of failures and disappointments he never despaired of ultimate success in a legitimate campaign of the Indian people for the full rights of British citizenship and the privilege of managing their own affairs. He was a solicitor with a large practice but he never grudged to devote a good portion of his time to matters of public interest. Mr. Basu was an ardent worker of the Indian National Congress of which august assembly he was the president at its sitting in Madras in 1914. He took a very prominent part in the public agitation against the partition of Bengal and as a non-official member of the Provincial and Indian Legislatures he did much useful work. He took no less interest in social and educational reforms than in political. In 1919 he was appointed a member of the Council of the Secretary of State for India and in that capacity he did much to give the new Government of India Act the shape it has. In 1922 he was nominated by the Government of India as their representative at the Labour Conference at Geneva. In 1923 Mr. Basu came back to India and was appointed a member of the Public Services Commission. After making over charge of his office at Whitehall, Mr. Basu became a member of the Executive Council of the Governor of Bengal and though in failing health he accepted the office of Vice-Chancellor of the University of Calcutta in succession to Sir Ashutosh Mookerjee. By the death of Mr. Basu the legal profession has lost one of its ablest members and Bengal a no less able, sober, level-headed and patriotic leader. If he had been alive to-day, wiser council would have prevailed in the Executive Council of the Government of Bengal and the Bengal Criminal Law Amendment Ordinance would not have come

into existence. We convey our heart-felt condolence to the members of the bereaved family.

Bengal Criminal Law Amendment Ordinance, (I) of 1924.

We very much regret that it should at all have been considered necessary or expedient to have resort to legislation by Ordinance by the Governor-General of India at the instance of the Governor of Bengal arming the Police and the executive with extraordinary powers and ousting the jurisdiction of law Courts with regard to certain offences. In exercise of the powers conferred by sec. 72 of the Government of India Act, the Governor-General has promulgated an Ordinance called the Bengal Criminal Law Amendment Ordinance, 1924. Its main features are :—In cases of certain specified offences it substitutes a trial by three Commissioners for the ordinary trial by jury. No preliminary enquiry is necessary and the Commissioners are authorised to take cognizance of offences without the accused being committed to them for trial. In matters of adjournment and bail, the provisions of the Code of Criminal Procedure are superseded by those of the Ordinance. An appeal to the High Court is, however, allowed in the ordinary way against a conviction and sentence passed by the Commissioners and capital sentences passed by the Commissioners are subject to confirmation by the High Court. The more drastic provisions of the Ordinance are those that are contained in secs. 12 and 14. Sec. 12 lays down that under orders of the Local Government any person may be arrested without warrant and committed to custody in jail, and sec. 14 empowers any officer of Government authorised in this behalf by general or special order of the Local Government to arrest without warrant any person against whom a reasonable suspicion exists that he is a person in respect of whom an order might lawfully be made under sec. 12. To persons committed to custody in jail an allowance is to be given by Government but they are to be treated as under-trial prisoners subject to jail discipline. By a notification issued simultaneously with the Ordinance the Local Government has invested all Magistrates of the first class and all police officers above the rank of Sub-Inspector with the powers under sec.

14. In two lengthy statements issued along with the Ordinance the Governor and Governor-General have given reasons for promulgating the Ordinance:

We have very carefully considered the reasons advanced by the Governor of Bengal in Council for taking the powers conferred by the Ordinance by the Governor-General and we find them quite unconvincing. The reasons given by His Excellency the Governor-General are but a resumé of those given by the Government of Bengal and so what we have to say about the latter will be equally applicable to the former. We are of opinion that the Government have not been able to make out any case for the passing of such a drastic Ordinance. The Government of Bengal say that "the Government of Bengal have not been able to take the public as fully into their confidence as they would wish." We have no sympathy for anarchy or anarchical movements but we have no sympathy either for the Executive Government taking and conferring on the Police more drastic and arbitrary powers than the "Dora" by an Ordinance in times of peace and ousting the jurisdiction of the Courts of law in a more thorough-going manner. The "Dora" or the Defence of India Act and the Rules thereunder were passed at a time when the greatest of wars, known to history, was threatening the safety of India no less than that of the British Isles, when enemy's war vessels were cruising in Indian waters, bombarding her coasts, and foreign emissaries were trying to promote internal disorder and rising in India. It is ridiculous to say that the Bengal Government require similar or much more drastic powers now to put down a few stray and straggling individuals who may entertain revolutionary or anarchical ideas and commit some reckless crimes.

We fully believe that it is quite competent for the Police with a very ordinary amount of vigilance to keep these desperate persons in check as is done throughout the civilized world and to bring them to book in the law Courts under the ordinary law of the country. The Ordinance and the reasons advanced for bringing it into existence seem to us to cast an unmerited slur on the judiciary, the jury and

the people of Bengal and an indirect censure on the Government itself and the Police. We shall take the principal cases relied on by Government in justification of taking such extraordinary powers under the Ordinance. These are the cases of *Barendra Ghose* (Sankaritolu Post Office murder) and *Gopi Mohan Shaha* (Day murder case). They are fresh in our memory. So far as the public are concerned, it will be remembered that the members of the public including a student returning from College gave *Barendra* a chase at the risk of their lives when he ran firing at them. Then at his trial witnesses gave their evidence boldly and none of them were intimidated or molested at the time or since then. The jury also returned a unanimous verdict of guilty and the Court passed the extreme sentence under law which has recently been confirmed by the Privy Council. It is the Government of India who commuted the death sentence on *Barendra* to one of transportation, not on the recommendation of the Judges and the jury who tried the case, but at the instance of the Bengal Government. Then again take *Gopi Mohan Shaha's* case. He too was arrested after the atrocious crime by the common people in the street and at the risk of their lives when he too was running and firing. At his trial the plea of insanity was pressed on the jury very vigorously by his Counsel and expert medical witness. It cannot be questioned from the evidence that the fellow was a maniac. But the jury had no sympathy for this homicidal maniac and returned a verdict of guilty. The jury are not supposed to be judges of the law but relying on their sound common sense they brought in the right verdict which is in accordance with Macnaghten's case which laid down that insanity as a plea can only prevail if the accused is found to be devoid of the sense of right and wrong and is unable to judge of the consequences of his act. The law as laid down by the Indian Penal Code is the same.

The Government of Bengal says that if it possessed powers now conferred by the Ordinance they could have prevented the murder. But the evidence in this case showed that the accused was seen several times in the neighbourhood of Park Street and the maidan at early hours of the morning, when Bengali youths are seldom to be seen in that quarter. He

must have had his revolver with him then and if arrested on suspicion, for which the Code of Criminal Procedure makes ample provision, this diabolical murder could have been prevented and the accused punished. Two lives might have been thus saved. This case is a serious reflection on the detective ability of the police, and now they by way of an excuse ask for arbitrary powers which will only further demoralise them. About the recent Alipur Gang case, everyone who has followed the proceedings knows how the Police bungled it and even the judge who tried it recorded a note reflecting on their conduct. The veiled suggestion that the judges and the jury failed in their duty is a most unjustifiable charge. As regards the Sirajgunge resolution, it is well-known that the public and all sections of the press unanimously condemned it. Only one newspaper was at great pains to explain that the resolution could not be regarded as lending any support to any creed of murder or violence and that because its editor was indiscreet enough to lend it his indirect support in a different capacity. The Government says it has been able to trace the red leaflets to its publisher. Why then does it not prosecute him? As regards *Dhenki's* case and the subsequent murder of his co-accused it is still sub-judice and we express no opinion and the Government should not either. Thus the plea of the Government that extraordinary powers are required because the judges, the jury and witnesses or the members of the public cannot be relied on to bring anarchists or revolutionary criminals to justice utterly fails.

The Government say that they do not consider it expedient to take the public into their confidence regarding the prevalence of revolutionary or anarchical movements in Bengal and assert that "they have had informations which have been tested and found reliable." The members of the public who, we have shown, are not in sympathy with such movements, are not prepared to accept such *ipse dixit* of the Government. Even in the pre-reform days the Government used to place sufficient evidence of such movements before the public and that by prosecution of persons concerned in such conspiracies or crimes before the Courts of justice. This is

the only means by which the Government or the public can be satisfied about the truth or otherwise of the facts concerning them. The Government and the Police mostly get their information from spies and informers who as a rule are not a very reliable class of people. It is therefore all the more necessary that their informations should be tested and corroborated by other witnesses in open Court. There is no question that revolutionary conspiracies came into existence in Bengal after the Partition. The Government of the day had to face a very grave situation. Still they did not adopt the dark methods of the present Government. They, no doubt, got the Criminal Law Amendment Act of 1908 passed but Part I of it was not at all such a drastic measure as the present Ordinance. Persons or groups of persons suspected of seditious conspiracy or political crimes were all the same tried before the law Courts. The Act of 1908 provided for a preliminary inquiry before a Magistrate, though of a summary nature, which the Ordinance has altogether dispensed with. Then when a *prima facie* case was made out, the accused were committed to the High Court for trial by a special bench of three Judges, though without a jury, and for this the Ordinance now substitutes a Commission of Mofussil Judges and no jury. The Government may also take the opinion of two judicial officers with regard to persons arrested but their opinion is not final and the Executive Government will have the last say in the matter. The Commission will discharge their duties in a more or less Court martial fashion. Is it at all proper to adopt such a course by any constitutional Government in times of peace?

Even between 1908 and 1912 when there was more unrest in Bengal than there has ever been in this province, the Government of the day, though professedly autocratic, adopted a more constitutional course. They submitted the cases of conspiracy of a far more serious character than is alleged to exist now to judicial tribunals. We need here mention only the leading ones. The *Alipur Conspiracy* case (1908), the *Dacca Conspiracy* case (1910), the *Howrah Gang* case (1910), the *Barisal Conspiracy* case, (trial in 1913 of a conspiracy of a much earlier date), the *Raja Bazar Bomb* case (trial in 1913 of a conspiracy of

an earlier date). All these ended in conviction as will be found from the law reports or the appendix to Rowlatt Committee's Report. These and many other cases, which were successfully prosecuted by the Government of the day, and the heavy sentences of transportation and imprisonment that were passed by the law Courts then, broke the back of these conspiracies. It is a fiction on the part of the Government to say that it was the orders of internment and deportation that were passed then or during the war that enabled them to cope with the terrorist movement in Bengal. Soon after the annulment of the Partition the great war broke out and such an event was bound to promote violent activities of some stray and straggling revolutionaries who remained undetected. They continued committing some crimes for their own personal gain or for taking revenge but not in any organised form. The only incident of importance was the taking away of a large consignment of arms and ammunition on its way to Rodda & Co. But the Government of Bengal did not hesitate to submit even this *Arms Theft* case for trial before the law Court and it ended in a conviction of the persons concerned. We need not go into the details of war-time troubles, which were to no small extent promoted by foreign emissaries. The Indian people helped the Government in every way possible. The Defence of India Act and its rules were framed for coping with troubles created by foreign emissaries and not at all as an executive weapon for the punishment of political offenders without a trial.

It was, however, the Rowlatt Act that was so designed. But before the Rowlatt Act was framed, a committee was appointed before whom not only all the cases of political outrages and conspiracies from 1907 to 1913 but also facts of a more serious character such as, attempts for the supply of ship-loads of rifles, pistols, bombs and cartridges by the enemy were placed and the Rowlatt Report after reviewing and publishing all these facts for public information proposed special legislation. If the publication of the Rowlatt Report did not set the Hoogly on fire, we do not believe the facts alleged to be in the possession of Lord Lytton and his wise councillors will do so. Unless the

public are taken into confidence, they would be quite justified in believing that the Governor is being led blindfold by some of his autocratic executive councillors and the police, now that the Legislative Council has adopted a policy of self-immolation. The Government has, however, made a very sinister use of Mr. C. R. Das's reckless assertion regarding the prevalence of anarchy in Bengal to his complete discomfiture when he vainly imagined that he could thus bluff the British Government to come to terms with him on the lines of the Irish Treaty of 1919. The Government here took advantage of his hoax to throw dust into the eyes of the Labour Government and the latter in their turn made as much use of it for electioneering purposes as their opponents did of the Zinovieff's letter. But after all, political trickery does not pay in the long run. We would therefore suggest to the Government of Bengal and the Government of India to withdraw the Ordinance and put the persons arrested thereunder to their trial before the ordinary Courts of law under the ordinary law of the land which would enable them to cope more effectively with the criminal activities of political offenders. Coercive and repressive laws only serve to promote general discontent in the country.

We shall conclude by pointing out that the terms of the Ordinance are even more drastic than the Rowlatt Act—a very ill-fated legislation which after it was passed by the Indian Legislature, in 1919, by a nominated official majority, brought in a lot of troubles which is still fresh in our memory. It remained a dead letter ever since, till its funeral rites were mournfully performed by Sir William Vincent in the Legislative Assembly in 1922 with the full concurrence of Lord Reading who accepted the recommendations of the Repressive Laws Committee of the Indian Legislatures in this behalf. The present Ordinance is but a hideous ghost that has been conjured up out of the grave of the Rowlatt Act by the joint collaboration of Lord Reading and Lord Lytton and some of their uncanny councillors. That this is so will appear from the skeleton sketch of both the Ordinance and the Rowlatt Act, we publish below.

REPRESSIVE LAWS, PAST AND PRESENT.

A brief survey of the Legislation undertaken in recent years to supersede the ordinary criminal law of the land shows that in 1908 the Indian Criminal Law Amendment Act (Act XIV) was passed whereby a special procedure was provided for the trial of certain offences by three Judges of the High Court. The proceedings were to be instituted by an *ex parte* preliminary enquiry by a Magistrate. Part II of this Act dealt with unlawful associations and the Governor-General could declare any association unlawful and the penalty for being a member of an unlawful association was imprisonment for three years.

In 1915 the Defence of India (Criminal Law Amendment) Act (Act V) was passed for the more speedy trial of certain offences. The preliminary enquiry for the purpose of commitment was dispensed with and the trial was to be by three Commissioners as under the new Ordinance which in matters of trial is almost on a line with this Act, with this exception that the Ordinance provides for an appeal to the High Court in the ordinary way and a sentence of death passed by the Commissioners under the Ordinance is subject to confirmation by the High Court. Under sec. 2 of this Act the Governor-General in Council could make rules for the purpose of securing the public safety and the defence of British India. Sec. 3 of these rules [Defence of India (consolidation) rules] laid down that where in the opinion of the Local Government there were reasonable grounds for believing that any person had acted, was acting or was about to act in a manner prejudicial to the public safety or the defence of British India, the Local Government might by order in writing direct that such person was not to enter, reside or remain in any area specified in the order; was to reside or remain in any area specified in the order; was to reside or remain in any area in British India so specified; was to conduct himself in such manner or abstain from such acts or take such order with any property in his possession or under his control as might be specified in the order.

In 1919 the Anarchical and Revolutionary Crimes Act (Act XI) was passed which made special provisions for the trial of certain offences by three Judges of the High Court, the proceedings being instituted by the lodging of an information with the Chief Justice. Part II of this Act laid down in sec. 22 that

when in the opinion of the Local Government there were reasonable grounds for believing that any person was or had been actively concerned in any anarchical or revolutionary movement the Local Government might make an order against such person directing him to execute a bond, to notify his residence or to remain or reside in any area in British India specified in the order. Part III of this Act laid down in sec. 34 that where in the opinion of the Local Government there were reasonable grounds for believing that any person had been or was concerned in any offence mentioned in the schedule of the Act the Local Government might make an order directing the arrest of such person without warrant and the confinement of any person in such place and under such conditions and restrictions as might be specified in the order. Under this section the Local Government might direct the search of any place specified in the order which in the opinion of the Local Government had been, was being, or was about to be, used for any purpose connected with any anarchical or revolutionary movement.

In each case, both under Part II and Part III, before making the order the Local Government was to place all the materials in its possession relating to the particular case in question before a judicial officer qualified for appointment to a High Court and take his opinion and it was only after considering such opinion that the Local Government could make an order under Part II or Part III.

Sec. 12 of the Ordinance lays down :—

“(1) Where in the opinion of the Local Government there are reasonable grounds for believing that any person—

(i) has acted, is acting or is about to act in contravention of the provisions of the Indian Arms Act, 1878, or of the Explosive Substances Act, 1908, or

(ii) has committed, is committing, or is about to commit any offence specified in the second schedule, or

(iii) has acted, is acting, or is about to act with a view to interfere by violence or by threat of violence with the administration of justice,

The Local Government, if it is satisfied that such person is a member or is being controlled or instigated by a member of any association of which the objects or methods include the doing of any of such acts or the commission of any of such offences, may, by

order in writing, give all or any of the following directions, namely, that such person

(a) shall notify his residence and any change of residence to such authority as may be specified in the order :

(b) shall report himself to the police in such manner and at such periods as may be so specified :

(c) shall conduct himself in such manner or abstain from such acts as may be so specified :

(d) shall reside or remain in any area in British India so specified :

(e) shall not enter, reside in or remain in any area specified in such order :

(f) shall be committed to custody in any jail :

Provided that the Local Government shall not in an order under cl. (a) or cl. (b) specify an area or a jail outside Bengal without the previous sanction of the Governor-General in Council.

(2) The Local Government in its order under sub-sec. (1) may direct

(a) the arrest without warrant of the person in respect of whom the order is made at any place where he may be found by any police officer or other officer of Government to whom the order may be directed or endorsed by or under the general or special authority of the Local Government ;

(b) the search of any place specified in the order which in the opinion of the Local Government has been, is being or is about to be used by such person for the purpose of doing any act or committing any offence of the nature described in sub-sec. (1).”

Sec. 14 of the Ordinance provides :—

“(1) Any officer of Government authorised in this behalf by general or special order of the Local Government may arrest without warrant any person against whom a reasonable suspicion exists that he is a person in respect of whom an order might lawfully be made under sub-sec. (1) of sec. 12.

(2) Any officer exercising the power conferred by sub-sec. (1) may at the time of making the arrest search any place and seize any property which is or is reasonably suspected of being used by such person for the purpose of doing any act or committing any offence of the nature described in sub-sec. (1) of sec. 12.

(3) Any officer making an arrest under sub-sec. (1) shall forthwith report the fact to the

Local Government and pending receipt of the orders of the Local Government may by order in writing commit any person so arrested to such custody as the Local Government may by general or special order specify in that behalf :

Provided that no person shall be detained in custody under this section for a period exceeding fifteen days save under a special order of the Local Government and no person shall in any case be detained in custody under this section for a period exceeding one month."

By a notification the Local Government has authorised all Magistrates of the first class and all police officers above the rank of Sub-Inspector to make arrests under sec. 14. The notification also authorises that persons arrested under sec. 14 in any area subject to the jurisdiction of the Commissioner of Police, Calcutta, shall be committed to custody in the Presidency Jail and those arrested in any other area shall be committed to custody in the District Jail. The notification further provides that persons committed to custody under sec. 14 shall for the duration of such custody be subject to jail discipline in all respects as if they were under-trial prisoners committed to custody under the provisions of the Code of Criminal Procedure.

It will thus be seen that the Ordinance provides for no preliminary safeguard like taking the opinion of a judicial officer before making an order which was to be found in the Rowlatt Act but only provides in sec. 19 that within one month from the date of the issue of an order under sec. 12 the Local Government shall place before two Judges the facts and circumstances of each case and on receipt of the report of the Judges the Local Government shall pass such orders as will appear to be just and proper. Over and above this the special provision has been made under sec. 14 for arrest by a police officer.

MODE OF RECORDING EVIDENCE IN CRIMINAL CASES.

Having regard to the general object of Chap. XXV of the Code of Criminal Procedure, which is to ensure the accuracy of the record and afford information to the accused as to what the evidence at the trial is, compliance with sec. 360, cl. (1) which lays down that

the evidence of each witness after being recorded by the Court shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader and shall, if necessary, be corrected is imperative.

It is a matter of common knowledge that this wholesome provision of law enacted not only for the benefit of the witness but also of the accused is almost universally ignored. The result has been to set up a wholly erroneous practice in the Criminal Courts in direct contravention of the law on the subject. A similar deplorable consequence was brought about by the non-observance of sec. 342 of the Code of Criminal Procedure which came to the notice of the High Court in *Muzahar Ali v. King-Emperor*, 27 C. W. N. 99 and subsequent cases and it was ruled that strict compliance with the provisions of the statute was absolutely necessary and must be enforced. In consequence of this decision a very large number of cases, disposed of both in the Mofussil and in Calcutta had to be retried. Exactly similar will be the result of the recent decision of the High Court in *Hira Lal Ghosh v. The King-Emperor*, 28 C. W. N. 968, in which their Lordships Newbould and Mukerji, JJ., have strongly condemned the practice of not complying with the provisions of sec. 360, cl. (1) and held that the failure to comply with the provisions deprives the accused of the very valuable right of checking the depositions of the witnesses and vitiates the whole trial.

In the first Draft Bill (III of 1914) for the purpose of amending the Code of Criminal Procedure, it was proposed, in cl. 83 of the Bill, evidently to legalise the practice that had grown up, to amend sec. 360, so as to provide for the reading over of the deposition to the witness only if the accused so desired and not in any other case. The Calcutta High Court when consulted on the Bill supported the proposed amendment but in the Bill introduced in the Imperial Legislative Assembly on 20th September 1917, cl. 83 was omitted. Thus it is clear that the Legislature deliberately decided that the inconvenience, if any, caused by the provisions of sec. 360 did not justify an alteration of the law and therefore it is all the more necessary and imperative that compliance with the provisions of the section must be strictly enforced. Hundreds of cases will now have to be retried on the ground that the depositions of the witnesses were not pro-

perly read over to them as last year numerous retrials took place on account of the omission of the Magistrates to examine the accused under sec. 342 after the close of the evidence for the prosecution. This waste of public time is much to be regretted and the responsibility for it rests with the Magistrates who must now clearly understand that the slightest deviation from imperative rules of procedure laid down by the Legislature cannot be validated by any practice that may have grown up without the sanction of law, however long established and frequently followed that practice may be.

In a correspondence to be published hereafter our attention is drawn to another point in connection with sec. 360. The ordinary mode of taking evidence in a criminal case is that the Judge or Magistrate should record it in the language of the Court (sec. 356) or in his mother tongue (sec. 357) in the form of a narrative (sec. 359) and the record so made is to be read over to the witness in the presence of the accused (sec. 360). Sec. 355 is an exception to the general rule and empowers the Court to make a memorandum only of the substance of the evidence of each witness in summons cases and in cases of certain offences mentioned in sec. 260; on the other hand, under sec. 358 the Magistrate in his discretion may in cases in which he is authorised to make only a memorandum of the evidence choose to make a full record. Sec. 360 enjoins that the evidence of each witness taken down under sec. 356 or sec. 357 shall be read over in the manner provided; in other words, the evidence recorded is to be read over to the witness only in those cases where a full record is made and not where a memorandum only of the substance is kept for in these latter cases, having regard to the petty nature thereof, the Legislature has allowed a deviation from the general rule.

The question raised is whether sec. 360 applies to a case where the Magistrate chooses to proceed under sec. 358. Sec. 358 is analogous to sub-sec. (2) of sec. 260 which provides for the regular trial of a case which the Magistrate has commenced under the summary form but which in the course of the trial appears to be of a character which renders a regular trial necessary. Where a Magistrate takes action under sub-sec. (2) of sec. 260 all the formalities of a regular trial must be followed and advantage cannot be

taken of the deviations from the general rule provided for summary trials by secs. 263, 264. Likewise if the Magistrate chooses to follow sec. 358 all the formalities of recording evidence in a regular way must be followed and sec. 360 will undoubtedly apply and the evidence of witnesses recorded by the Magistrate must be read over to them in the manner provided by law.

Secs. 356, 359, 360 are obviously to be read together and no one of them can be brought into operation except in conjunction with the others. The arrangement of the sections and the general policy adopted in the Code makes it abundantly clear that this was the intention of the legislature.

As to the point which may be raised about the legality of the Magistrate making a memorandum of the evidence of witnesses in a case, say, under sec. 457, I. P. C., which is a "serious" offence for which the maximum punishment provided is imprisonment for five years, the answer is not far to seek.

Cases under sec. 457, I. P. C., as under many other sections may vary in grades of criminality and a Magistrate can dispose of those cases only which are not fit to be committed to the Court of Sessions, in other words, of petty cases only and in these petty cases the law allows him to take a short cut in proceeding with the trial without recording the depositions in full. The decision of this point does not in any way depend on the applicability or otherwise of sec. 360 to cases proceeded with under sec. 358, because it is entirely optional with the Magistrate to follow the procedure laid down by the latter section or not. If he chooses to follow sec. 358 then and then only sec. 360 comes in; the Magistrate is not in any way bound by the operation of sec. 360 to follow sec. 358.

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The Ordinance and its supersession or confirmation by legislation.

We have in our last issue commented on the provisions of the Ordinance lately issued by the Governor-General. From newspaper reports it appears that Pundit Moti Lal Nehru has given notice of the introduction of a Bill in the Legislative Assembly for the repeal of the Ordinance with effect from the date on which it was passed. Ordinances are passed by the Governor-General under sec. 72 of the Government of India Act in cases of emergency for the peace and good government of British India or any part thereof and they are subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act. But under sec. 67 (2) of the Government of India Act, it shall not be lawful without the previous sanction of the Governor-General to introduce at any meeting of either Chamber of the Indian Legislature any measure repealing or amending any Act or Ordinance made by the Governor-General and under r. 19 of the Legislative Rules such sanction is to be appended with the notice of motion for leave to introduce the Bill. Thus the previous sanction of the Governor-General is a condition precedent to the introduction of any measure like the one proposed.

An Ordinance "may be made" by the Governor-General under sec. 72 "in cases of emergency" as was done by His Excellency at the time of the Mophla rising and that was at a time when the

Legislature was not sitting. When the Legislature met no one objected to it because there was no question that the rising had created an "emergency" which could not be coped with except by the declaration of martial law by the Ordinances issued at the time. The situation was debated upon when the Legislature met but no exception was taken to the Ordinances. But the circumstances of the issue of the present Ordinance is quite different as no overt act or apprehension of a rising or civil commotion is alleged and the public has been kept in the dark as to the character of the "emergency," if any.

Ordinances are, however, issued by the Governor-General and not by the Governor-General in Council and any resolution or motion for adjournment for eliciting facts or questioning their propriety or recommending their repeal may be ruled out of order under Legislative Rule 23 and Standing Or. 29 of the Indian Legislature. But a convention of the Legislature established by practice may override the Rules and Standing Orders and there is a ruling to that effect by the President of the Assembly with regard to nominal cuts in respect of non-votable items. Since the Mophla disturbances were debated upon, we see no reason why the Bengal situation can not form the subject-matter of a resolution. But apart from such debatable question whether a resolution or motion for adjournment relating to the Ordinance would be in order or not, there can be no question that a motion for leave to introduce a Bill for its repeal before its natural life of six months is quite competent. The Governor-General may no doubt refuse his sanction under sec. 67, but it may be questioned whether he should do so constitutionally. When "leave to appeal" is required by law, it is not intended that such leave should be arbitrarily refused but that leave has to be sought and should be granted when there are *prima facie* grounds for consideration.

We have mentioned above that the issue of an Ordinance is an "emergency" power and may properly be exercised when any "emergency" arises and the Legislature is not sitting. It seems to us that the spirit of the constitution requires that when the Legislature meets, the Government should of its own motion introduce a Bill covering the grounds of the Ordinance for obtaining legislative sanction to it. If such sanction is refused and the Governor-General is still convinced that it is essential for the safety or tranquillity or interests of British India or of any part thereof he may certify the measure under sec. 67B. Such a course would be far more constitutional than to ignore the Legislature altogether and to refuse leave to the introduction of any Bill; for, that would imply the Governor-General's want of confidence in the Legislature. As the constitutional head of the Government of India he should give the Legislature every opportunity for discussion of Ordinances promulgated by him in his executive capacity. Further, the provision in sec. 72 that an Ordinance may be "disallowed, controlled or superseded" by an Act of the Legislature would be quite unmeaning, if sec. 67 of the Act is to be read as meaning that leave for introduction of any Bill for the repeal of an Ordinance should invariably be refused.

We are further of opinion that such leave should be given because it is a very properly debatable question whether any such "emergency" has arisen in Bengal as would justify the issue of the Ordinance in question. Such a debate in the Legislature which would be an index to the public opinion in the country cannot do any harm but on the contrary would do much good. The Government will also get an opportunity of disclosing facts not known to the public and justify their action. On the other hand, if the Legislature can make out a good case for its repeal and carry the repealing Bill, the Government by accepting the measure may refute the charge of the obstructionists that the Legislature is a sham. If the Legislature fails to make out a good case, the Governor-General may withhold his assent to the repeal. The Government has a further alternative and may, as we have already said, introduce a recommended Bill and certify it under sec. 67B. So to refuse permission to

the Legislature to consider and discuss the measure would be, in our opinion, a serious blunder.

Local Legislature and the Ordinance.

Leave for the introduction of a Bill in the Indian Legislature may be refused by the Governor-General on the ground that he has already given sanction to the Governor of the Province concerned to introduce a Bill in the Bengal Legislative Council for passing the Ordinance into law. Such sanction implies that it will be competent for the Local Legislature to amend or reject it altogether. Under Devolution Rules, Sch. I, Part I, item 30, "criminal law including procedure" is put down as a central subject and is outside the scope of the Provincial Legislature. But under sec. 80A (3) (e), with the sanction of the Governor-General such legislation may be undertaken by the local legislature. When such sanction is given and the Ordinance is introduced into the Bengal Council in the form of a Bill of the local legislature, it would be competent for the Bengal Council to pass it, alter it or reject it or even to repeal the Ordinance. For, sec. 80A, sub-sec. (2) says:—

The local legislature of any province may, subject to the provision of the sub-section next following, [i.e., sub-sec. (3)] referred to above which provides for the previous sanction of the Governor-General to legislate with regard to criminal law or procedure.—[En.] repeal, or alter as to that province any law made either before or after the commencement of the Act [Government of India Act] by any authority in British India other than that local legislature.

From the above clause it is clear that the Bengal Council will be quite competent to amend or repeal the Ordinance, if a Bill on its lines is introduced in the Council with the sanction of the Governor-General. If the Governor-General has once accorded such sanction to the Bengal Government, he may legitimately refuse leave to the introduction of Pundit Moti Lal's Bill in the Legislative Assembly and in that case such refusal cannot be regarded as unconstitutional. In the statement issued by the Governor-General with the Ordinance, His Excellency announced that with his sanction a Bill for enactment of the Ordinance as a provincial measure of legislation would be introduced. But with regard to the Bill or its time of introduction we are in the dark. It has been surmised that even if such a Bill is introduced and is

rejected by the Bengal Council, the Governor may certify it. But we say, sufficient unto the day are the evils thereof. So far we have explained the constitutional position of the situation both with regard to the Indian Legislature and the Local Legislature.

As regards the Governor's power to certify we invite attention to sec. 72E of the Government of India Act which provides that if the "Legislative Council has refused leave to introduce, or has failed to pass in a form recommended by the Governor, any Bill relating to a reserved subject, the Governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon, the Bill shall be deemed to be passed." Sub-sec. (2) provides for the assent of His Majesty in Council, but a proviso to it empowers the Governor-General, if he be of opinion that there is an "emergency," to assent to it and thereupon it comes into force subject to disallowance by His Majesty in Council. Sub-sec. (3) provides for laying the Act before the Houses of Parliament for eight days before being presented for His Majesty's assent. It is fruitless now to surmise whether the proposed Bill if rejected by the Provincial Legislative Council will be certified by the Governor and if certified which of the courses mentioned above will be taken by the Governor-General.

In case of rejection by the Council and certification by the Governor, the only constitutional course open to the members would be to resign their seats and appeal to the country, as was proposed to be done by the members of the Legislative Assembly and actually done by some of them, when the Finance Bill doubling the salt tax was certified by the Governor-General. If the members who are opposed to the Bill are returned to the Provincial Council unopposed or by a majority, that would signify the verdict of the country with regard to the measure and such verdict would be binding on any Government which has a regard for the constitution. Once when the Government was heavily defeated, the non-official members of the Legislative Assembly good-humouredly shouted "resign," but the President, Sir Frederick Whyte, humourously observed, "the Government in this country never resigns." It is, therefore, a constitutional anomaly that

when the Government suffers a defeat on any vital issue concerning the rights and liberties of the people and disregards the vote or overrides it under its extraordinary powers of certification, the only alternative left to the opposition is to resign and bring about a dissolution and force a general election for confirming the confidence of the electorate in them and want of confidence in the Government with regard to the issue over which the opposition resigned.

Distinction between Civil and Criminal Cases.

It is not uncommon that an application in revision is thrown out on the ground that the sentence passed on the accused has expired. This is not what it ought to be. A conviction in a Criminal Court carries with it a stigma, and an accused person has every right to place his case before the highest Court and solicit its judgment. Moving the High Court means time and money, a fact which should never be overlooked. A notable instance in point is to be found in *Emperor v. Umed Singh*, I. L. R. 46 All. 64, where Mr. Justice Walsh revised a conviction for defamation after the accused had undergone the full term of imprisonment inflicted on him. The revisional powers conferred on the High Court by the Code of Criminal Procedure are not in any way less comprehensive than those which can be exercised in appeal and it is a mistake to suppose that sec. 439 of the Code is anything like sec. 115 of the Code of Civil Procedure. Criminal cases stand on a quite different footing from civil actions and it is the duty of the High Court to interfere where the finding arrived at by the lower Court is perverse or contrary to well-established principles of law, otherwise, as observed by the learned Judge, revision would be an idle farce if the revisional Court had not the power to look into the evidence for itself and see if the findings can be justified by what appears on the record. The distinction between a civil and a criminal case has very clearly been pointed out in the case in question where the accused was convicted of defamation for having slandered the complainant by a statement to the effect that the complainant had suffered the penalty of being outcasted by reason of his social relations with a man who was an outcaste. The lower Courts found against the accused especially on the ground that he did not plead justification

and therefore although the statement about the complainant having been outcasted might be true he had nonetheless got to go to jail. Says the learned Judge: "I dissent totally from the proposition that in a criminal case an accused person is to be judged by how he pleads or fails to plead in the proceeding. Much injustice may be done by applying to criminal proceedings the precise and pedantic requirements of civil procedure. It is quite true that in dealing with defamation the Penal Code has introduced a series of provisions adopted partly from the old common law in the nature of defences, but it has not altered the fundamental principle of the criminal law that the complainant or prosecution must prove the accused to be guilty, or, in other words, the absence of such facts as happen to bring the case within either of the defences or exceptions laid down in the section. There is no such language as pleadings in a Criminal Court. The subsequent conduct or statement of an accused person may affect his credibility. It cannot destroy his right to be assumed an innocent person until his guilt has been established without any reasonable doubt."

of the benefit of the first exception in sec. 499, I. P. C., on the technical difficulty of a supposed defect in pleading. The observations of the learned Judge are well worth quoting.

"If a person really was outcasted, the statement to the members of the brotherhood that he was outcasted was the kind of statement contemplated by the expression 'for the public good.' So long as caste prevails, and it must be remembered that it is sanctified by religious and by social traditions going back for centuries and forming one of the fundamental characteristics of social life in India, any attempt to minimise, ignore or brush aside existing regulations, existing sanctions or respect for existing decisions must be regarded from the Indian point of view as contrary to the public good. It is not from the Indian point of view for the public good that caste ought to be abolished. Therefore to justify the conviction it was necessary to hold not merely that the statement was untrue but if it was true, that it was a statement not honestly made for the benefit of the brotherhood."

As regards the proof of the absence of the existence of facts bringing a case within an exception provided in the Code, sec. 105 of the Evidence Act presents some difficulty. That section says that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions of the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence is upon him and the Court shall presume the absence of such circumstances. This, however, does not mean that the accused must lead evidence. If it is apparent from the evidence on the record whether produced by the prosecution or by the defence that a general exception would apply the presumption of sec. 105 of the Evidence Act is removed. In the case under notice the question was whether the statement made by the accused was false and further if it was true whether or not it was for the public good. Whether it was for the public good or not was a question of fact which could be decided on the statement itself without any additional evidence. Thus there was no reason for depriving the accused

RIGHT OF APPEAL UNDER THE PROVINCIAL INSOLVENCY ACT.

Sec. 75 of Act V of 1920 corresponding to sec. 46 of Act III of 1907 is the provision that deals with appeals in insolvency matters. Cl. 2 of the section specifies by reference to Sch. I of the Act the various orders against which a person aggrieved by a decision of the District Court sitting as an original Court of insolvency jurisdiction could prefer an appeal to the High Court. Cl. 3 provides that if an appeal is sought to be preferred from any other order of the District Court made in the exercise of original insolvency jurisdiction, that can only be done by leave of the District Court or the High Court. But cl. 1 of sec. 75 which deals with appeals to the District Court from orders made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, imposes no restriction and makes no enumeration of the orders from which alone an appeal will lie. The question for consideration is whether any order and every order made by an insolvency Court subordinate to a District Court is appealable,

or whether there are limits to the right of appeal. Sec. 5 of the Act says: "Subject to the provisions of this Act, the Court, in regard to proceedings under the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of Original Civil Jurisdiction." It is perhaps questionable if any useful guidance is to be sought for on the question under consideration from the language of sec. 5. Firstly, that general provision about the powers and procedure of Insolvency Courts is subject to the provisions of the Insolvency Act and so we come back to where we started from. Secondly, the use of the words "Court" at the beginning and "in the exercise of Original Civil Jurisdiction" at the end, seem to denote that the section deals with the powers and procedure of Courts exercising Original Jurisdiction in insolvency matters, and has little to do with appeals. Now, there are certain orders which are not appealable under the Code of Civil Procedure. Sec. 104 and Or. 43 of the Civil Procedure Code enumerate the various orders from which an appeal will lie, and sec. 104 (1) adds:—"Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force from no other orders." Here again we have a saving clause providing for appeals where provision is made therefor by any other law for the time being in force. Let us take a concrete case where no appeal lies under the Code of Civil Procedure. Suppose an adjudicated insolvent applies to the insolvency Court for discharge. The creditors are absent and an *ex parte* order of discharge is made. Then one or more of the creditors apply to the Court to set aside the *ex parte* order of discharge and it is set aside with a view to enable them to state their objections. Does an appeal lie under sec. 75 (1) to the District Court against such an order? Under the Code of Civil Procedure such an order would not be appealable. Even in the case of a decree, an order under Or. 9, r. 13 rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* would be appealable under Or. 43, r. 1 (d); but an order allowing such an application would not be appealable. If sec. 75 of the Provincial Insolvency Act is to be regarded as complete and self-contained, and unfettered by any of the conditions as to appeal laid down in the Code of Civil Procedure, then it might be contended that an order like

that would be appealable under the Insolvency Act, though a similar order to which the provisions of the Civil Procedure Code are applicable would not be appealable. What is the proper construction of sec. 75?

On the whole, the more reasonable construction appears to be that an order which is not appealable under the Code of Civil Procedure would not become appealable, simply because it is passed in a matter arising in insolvency jurisdiction—and for the following reasons:—

1. The policy of the Insolvency Act itself appears to be to restrict the right of appeal and place it within well-defined limits and not to leave the door wide open for anybody who may feel aggrieved by any order passed in insolvency jurisdiction though the order merely touches a question of procedure and does not finally dispose of the rights of parties to go through to the Appellate Court and reargue the matter there. Cls. 2 and 3 of sec. 75 show that this is the true intent of the legislature, *viz.*, to restrict the right of appeal and not to enlarge it.

2. What little of judicial authority there is on the point is also to the same effect. See *Mahomed Haji Essack v. Shaik Abdul Rahman*, 40 B. 461. That was a case under the Presidency Towns Insolvency Act. Sec. 8 (2) of that Act uses language as wide as we find in cl. 1 of sec. 75 of the Provincial Insolvency Act. Sec. 8 (2) says: "Orders in insolvency matters shall at the instance of any person aggrieved be subject to appeal as follows . . ." In construing sec. 8 (2) Scott, C. J., in 40 B. 461 says: "It does not appear to us that the legislature wished to put any limitation upon appeals made from original orders of a Judge except perhaps orders regulating procedure." This makes possible an interpretation of the section which does not conflict with the provisions of the Civil Procedure Code. A judicial decision of a matter arising in insolvency is appealable alike under sec. 75 (1) of the Provincial Insolvency Act and sec. 8 (2) of the Presidency Towns Insolvency Act: but an order merely touching procedure would be governed as regards appealability by the provisions of the Code of Civil Procedure. In this view the conflict between the provisions of the Civil Procedure Code and the Insolvency Act is more apparent than real.

3. Again if the Insolvency Act were to be regarded as a self-contained Code, containing within its four corners all provisions as to

appeals in insolvency matters, no appeal will lie in insolvency matters to the Privy Council, because the Insolvency Act makes no provision for it. In 40 C. 685, *Chatrapat Singh v. Kharag Singh*, an argument of that kind was advanced, namely, that the effect of secs. 46 and 47 of Act III of 1907 corresponding to secs. 5 and 75 of Act V of 1920 was, if anything, to negative the right of appeal to the Privy Council. But Jenkins, C. J., held, "I do not so read the Insolvency Act. In my opinion by that Act, there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist." The analogy of this decision suggests that neither does the Act confer any right of appeal which is negated by the general law as contained in the Code of Civil Procedure.

4. In 45 M. 31—*In the matter of Chidambara Chetty*, there was a conflict between the provisions of the Presidency Towns Insolvency Act and those of the Madras Estates Land Act. Sec. 36 of the Presidency Towns Insolvency Act provides for the determination by the insolvency Court of all questions relating to debts due by third parties to the insolvent. Sec. 189 of the Madras Estates Land Act debars Civil Courts exercising Original Jurisdiction from taking cognisance of any dispute or matter in respect of which a suit or application might be made to a revenue Court. In that case the Official Assignee applied to the Judge sitting in insolvency for an order against a raiyat for payment of *kist* due to the insolvent. It was held that the insolvency Court could not pass any such order and that sec. 36 of the Presidency Towns Insolvency Act cannot override sec. 189 of the Madras Estates Land Act. The *ratio decidendi* of this case also points to the same result, viz., that sec. 75 of the Provincial Insolvency Act cannot override the provisions as to appeal laid down in the Code of Civil Procedure, especially inasmuch as the language of the section does not clearly point to such a construction.

K. RANGANATHAN, M.A., M.L.,
High Court Vakil.

RIGHT OF UNRECOGNISED TRANSFEREE OF NON-TRANSFERABLE OCCUPANCY HOLDING TO DEPOSIT AMOUNT OF RENT-DECREE UNDER SEC. 170 (3), BENGAL TENANCY ACT.

By RADHAROMON MOOKERJEE, Vakil,
BERHAMPORE.

Introduction.

In some of its recent decisions [e.g.—*Mahammad v. Satyesh*, 26 C. W. N. clxx (1922), *Radha v. Nitai*, 38 C. L. J. 147 (1923), *Narendra v. Abdul*, 27 C. W. N. clxxv (1923) and *Barad v. Faijuddi*, 28 C. W. N. cxv : s. c. 39 C. L. J. 428 (1924)], the Calcutta High Court has denied the unrecognised purchaser of a non-transferable occupancy holding the right to deposit in Court the amount of the rent-decree in order to save it from being sold in execution thereof. Previously the case of *Ahmadulla v. Hakaru*, 22 C. L. J. 106 : s. c. 18 C. W. N. ccxxxi, *Ahmadulla v. Prayag*, 20 C. W. N. 39 (1914) was the only one decided after, and on a consideration of the ruling of the Full Bench of that Court in *Dayamayi v. Ananda*, 20 C. L. J. 52 : s. c. 18 C. W. N. 971; I. L. R. 42 Cal. 172 (1914), in which his right was fully recognised. Since then, however, a Special Bench of the Patna High Court in the case of *Mahadeo v. Langat*, 2 P. L. J. 457 (1917), held that he had not the right. But so far as the Calcutta High Court was concerned the case of *Ahmadulla v. Hakaru* was practically the governing authority for a period of about eight years till 1922 when again for the first time in that year it expressed the contrary view in *Mahammad v. Satyesh*, 26 C. W. N. clxx. As the matter is of great practical importance in the Mofussil inasmuch as it will affect very materially the sale of agricultural holdings, it is necessary to discuss fully the grounds on which the High Court has changed its opinion.

Persons entitled to deposit under sec. 170 (3), Bengal Tenancy Act.

The persons who are entitled to deposit the decretal amount have been stated in sec. 170 (3), Bengal Tenancy Act to be "the judgment-debtor, or any person having in the holding any interest voidable on the sale."

To enable the purchaser to avail himself of

the provision it is necessary that he should come within one of these categories.

Purchaser is not judgment-debtor.

The "judgment-debtor" mentioned there has been explained to be a person against whom the decree under execution has been obtained. It does not include a person who purchased the holding from the recorded tenant long before the rent-suit, although he is likely to be affected by the sale which may ultimately be held in execution of the decree. [*Tarak v. Harish*, 16 C. L. J. 548: s. c. 17 C. W. N. 163].

Is his interest in holding voidable?

The only other class of persons who is given the right is the person whose interest in the holding is voidable on the sale. To entitle the purchaser to come within that class it must be shewn that he has an interest in the holding, and that if so, that interest is voidable on the sale. [*Jugal v. Srinath*, 12 C. L. J. 609].

Assuming that he has an interest in the holding, the question is whether it is voidable.

According to Doss, J., of Calcutta High Court, and Patna High Court, Interest to be voidable must be incumbrance.

The answer to this question depends upon the right which an auction-purchaser at the rent-execution-sale acquires in the holding. These have been dealt with in Chap. XIV of the Bengal Tenancy Act, which appears to be self-contained, so far as the present question is concerned. [*Mahadeo v. Langat*, 2 P. L. J. 457, S. B. Per Chamier, C. J.]. He acquires the holding with power to annul the interests which are described as "incumbrances." [Secs. 161 and 159]. The word "annul," as used in sec. 159, means, according to some, the same thing as the word "avoid" implied in the word "voidable" as used in sec. 170 (3). And probably it was this that led Doss, J., of the Calcutta High Court as early as 1908, to express for the first time the opinion that "the words 'any person having in the tenure or holding an interest voidable on the sale' mean any person who has in the tenure or holding an incumbrance, as defined in sec. 161, Bengal Tenancy Act." [*Behari v. Fakir*, 12 C. W. N. ccxxxi]. This was merely echoed and amplified by Chamier, C. J., of the Patna High Court recently in the case of *Rameswar v. Raghunandan*, 1 P. L. J. 403 (1916) and re-

iterated by him in the Special Bench decision of the same Court in the case of *Mahadeo v. Langat*, 2 P. L. J. 457 (1917) in the following words:—"It seems to me . . . that the only interests which are 'voidable on the sale' within the meaning of sec. 170 are those interests which can be avoided by means of an application under sec. 167, and that the only interests which can be avoided by means of such an application are the interests defined in sec. 161 as 'incumbrances'." Hence, according to this view, the "interests voidable on the sale," referred to in sec. 170 (3), are those interests which are "incumbrances" within the meaning of sec. 161, [*Rameswar v. Raghunandan*, 1 P. L. J. 403], or, in other words, "the incumbrance-holders whose interests are voidable on the sale are the only persons who are entitled to make the deposit." [Per Sharfuddin, J., in *Mahadeo v. Langat*, 2 P. L. J. 457, S. B.].

(To be continued.)

Correspondence.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
Sir,

Will you kindly publish the following few lines in your much esteemed journal?

Sec. 360, Cr. P. C., lays down the procedure in regard to evidence taken under sec. 356, Cr. P. C. This latter section does not apply to Summons Cases and "to offences mentioned in sub-sec. (1) of sec. 260, Cr. P. C., clauses (b) to (m), both inclusive, when tried by a magistrate of the 1st or 2nd class," and "to proceedings under sec. 514, Cr. P. C., if not in the course of a trial." For these cases, offences and proceedings, provision is made in sec. 355, Cr. P. C., under which the magistrate is to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. Sec. 358, Cr. P. C., makes it optional for the magistrate in cases under sec. 355, Cr. P. C., to take down the evidence of any witness in the manner provided in sec. 356, Cr. P. C. Now, what would be the procedure about recording evidence of witnesses in a case under sec. 457, I. P. C., [lurking house-trespass or house-breaking by night in order to the commission of any offence punishable with imprisonment—an offence mentioned in sec. 260 (1) (i), Cr. P. C.] when the trying magistrate elects to proceed under sec. 358, Cr. P. C.? Would sec. 360, Cr. P. C., apply?

It may be suggested that sec. 360, Cr. P. C., does not contemplate Summary Trials, and that if a case under sec. 457, I. P. C., is tried in a non-summary way, it must apply. If this was really the intention of the Legislature, suitable

words might have been employed to convey such a meaning. Sec. 355, Cr. P. C., speaks of offences mentioned in sub-sec (1) of sec. 260, cls. (b) to (m), Cr. P. C. It is perfectly silent about Summary Trials. Besides, a 2nd class magistrate has no power to try any offence summarily. Again, though sec. 357, Cr. P. C., is mentioned in sec. 360, Cr. P. C., sec. 358 is not. If the Legislature intended otherwise, sec. 358, Cr. P. C., might as well be added after the words "sec. 357" in sub-sec. (1) of sec. 360, Cr. P. C. The Legislature omitted sec. 358, Cr. P. C., from that section deliberately with a purpose. If this view is correct, then in the trial of such a case, i.e., a case under sec. 457, I. P. C., which provides imprisonment of either description for five years and fine, the magistrate may make only a memorandum of the evidence of each witness. The result will be far from satisfactory. The point is very doubtful and difficulties have already arisen. Will you or any one of your numerous correspondents come forward and throw some light on it?

I have, etc.,

Yours truly,

GIRINDRA KUMAR DEB, M.A., B.L.,
Vakil.

Dist. Bar Library, Sylhet,
20th Sept. 1924.

[We commented on the points raised in our last issue.—Ed., C. W. N.]

ADMISSIBILITY OF PLEADINGS AS PUBLIC DOCUMENTS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

I shall be highly obliged if you will kindly publish the following in your much esteemed journal. I expect that the question will receive your consideration and also that of your learned readers.

Among the public documents as defined in sec. 74 of the Indian Evidence Act, the records of Courts of justice and other judicial writings also constitute public documents.

Mr. Best says in his Evidence, 4th Edition, p. 301, that among public documents of judicial nature but not of record may be mentioned various forms of inquisitions, depositions, examinations, writs, pleadings, etc.

Again says Mr. Taylor that pleadings in an action may be proved either by producing the originals or by means of copies filed with the officer of the Court [*R. v. Scott*, (1877) 2 Q. B. D. 415]—Taylor, 10th edition, sec. 1586, pp. 1137-38.

This shows that pleadings may be proved by certified copies.

Pleadings mean plaint or written statement (Or. 6, r. 1, C. P. C.).

Having regard to the opinions of the text writers and the principles enunciated in *Bhagat Mehraani v. Gooroo Pershad*, 25 W. R. 68 and *Mangal Sen v. Hira Sing*, 1 A. L. J. 101, a certified copy of plaint is admitted in evidence under

sec. 74 of the Indian Evidence Act apparently on the ground that being a part of the record, it is a public document. [*Mahomed Shahabuddin v. Wedgberry*, 10 B. L. R. App. 31].

Although the plaint is admitted as a public document, written statement which is as good a pleading as the plaint is not treated as such and the principle on which this technical distinction is made does not at all seem to be clear.

As regards the nature, signing, verification, striking out or amendment of pleadings and many other matters connected therewith, the same provisions of law as laid down in the Civil Procedure Code equally apply to both plaint and written statement (*vide* Or. 6, rr. 2, 14, 15, 16 and 17, C. P. C.).

The only obvious distinction that exists between the plaint and written statement is that the former is chargeable with Court-fees but the latter is not (except in the case of one claiming set-off) but that cannot possibly and reasonably mark any difference between them as to the application of principle of their admissibility as public documents as being of judicial nature.

Sometimes it becomes very necessary to confront a party litigant with his written statement filed in a different suit of different Court of different jurisdiction, setting up quite a contrary story in respect of the similar, identical or connected subject-matters forming the points at issue in the two suits but it does not become always possible to procure, before the date of hearing, a certified copy of that written statement, to file it and call for the original and summon and produce the persons competent to prove the original without much trouble and expense and further adjournment from the Court for the purpose which is seldom granted at such a stage and the idea of proving the original becomes out of question when the hearing commences and the knowledge of such written statement reaches the party intending to prove it in the midst of hearing.

The result follows that the party to be confronted with his written statement as aforesaid goes quite unchallenged and free, making with impunity different versions at different times according to exigencies of circumstances to suit his purpose and convenience.

The difficulty standing in the way of proving the written statement by the original seems to be serious and responsible for the abuses that are made thereof and it can only be obviated if the written statement also is declared as a public document just like the plaint for the reasons stated above so that a party may prove the original by the production of the certified copy.

Yours truly,

UPENDRANARAYAN CHOUDHURY, B.L.,
Pleader, Judge's Court,
Sylhet.

SYLHET,
21st Sept. 1924.

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REVIEW

REPORTS (See Index.)

The late Mr. Edwin Samuel Montagu.

It is a great pity that the career of such a brilliant and promising statesman and a great friend of India should have come to a sudden close in the prime of his life. In the history of British connection with India, very likely the future Indian historian will assign to the late Mr. Montagu a higher place than to the British generals and statesmen who established and consolidated British rule in India. What men like Munro, Macaulay, Metcalfe, Bentinck, Canning, Ripon and Hardinge (names held in high esteem in India) dreamed of and pondered for over a century, this young and brilliant Englishman, with a heritage of eastern and western culture, rare foresight and broad sympathies, carried into partial execution within a couple of years when placed at the helm of Indian affairs at a very critical time of the world's history. Arm-chair critics and platform politicians are apt to forget the world situation and the part that India played during the Great War against autocracy. How could a responsible Minister of the Crown or the Parliament perpetuate autocracy in India then or thereafter? India spared neither blood nor money to save the liberty-loving people of the west from annihilation. India had for many decades before the war been demanding the right of full and free citizenship in the British Empire. In spite of some restlessness amongst the younger generation, the more sober and maturer minds in India decided not to take any mean advantage of the then British embarrassment and co-operated whole-heartedly for preserving the integrity of the British Empire. It is

the Indian troops who guarded the British Empire in the east and chiefly contributed to the victory of British arms in Egypt, Palestine, Mesopotamia, East Africa and made immense sacrifices in Gallipoli.

Nor were their services less momentous for saving the liberty and freedom of France and the British Isles. But for them Paris would have fallen and Calais would have been captured and it is too horrible to contemplate with what consequences! It speaks for the high statesmanship of Mr. Montagu and his colleagues and the good sense of the British Parliament that they initiated, in the midst of such serious troubles, a proposal for the conferment of responsible Government, partial though it was on India. The memorable declaration of the 20th of August 1917 was a deliberate pronouncement of the British Cabinet, and Mr. Montagu was but its mouth-piece. Lord Curzon drafted it for the Cabinet and Mr. Chamberlain may also claim credit in common with the Cabinet for initiating a policy which was so faithfully and wisely carried out by his illustrious successor.

But the great achievement of Mr. Montagu was that within a year of the memorable declaration, he with his rare ability, energy and capacity for work completed his enquiry and formulated his scheme in a report of exceptional merit and interest. It must not be forgotten that the report which bears such evidence of deep thought and study, sound judgment, high sense of responsibility, rare power of exposition and a high order of literary merit, and which in fact would perpetuate his memory in Indian history, was drawn up at a time when the fate of Europe was still hanging in the balance, as would appear from the following memorable words with which the report concluded:—
" . . . Far greater issues still hang in the balance upon the battle-fields of France. It

is there and not in Delhi or Whitehall that the ultimate decision of India's future will be taken." The war was won and India could claim no small share of the honours of victory. Mr. Montagu tried only honestly to fulfil the pledges given by Parliament.

The Government of India Act was drafted by Parliamentary draftsmen to give effect to the Montagu-Chelmsford Report. The draft Bill was settled by a Joint Parliamentary Committee, over which Lord Selborne presided, after prolonged discussion with leaders of public opinion from all parts of India. Mr. Montagu took an active interest in the discussions at the Committee stage of the Bill and after it emerged in a cut and dried form from the Committee, Mr. Montagu piloted it through Parliament with that tact, judgment and eloquence for which he was noted. Lord Sinha acted as its sponsor in the House of Lords where he too received a kind and sympathetic response. It is not for us to review the merits and drawbacks of the Government of India Act on the present occasion. But no one who has studied it can deny that with all its shortcomings it is a very remarkable piece of legislation. Dyarchy may be a novel experiment, which may have failed, but the Act makes provision at the same time how provincial autonomy may be granted without any amendment of the Act. Sec. 19A similarly provides how the Government of India may be relieved of the overlordship of the Secretary of State and his Council. A very material drawback of it is that it does not provide for any present or future responsibility of the Government of India to the Legislature and creates a further 'anomaly' that while the people's representatives command the majority of votes in the Legislature, the official minority wield the executive power.

This anomaly of the constitution is bound to create constant friction between the executive and the legislature. All the same, we believe, such defects and drawbacks would have been much more readily removed by a show of reason than by unreasoned obstruction or any suggestions of force or violence. The present unsatisfactory relationship between the Legislature and the executive is but a passing phase of constitu-

tional struggle between the two, which have been known to have resulted in much more serious conflicts in the course of the development of the constitution in the self-governing Dominions. Such political ebullitions, as are now noticeable in India, would not have disturbed the robust faith of Mr. Montagu in the good sense of India and should not perturb any statesman of his ilk and calibre. So the death of Mr. Montagu at the present moment is not only a great loss to India but to English public life as well.

There are few Englishmen who have been able to enter into the different phases of public life in India so thoroughly as Mr. Montagu did during his short term of office as Secretary of State for India. It now stands vindicated by history that in the unfortunate difference with Lord Curzon over which he resigned, he was also eminently in the right. He was perfectly within his rights to publish the views of the Government of India after he had mentioned the matter to Lord Curzon at a meeting of the Cabinet held on the 6th of March 1922 and to which Lord Curzon did not object as was later on admitted by himself. His Lordship did not then take any exception to it, because, he says, he was "dumbfounded." No one who has read the letter which Lord Curzon wrote to Mr. Montagu afterwards can doubt that it was meant more as a reflection on the Governor-General of India than on Mr. Montagu. It suggested that Lord Reading by making a pronouncement with regard to Indian Moslem view regarding the treaty of Sevres had unjustifiably meddled in matters of foreign policy of the Government of Europe for which he deserved to be recalled and the noble Lord reminded Mr. Montagu that for a much less indiscretion during his own Viceroyalty he had been rebuked. His Lordship considered it intolerable that a "subordinate," . . . "six thousand miles away" should "dictate" to him what policy he was to pursue at the Paris Conference held for the revision of the treaty of Sevres. It is for lending his moral support to the pronouncement of the Government of India, who voiced the views of the Indian Moslems, that Mr. Montagu, as a man of honour and the responsible head of the Indian administration, resigned. The Treaty of Lausanne testifies to the political foresight of Mr. Montagu

which eventually received international recognition. It is in the service of India that he sacrificed his health and a promising parliamentary career, and all India pays him to-day her homage of high esteem and deep gratitude.

Implied warranty of habitability of a furnished house.

In the case of an unfurnished house there is ordinarily no warranty of fitness for occupation. The rule is different with respect to furnished houses or apartments. In such a case the law implies in the absence of agreement to the contrary a warranty by the landlord as to the state and fitness of the premises. As far back as 1843 in *Smith v. Marrable*, 11 M. & W. 5, 7, 9, it was held that the Defendant was entitled to repudiate the tenancy of a furnished house on the ground that it was infested with bugs. Chief Baron Lord Abinger held, "A man who lets a ready furnished house surely does so under the implied condition or obligation that the house is in a fit state to be inhabited." The same view was held in *Wilson v. Finch Hatton*, (1877, 2 Ex. D. 336); *Bird v. Lord Greville*, (1884, Cab. & El. 317); *Charsley v. Jones*, (1889, 5 Times L. R. 412). *Humphreys v. Miller*, (1917, 2 K. B. 122), dealt with a converse case and there it was held that there is no implied warranty on the taking of furnished lodgings that the intending tenant is a fit and proper person to occupy them and that he is not suffering from an infectious disease. As to the meaning of the expression "fit for habitation" it must vary with the circumstances to which it is applied. In *Collins v. Hopkins*, (1923) 2 K. B. 617, the question was raised as to the contractual duty of a person who lets a furnished house lately occupied by one suffering from an infectious disease. The Defendant let to the Plaintiff a furnished house for twenty-six weeks at 6½ guineas a week. The Plaintiff entered into residence with his wife, his daughter and his domestic maids. On the day after he entered he discovered that the Defendant's husband while suffering from pulmonary consumption had recently resided in the house and was then in Switzerland under treatment for that complaint.

The Plaintiff at once repudiated the agreement of tenancy and quitted the house on the

ground that it was not reasonably fit for habitation and that the Defendant had therefore broken her implied warranty. He claimed damages including the amount paid by him in advance as rent for thirteen weeks. Judgment was given for the Plaintiff. It was observed: "In the case of unclean furnished or defective drains or a nuisance by vermin the matter is not as a rule one of difficulty. The eye or the nostrils can detect the fault and measure its extent. But in the case of a house lately occupied by a person suffering from an infectious disease the eye and other senses are of no avail. The bacilli of infection are not apparent to the eye. Yet a peril is none the less grave because it is hidden. . . . It is not enough for the landlord to say that he honestly believes that the house is fit and proper for safe habitation. It must in fact be fit and safe. The mere belief of the landlord is not the point."

Smith v. Marrable has been explained as proceeding on the idea that furniture was the principal thing in the contemplation of the parties and the chief subject of warranty but in subsequent cases the nuisance was independent of the furniture.

In the United States one case has followed *Smith v. Marrable* on practically identical facts (*Ingalls v. Hobbs*, 156 Mass. 348), but otherwise the English doctrine has been flatly rejected or criticised and distinguished on various grounds. The following comments in Harvard Law Review on *Collins v. Hopkins* are worth quoting:—"The most plausible justification proposed for the *Smith v. Marrable* doctrine is that both parties intend that the house shall be fit for immediate occupation. Acceptance of this reasoning would obscure the broad distinction based upon furniture and would make the presence of furniture unimportant except as evidence binding to show that the premises were let for immediate habitation. If there is an implied warranty of habitability it should not be confined to furnished houses. The limitation to furnished houses can be justified only as an effort comparatively unsuccessful to attain certainty. *Collins v. Hopkins* exaggerates the necessity of protecting the tenant from the rigour of *caveat emptor*. He can examine the premises and exact express warranties.

Moreover where a landlord knows of a latent defect rendering premises unhealthful or dangerous he has a duty of disclosure in letting them. But this liability has just limits suggestive of a standard of due care under the circumstances."

RIGHT OF UNRECOGNISED TRANSFEREE OF NON-TRANSFERABLE OCCUPANCY HOLDING TO DEPOSIT AMOUNT OF RENT-DECREE UNDER SEC. 170 (3), BENGAL TENANCY ACT.

BY RADHAROMON MOOKERJEE, VAKIL,
BERHAMPORE.

(Continued from p. xv.)

Purchaser's interest not being incumbrance is not voidable.

The question, therefore, is whether the interest acquired by the purchaser in the holding by his purchase is an "incumbrance." The term has been fully explained in sec. 161, and considering the nature of the rights indicated therein, the sale of an entire holding cannot, by any stretch of argument, be regarded as such. And although there might have been at a time foundation for the contention that the sale of a part of a holding is so, the matter may now be considered to have been finally settled [*Abdul v. Ahmadar*, I. L. R. 43 Cal. 558 : s. c. 19 C. W. N. 1217 (1915)]. Thus, the interest of a purchaser of the whole or a part of a holding is not an incumbrance, and it is not, therefore, voidable on the sale. In that view he is not entitled to make the deposit under sec. 170 (3).

Contrary view of Mookerjee, J., of Calcutta High Court—Protection in sec. 170 (3) not limited to incumbrances.

But, as pointed out by Mookerjee, J., of the Calcutta High Court, in *Tarak v. Harish*, 16 C. L. J. 548 : s. c. 17 C. W. N. 163 (1912) :—"The expression used by the Legislature [in sec. 170 (3)] is 'interest voidable on the sale,' and not 'incumbrance voidable on the sale under the provisions of Chap. XIV of the Bengal Tenancy Act'." The term "interest" used there is wider and more comprehensive than the term "incumbrance," and includes

rights other than those falling within the narrow limits of sec. 161 (which defines "incumbrance"). Chap. XIV does not in terms say that the words "interest" and "incumbrance" are synonymous and there is no reason why we should strain its language and give the word "interest" a meaning which it does not ordinarily possess. On the other hand, the obvious object of the provisions precludes the idea that it should be narrowly construed. Thus, the weight of authority is wholly in favour of the view that the protection afforded by sec. 170 (3) is not limited to incumbrances.

(To be continued.)

Review.

GHOSH'S DIARIES FOR 1925. Compiled by J. N. Ghosh; M. C. Sarkar & Sons, Law Book-sellers and Publishers, 90/2A, Harrison Road, Calcutta.

We received last week several specimens of Ghosh's Diaries for 1925. The Lawyer's Diary contains much valuable information which lawyers require for ready reference in the course of their every day work such as regarding stamps and court-fees required for conveyances, mortgages, institution of suits, etc. Some forms are given which may be found useful in drafting. The English, Bengalee, Sambat date, and the dates of public holidays and religious ceremonies observed by different communities are given. Ample space is provided for making daily notes. The prices are cheap, the binding and get-up neat and quality of paper good. The smallest size is very appropriately called the *Gem*, which contains all the information one ordinarily requires, provides a page for each day and yet is small enough for being put into one's watch pocket. These and other intermediate sizes will be found very useful for all purposes by lawyers and businessmen alike.

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REPORTS (See index.)

Have our Jury and Judges been found wanting in State trials?

We have mentioned before that it has been suggested in the resolution of the Government of Bengal in promulgating the Bengal Ordinance framed by His Excellency the Governor-General, that the alleged political offenders cannot be brought to justice because the witnesses, the jury and even the judges are or are likely to be intimidated by their associates. We have mentioned before that the trials, verdicts and sentences in the Sankaritol Post Office murder case and the Day murder case furnish no grounds in support of this view. We shall presently show that neither does the recent Alipur conspiracy case lend any support to it. A part of the prosecution case was that it was in pursuance of a political conspiracy that the Kona dacoity (referred to in the Government resolution) was committed. It transpired in evidence that two zamindars who were murderously assaulted in the course of the alleged dacoity died in hospital. One of them in making a dying declaration mentioned the name of some of the assailants and stated that a family quarrel was the cause of the assault. Some ladies of the family also identified the assailants. The approver who alleged that the dacoity was committed in pursuance of a conspiracy stated that he had driven the taxi cab in which the dacoits had gone to Kona and returned. To test the truthfulness of the approver the jury suggested that the approver should be asked to drive a motor

car outside the Court premises. A trial was held and it was found that he did not know at all how to drive a motor car. After this, could any jury or judge believe his story and convict the accused relying on his evidence, which far from being corroborated was contradicted by more reliable witnesses. The learned Sessions Judge did not in the circumstances consider it worth his while to differ from the jury and refer the case to the High Court and thus unnecessarily waste the time of the Hon'ble Judges. This case is very instructive as to the risk of relying on the testimony of approvers unless it is tested and corroborated in a regular judicial trial.

Then with regard to the Chittagong murder case, referred to in the Government resolution, an application was made by the Crown to the High Court of Calcutta for a transfer of the case from Chittagong to some other district alleging that the jurors were likely to be intimidated. The High Court after careful consideration of the statements in support of the application decided that no sufficient grounds had been made out for such transfer. Thus the suggestion that jury in this country, if intimidated, would fail to come to a just finding in cases of persons who may be charged with revolutionary conspiracy or violent crime is without justification, especially, when His Excellency the Governor admits that "there is no spirit of revolt in the hearts of the people of Bengal." The people of Bengal have a high regard for law and justice and it is impolitic to shake their confidence in it.

Those detained under Reg. III of 1818 are not to be tried, nor are those who are to be interned under the discretionary powers of the Executive. As regards Reg. III of 1818, His Excellency the Governor-General in 1922

accepted the recommendations of the Repressive Laws Committee that it should be limited to its original purposes and would not be put into operation against British Indian subjects. Now to resile from the undertaking given by the Government of India, is bound to be regarded by the public as an act of bad faith. When the law Courts are open and are quite competent to deal with such cases we do not consider it wise to put it into operation again. As regards the cases of internment, they follow the drastic provisions of the rules framed under the Defence of India Act at the time of the great war. Public opinion is unequivocal that they are quite out of place in times of peace and persons interned should also be brought to trial. The lessons of history teach us that arrests and incarcerations under Executive orders promote a revolutionary spirit in the people while observance of the rule of law by the Executive Authorities and trials in due course of law not only have a deterrent effect but promote a sense of security in public mind.

It may be said that the Ordinance provides for trial by Commissioners who will ordinarily be persons of judicial experience. Under the Ordinance none of the detainees or internees can claim a trial. Further, trials by Commissioners specially appointed by the executive Government in times of peace, are open to serious objections. When His Excellency the Governor has repeatedly pronounced the arrested persons to be guilty and declared the evidence to be conclusive, on no sound judicial principle ought they to be tried by a commission nominated by the Executive Government. It should not be overlooked that public opinion in Bengal has demanded for the last fifty years the separation of executive and judicial functions. The Committee over which Mr. Justice Greaves presided only recently formulated a scheme for such separation which could not be carried into effect for want of public funds. Public opinion in this Presidency is therefore opposed to the setting up of commissions by the Executive and manning them with members of the subordinate judiciary and ousting the jurisdiction of the ordinary Courts of law for the trial of political offenders. The enlightened public in Bengal is as constitutional in spirit as the British public and

naturally they object to the Executive departing from the rule of law. We protest in the same spirit.

It is with a very just pride that we can claim that the High Court of Calcutta, which is independent of the Local Government, has maintained the high traditions of British justice. His Excellency the Governor bore testimony to this in his recent speech at Dinajpur. His Excellency said: "We cannot use the High Court except in its judicial capacity. The service of examining in secret our evidence and advising us as to its reliability is an executive service which cannot be performed by Judges of the High Court. It is not our unwillingness to consult them, but their unwillingness to serve in this capacity which precludes us from resorting to Judges of the High Court." We say, all honour to His Majesty's Judges. In all fairness we must also say that the jury and judges of the Courts subordinate to the High Court have seldom been found wanting in the due discharge of their duties. We see no reason why the Government cannot rely on them for bringing offenders to justice regardless of fear and favour in State trials.

We may mention in this connection that the Punjab Government had to deal with very serious unrest, terrorism and civil commotion during recent years and yet two successive provincial Governors, who have been members of the Indian Civil Service, never approached the Government of India for the issue of Ordinances and any extraordinary powers thereunder. The Governor of the United Provinces, also a member of the Indian Civil Service, has also preferred to rely on the ordinary law and law Courts in bringing persons associated with a highly dangerous type of conspiracy to justice and thus furnishing convincing proof of its existence; and no exception has been taken by the public to the course adopted by the Governor. We feel therefore that the Ordinance is a blot on the fair fame of Bengal of which the Government ought to be as jealous as we are.

Vakils and Attorneys enrolled as Advocates in Calcutta.

We accord our welcome to the members of the sister profession who were for the first

time enrolled as advocates of the Calcutta High Court in the course of last week. Formerly none but English barristers, Scotch and Irish advocates were entitled to be enrolled as advocates of the Calcutta High Court. They had also the exclusive privilege of pleading on the Original Side of the Court. When a Bill was introduced in the Legislative Assembly for conferring equal privileges on all vakils and attorneys of pleading on the Original Side of the Court, we suggested that the wiser course would be for the High Court to frame rules for the enrolment of advocates by reference to their standing than for the Legislature to undertake legislation in such matters. The Legislature is, surely, competent to make any laws it chooses. But in England, the Parliament would never think of undertaking legislation with regard to matters in respect of which the Hon'ble Judges of the High Court have enjoyed the exclusive privilege from early times. The enrolment of counsel and solicitors have always been a concern of the Judges and very rightly so. The charters under which the High Courts in India were established gave powers to the Judges of the Hon'ble Courts following the time-honoured practice of the High Court of England. We therefore regarded any legislation in this behalf as contrary to the recognised principles of English law and practice and suggested that the Hon'ble Judges should frame rules for extending the privileges to qualified lawyers of standing in this country. We are glad that the Bar Committee made similar recommendations and we convey our congratulations to the Hon'ble Judges and our brother members of the legal profession that the rules have been amended and that they have been placed on the same footing as English barristers and Scotch and Irish advocates in the Calcutta High Court.

First Lady Advocate of Calcutta.

On Monday last before Mr. Justice Pearson, Miss Cornelia Sorabji was sworn in as an advocate of the High Court. She is the first lady barrister on the rolls of the Court. In England women have been admitted to practise in the Courts of law and in this country also the law relating to legal practitioners has been amended so as to remove the disability on the part of women. Some years ago the late Miss Regina Guha applied for being enrolled as a vakil. The matter was argued before a Special Bench and the Hon'ble Judges on an

examination of the history of the legal profession in this country refused to accept the contention advanced on her behalf by Mr. Fardley Norton that in the Legal Practitioners Act, as in all other statutes, words denoting the masculine gender should be construed to include the feminine. The legislature, however, has now removed all ambiguity and doubt with regard to the question. The Calcutta Municipal Act, which we owe to the last labours of the political guru of India, is remarkable in many respects in the history of legislation in this country and amongst its progressive, liberal and democratic provisions, we note that it placed women on a footing of equality with men. The Corporation of Calcutta has now got its first lady councillor. In Bombay, we believe the election rules have been amended to permit women to vote and offer themselves for election in the Provincial Council. In Madras an Indian lady has been appointed to take her seat in the Children's Court. Thus India is keeping pace with the times.

RIGHT OF UNRECOGNISED TRANSFEREE OF NON-TRANSFERABLE OCCUPANCY HOLDING TO DEPOSIT AMOUNT OF RENT-DECREE UNDER SEC. 170 (3), BEN-GAL TENANCY ACT.

By RADHAROMON MOOKERJEE, VAKIL,
BERHAMPORE.

(Continued from p. xx.)

According to some purchaser's "interest is void and not voidable on sale."

Even if that is so the question still remains for answer—whether the interest of the purchaser is otherwise "voidable on the sale." And considering the nature of the interest acquired by him, it has been contended that it is void and not voidable, as required by the section. This has been sought to be shewn from different standpoints—that of the purchaser himself, of the landlord, and of the auction-purchaser.

(I) *Because he acquires no interest by his purchase.*

This was based upon the view formerly taken of the nature of the occupancy right itself, namely, that it is "a right personal to the particular raiyat" (himself), and there-

fore could not be transferred at all. [*Narendra v. Ishan*, 22 W. R. 22 F. B. (1874), *Agarjan v. Panaulla*, 12 C. L. J. 169 : s. c. 14 C. W. N. 779 ; I. L. R. 37 Cal. 617 (1910)]. Hence, it is not saleable at the instance of the occupancy raiyat or any creditor of his other than the landlord seeking to obtain satisfaction of his decree for arrears of rent. [*Bhiram v. Gopi*, I. L. R. 24 Cal. 355 (1897)]. A purchase of it, therefore, could convey nothing, and not only the landlord, but even the raiyat himself could question the validity of the transfer. [See the referring judgment of Jenkins, C. J. and N. Chatterjea, J., Calcutta High Court, in *Dayamayi v. Ananda*, 18 C. W. N. 971 : s. c. 20 C. L. J. 52 (F. B.)].

As held in Nalini v. Fulmani, 16 C. W. N. 421 : s. c. 15 C. L. J. 388 (1912).

On the same ground it was held that the purchaser had no right to deposit in Court the amount of the rent-decree under sec. 170 (3), Bengal Tenancy Act, and thereby to prevent the sale of the holding in execution thereof. Thus, in the case of *Nalini v. Fulmani*, 16 C. W. N. 421 : s. c. 15 C. L. J. 388 (1912), which is the leading case on the subject, Stephen, J., of the Calcutta High Court observed :—"We have to consider whether he has any interest in the land, and if he has, whether that interest is voidable on the sale. On the authorities before us I hold that he has no interest in the land. This result in my opinion follows from the decisions of this Court in *Nissa v. Radha*, 11 C. W. N. 312 (1906) and *Prosunno v. Bama*, 13 C. W. N. 602 (1909). The two cases together are authority for the statement that he is not 'a representative' of the transferor (judgment-debtor) under sec. 244, or 'the owner of immoveable property' under sec. 311 (of the old Civil Procedure Code.)." In both these cases, it appears that the point was considered as depending on the question whether he had an interest in the judgment-debtor's property which was affected by the decree. It was clear enough that if he had purchased any interest in the judgment-debtor's property that interest was bound by the decree, and he was so far a "representative of the judgment-debtor," and was entitled to apply under sec. 244. The question, therefore, narrowed itself down to this, namely, whether he could be said to have purchased any interest at all in the property. There was

authority for the view that the purchase, such as this, could convey nothing. He could not, therefore, be rightly regarded as a representative in the proper sense of the word, and as falling within the provisions of sec. 244, inasmuch as if he bought no interest he had no interest to be affected by the decree. [See also the referring judgment of Coxe and Boss, JJ., in *Dayamayi's* case.] Further, his Lordship points out :—"It is possible, of course, that (the phrase) 'having any interest' in sec. 170 (3), Bengal Tenancy Act might be construed as having a wider application than (the phrase) 'the representative of a party to a suit' under sec. 244, or 'the owner of immoveable property' under sec. 311, C. P. C., 1882. But in *Ishan v. Beni*, I. L. R. 24 Cal. 62 (1896), the authority on which *Nissa v. Radha* was decided, it seems that as if the classes of persons described in these sections were all the same, as indeed there is no reason why they should not be." Hence, it was held in case that the transferee was not entitled to make the deposit under sec. 170 (3), Bengal Tenancy Act, inasmuch as he had no interest in the holding.

Calcutta High Court Full Bench in Dayamayi v. Ananda, 18 C. W. N. 971 :

s. c. 20 C. L. J. 52 (1914) and

Special Bench in Chandra v.

Ala, 24 C. W. N. 818 : s. c.

31 C. L. J. 510 (1920)

held contrary view.

A Full Bench of the Calcutta High Court in the case of *Dayamayi v. Ananda*, 18 C. W. N. 971 : s. c. 20 C. L. J. 52 (1914), and a Special Bench of the same Court in the case of *Chandra v. Ala*, 24 C. W. N. 818 : s. c. 31 C. L. J. 510 (1920) did not, however, accept that view of the nature of the right of occupancy and of the interest acquired by the purchaser. Sir Asutosh Mookerjee, C. J., who delivered the judgment of the Special Bench pointed out :—"Whatever might have been the law earlier, the occupancy raiyat enjoys under the Bengal Tenancy Act substantial rights in the land, and his interest cannot be appropriately described as a merely 'personal right' or 'personal privilege.' The decisions on the question of transferability of occupancy holdings (show) that the validity of the transfer (was) challenged only by the zemindar or by a person claiming through or under him ; and this important circumstance must be carefully borne in mind when we

meet with the general expressions like 'a right of occupancy cannot be transferred' in cases between landlords and tenants. (Hence) no one appears to have doubted that 'in the event of a transfer, voluntary or involuntary, the landlord was the only person entitled to dispute its validity, if it had been effected without his consent previously taken or assent subsequently obtained' till 'the year 1897, when for the first time in the decision in the case of *Bhiram v. Gopi*, I. L. R. 24 Cal. 355, the contrary proposition was enunciated. The grounds of decision in (that case), which was in reality a departure from the law as administered for over sixty years, do not stand the test of criticism. Our conclusion is that it was erroneously decided.' The results of the decision are that "a right of occupancy, which is not transferable by custom or local usage, can be transferred," and that "the transfer of the whole or a part thereof is operative against the raiyat, whether it is made voluntarily or involuntarily." The transferee thus acquires a valid title, whether he purchases the holding from the raiyat or at a sale in execution of a decree against him. And consistently with the view thus taken of the purchaser's right it has further been held that he is "a 'representative of the judgment-debtor' (under sec. 244), and is a 'person whose immoveable property has been sold'" (under sec. 311, C. P. C., 1882, especially when he purchases a part of the holding). [See *Dayamayi's* case.] These decisions shew that "in case of transfer, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord, and although the validity of the transfer is liable to be questioned by their landlord, who is no party to the transaction." [*Sehari v. Sindhubala*, 22 C. W. N. 210 : s. c. 27 C. L. J. 497 (1917).]

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Oct. 21st, 1924.—The Privy Council resumed their sittings to-day and the following judgments were delivered—

(1) *Sat Narain v. Behari Lal* (Lahore). The appeal was allowed.

(2) *Maung Dwe v. Khoo Haung Shim* (L. Burma). The appeal was dismissed.

The following members constituted the Board :—

LORDS DUNEDIN and ATKINSON, MR. AMEER ALI and LORD SALVESEN.

Thanukadi Naicken v. Ramaswami Naicken (Madras).

An application was made in the above suit for special leave to appeal from the judgment of the High Court of Madras. The question on which the applicant desired the decision of the Board was as to the age of majority of an adopting father under the Mitakshara.

The applicant had failed to raise in the lower Courts the point which he wished to raise on appeal, and leave was refused.

Messrs. Dunne, K. C. and Narasimham for the Applicant.

Mr. Kenworthy Brown contra.

Special leave to appeal from Patna was granted in *Sunder Mull v. Satya Kinker Sahana*.

Messrs. Dunne, K. C. and Macaskie appeared in support of the application which was not opposed.

The hearing was commenced of an appeal from Madras, *Dasaraju Jagannadha Rao Pantulu Garu v. Vyricherla Sunyanarayanaraj Bahadur*.

Judgment was delivered dismissing the appeal.

Messrs. Dunne, K. C. and Kenworthy Brown for the Appellant.

Sir Geo. Lowndes, K. C. and Mr. B. Dubé for the Respondents.

On Oct. 23rd.—LORD SUMNER delivered the reasons for the report of the Privy Council in the criminal appeal by *Barendra Kumar Ghosh*.

The same Court as on October 21st continued the hearing of the Madras appeal mentioned above.

In the Board Room LORD SUMNER presided over a Board consisting of himself, LORD PHILLIMORE, SIR JOHN EDGE and SIR LAWRENCE JENKINS.

Messrs. DeGruyther, K. C. and Kenworthy Brown applied to this Board for rectification of the order in Council passed in the appeal of

The Midnapur Zemindary Co. v. Naresk Narayan Roy. They contended that the date 1903 which appeared in the order as the date from which compensation should be paid had been inserted through inadvertence.

Messrs. Dunn, K. C. and *Wallach* supported the date and the Board being of opinion that a substantial point was in issue adjourned the application for argument before the Board which had heard the appeal.

Sm. Karimunessa Khatun v. Md. Fazlul Karim, an appeal from Bengal, was argued before the same Board.

Mr. A. Majid for the Appellant.

Mr. S. Hyam for the Respondent.

Oct. 24th.—In the Council Chamber the following Court was constituted:—

LORD DUNEDIN, LORD ATKINSON, MR. AMEER ALI and LORD SALVESEN.

Sir Geo. Lowndes, K. C. and *Mr. Wallach* applied for special leave to appeal from the decision of the Lahore High Court in *Umra v. King-Emperor*. They contended that the evidence of a co-accused had been wrongly admitted and that there was a substantial miscarriage of justice. Leave was refused—the reasons for the Board's decision are to be given later.

The hearing was continued of *Satya Niranjan Chakravarti v. Ram Lal* (Patna).

Messrs. Upjohn, K. C., *Dunne*, K. C. and *B. Dubé* for the Appellants.

Messrs. DeGruyther, K. C. and *K. Brown* for the Respondents.

The question at issue is the right to minerals under a *patni* grant.

In the Board Room:

LORDS SUMNER and PHILLIMORE, SIR J. EDGE and SIR L. JENKINS.

Karimunessa v. Md. Fazlul Karim (Bengal).

Mr. A. Majid for the Appellant.

Mr. S. Hyam for the Respondent.

Judgment was reserved.

Oct. 27th.—In the Council Chamber:

Hearing continued and concluded of *Satya Niranjan Chakravarti v. Ram Lal* (Patna).

Oct. 24th and 27th.—In the Board Room: Hearing was concluded in *Fateh Singh v. Jagannath Bakhsh* (Lucknow).

Judgment was reserved.

Mr. DeMello for the Appellant.

Mr. Parikh for the 1st Respondent and *Mr. Dubé* for the 2nd Respondent were not called upon.

The question for decision is whether the doctrine of *res judicata* is applicable to the Appellant's claim.

Ranodip Singh v. Parmeshwar Pershad (Oudh).

In this appeal the sons of a Hindu governed by the Mitakshara sought to set aside an alienation made by their father. Two of the Plaintiffs were born after the alienation. The Indian Courts held that the suit was barred by limitation. Judgment was reserved.

Mr. Dubé for the Appellant *ex parte*.

In the Council Chamber before the Board presided over by LORD DUNEDIN *Mr. Parikh* instructed by *Mr. Delgado* applied for an adjournment of the appeal in the present list, *Ahmed Khan v. Ali Ebrahim Noor* (Aden). The application was opposed by *Mr. Raikes* and was refused, but their Lordships permitted the case to be placed at the bottom of the list. A similar application was made by *Mr. Narasimham* and a postponement was again refused in *Gutta Bhadrappa v. Kalagara Kanakamma* (Madras).

Oct. 28th.—The hearing was commenced of the appeal *Maina Bibi v. Wasi Ahmad* (Allahabad).

The Appellant, a Mahomedan lady, took possession of her husband's estate on his death in lieu of her unpaid dower. Certain heirs of the deceased obtained a decree for possession of their shares in the estate on payment of the proportionate amount of dower due from them, failing which payment, their suit to stand dismissed. The money was not paid, and Maina Bibi parted with the property by a "*hiba biltamlik*." The Plaintiffs then brought the present suit for possession of the property. The questions for determination are whether the suit was barred by *res judicata*, and as to the right of a Mahomedan widow in possession of her husband's estate in lieu of dower to alienate it. The hearing of the appeal is proceeding.

Messrs. L. DeGruyther, K. C. and K. Brown for the Appellant.

Sir Geo. Lowndes, K. C. and Mr. B. Dubé for the Respondents.

In the Board Room :

Oct. 27th and 28th. *Palani Ammal v. M. Moniagar* (Madras) raised a question as to whether there had been a partition of joint family property.

Mr. Dubé for the Appellant.

Mr. Wallach for the Respondent.

During the argument the question as to the admissibility of the appeal was raised on the ground of concurrent findings of fact in the lower Courts. The argument for the Appellant was concluded and the Board intimated that they would inform counsel for the Respondent should they require any argument from him.

Before the same Board *Messrs. Dunne, K. C. and Bryan Farrer* appeared *ex parte* in the appeal, *Graham v. Krishna Ch. Dey* (Bengal). The suit was instituted by the Respondent for specific performance of a contract for the sale of land in Tollygunge. The Appellant was owner of part only of the property which he had contracted to sell. The question for determination was whether having regard to the provisions of the Specific Relief Act, the Respondent was entitled to specific performance of part of the contract. The argument was concluded and judgment reserved.

Oct. 29th.—An application was made to a Board composed of LORDS ATKINSON and BLANESBURGH, SIR JOHN EDGE and MR. AMEER ALI for rectification of the Order in Council in the appeal, *Midnapur Zemindary Co. v. Naresh Narayan Roy* (Bengal). Judgment had been given in favour of the Respondents and compensation was awarded them for a period of 9 years during which they had been excluded from possession of the property in dispute.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellants contended that the date June 1903 from which compensation had been allowed had been inserted by inadvertence, that the Respondents were claiming mesne profits and that in law they were not entitled to such. In any event the longest

possible time during which compensation could be claimed was 6 years. They referred to Art. 120 of the Limitation Act and to *Watson & Co. v. Ram Chand Dutt* (17 I. A. 110, 118, 122), *Batul Begum v. Mansur Ali Khan* (L. R. 28 I. A. 248, 254) and *Watson & Co. v. R. C. Dutt* (I. L. R. 23 Cal. 799).

Messrs. Duttie, K. C. and Wallach for the Respondents contended that no limitation applied. The Board decided that 6 years was the period of limitation under Art. 120 and ordered the date 8th August 1906 to be substituted for June 1903 in the Order in Council.

G. D. M.

Correspondence.

BENGAL TENANCY ACT, SEC. 170 (3)—INTEREST VOIDABLE ON SALE.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

May we crave the hospitality of your columns and request you to insert the following few lines in your most esteemed journal

Sec. 170 (3), Bengal Tenancy Act, provides that "the judgment-debtor or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section."

Some discussion took place in Council on the subject of this provision and its object was more fully explained as follows:—

The intention of the framers of the Bengal Tenancy Act, 1885, with regard to sales of tenures or holdings for arrears of rent was that any one having in the tenure or holding an interest voidable on the sale, (e.g., a mortgagee or an unrecognised transferee), might pay in the decretal amount with costs before and so stop the sale. This is provided for in sec 170 (3). But it was intended that after the sale only the judgment-debtor should have the privilege of having the sale set aside by paying up the decretal amount and costs with compensation to the auction-purchaser of 5 per cent of his purchase-money. The object of these provisions was to induce persons having an interest in the property to be sold to pay in the amount of the landlord's debt before the sale. So that the landlord (decree-holder) might get the money due to him quickly and the matter might be settled and set at rest once for all . . . (Rampini's Tenancy Act, 4th Ed., p. 533).

Thus by the words "any one having in the tenure or holding any interest voidable on the sale" they meant and included "a mortgagee or an unrecognised transferee."

Now there has been a good number of conflicting rulings on the point.

In *Tarakdas Pal Chowdhury v. Haris Chandra Banerjee*, 17 C. W. N. 163, Mookerjee and Beachcroft, JJ., held that an unrecognised purchaser has an interest in the holding which is voidable on the sale and is therefore entitled to deposit under sec. 170 (3), Bengal Tenancy Act.

In *Ahamadullah Chowdhury v. Prayag Sahu*, 20 C. W. N. 39, D. Chatterjee and Walmsley, JJ., held that an unregistered purchaser of non-transferable occupancy holding has an interest in the holding which is voidable on the sale and is entitled to deposit under sec. 170 (3).

In *Jote Kumar Mukherjee v. Monohar Mukherjee*, 50 Indian Cases 596, Fletcher and Walmsley, JJ., following the decisions as reported in 17 C. W. N. 163 and 20 C. W. N. 39, held that the unrecognised transferee of a non-transferable occupancy holding is entitled to make a deposit.

But in *Nalini Behary Ray v. Fulmani Dasi*, 16 C. W. N. 421, Stephen and Coxe, JJ., held that a transferee of an occupancy holding not transferable by custom has no interest in the holding and is not entitled to make a deposit under sec. 170 (3).

In *Maharaja Sir Rameswar Singh v. Raghunandan Khawas*, 38 I. C. 337, Chief Justice Chamier relying on the decision as reported in 16 C. W. N. 421, held that an unregistered transferee of an entire occupancy holding is not a person having in the holding an interest voidable on the sale. His Lordship also remarked that the interests voidable on the sale referred to in sec. 170 (3) are those interests which are incumbrances within the meaning of sec. 161.

Next the point was referred to a Full Bench of the Patna High Court in *Mahadeo Lal v. Jangot Singh*, 40 I. C. 257, where it was held that the transferee of a portion of an occupancy holding not transferable by custom is not a person who has in the holding advertised for sale an interest voidable on the sale. Chamier, C. J., remarked that the only interests "which are voidable on the sale" within the meaning of sec. 170 are those interests which can be avoided by means of an application under sec. 167 and that the only interests which can be avoided by such an application are the interests defined in sec. 161 as incumbrances. Justices Chapman, Atkinson and Sharfuddin concurred with the Chief Justice. But Mullick, J., dissenting, delivered a very learned and elaborate judgment. His Lordship dealt with all the cases on the point, both for and against.

In *Barada Prasad Ray Chowdhury v. Foijuddi Haldar*, 28 C. W. N. 125 (notes), the same question arose and it was pressed by the opposite party that having regard to the conflict of decisions the question should be referred to a Full Bench. But Newbould and B. B. Ghose, JJ., following the decisions as reported in 16 C. W. N. 421, 26 C. W. N. 170 (notes), 27 C. W. N. 175 (notes) did not think it necessary to refer the matter to a Full Bench and held that a purchaser of a portion of a non-transferable occupancy holding is not a person whose interest is

voidable on the sale and is not entitled to make a deposit under sec. 170 (3).

So according to the majority of the recent rulings we find that though by the Full Bench decision in the case of *Dayamoyee v. Ananda Mohan*, the position of the part purchaser of a non-transferable occupancy holding has been much altered, still he is not allowed to deposit under sec. 170 (3).

Now, there remains the mortgagee. Mortgage is an incumbrance as defined in sec. 161 (16 C. L. J. 156). So we thought and from the remarks of their Lordships in *Mahadeo Lal v. Jangot Singh*, 40 I. C. 257, we understood that the mortgagee could deposit under sec. 170 (3).

But in *Rudha Benode Mandal v. Nitai Chand Sant*, 38 C. L. J. 147, Panton, J., following the Patna cases as reported in 38 I. C. 337 and 40 I. C. 257, and the recent Calcutta case reported in 26 C. W. N. 170 (notes) held that the mortgagee is not entitled to deposit under sec. 170 (3).

During the discussion in the Council as already referred, both an unrecognised transferee and a mortgagee were named as persons entitled to make a deposit before sale and the intention of the legislature, as we understand, of course with all respect to their Lordships, was to allow them to do so.

Will any of your numerous readers kindly enlighten us as to who are now the persons whose interests in the holding are voidable on the sale, as contemplated by sec. 170 (3)?

Yours truly,
SRIS CHANDRA DHAR.
RAMESH CH. PATRANAVIS.

NETRAKONA,
The 7th July 1924.

THE Calcutta Weekly Notes.

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If Judges may extra-judicially serve on Executive Commissions.

We noticed in our last issue the unwillingness of the Hon'ble Judges of the Calcutta High Court to act in any Commission that may be appointed by the Executive Government for advising, investigating or determining in any extra-judicial capacity the guilt or innocence of any person who may be charged with any conspiracy against the State or with any other State or other offences. That the Hon'ble Judges have in this respect acted according to the best traditions of the Bench will appear from the note that we reproduce below from the columns of the last issue of the *Law Times* :—

"The pronouncement of Mr. Justice Avory, at the Liverpool Assizes, is in consonance with the best and highest traditions of the Bench, and an echo, albeit unconscious, of Lord Brougham's description of the ideal judicial power, 'pure and unsullied, calmly exercised, amidst the uproar of contending parties, by men removed above all contamination of faction, all participation in either its fury or its delusions.' 'I am tempted,' said Mr. Justice Avory, 'to make some observations upon the necessity of maintaining the reputation, which this country has for so long enjoyed, for both firm and impartial administration of justice, but, lest it should be supposed that I am even indirectly taking part in the election campaign, I resist the temptation.' These words reflect the sentiments of Mr. Gladstone in reference to participation, however indirect, by judges in matters of party warfare. Mr. Gladstone eulogised the abstention of judges from political affairs, not on the ground that their impartiality would be thereby affected, but that it might seem to be affected. Speaking in the House of Commons on the 5th May 1887, Mr. Gladstone opposed the suggestion of an investigation by a commission of judges of charges made against members of the late Irish National Party. 'I believe, myself,' said Mr. Gladstone,

'that all the judges now on the Bench might be trusted [as members of such a commission]. But there is one judge on the Bench now [the late Mr. Justice Fitzjames Stephen] who came down from the Bench to take a part, with regard to the great Irish question, more violent than has been taken by any layman I can remember. And if one of these gentlemen [members from Ireland] sitting below the gangway says it is excusable in him to feel some mistrust in such a case, though I should not feel such mistrust myself, yet I must say I understand that mistrust.' Lord Esher, when, as Master of the Rolls, he replied, at the Guildhall Banquet on the 9th November 1892, to the toast of 'The Judges,' laid down the golden rule by whose observance judges cannot fail to secure public confidence. Referring to the fierce attacks to which Lord Justice Mathew had been subjected as chairman of the Evicted Tenants (Ireland) Commission, Lord Esher said: 'The education and training of the judges made them impartial and determined to do right in every question which came before them. This, indeed, was so well known and recognised that when the judges of England acted within the scope of their ordinary duties nobody ever attempted even to suggest that they were not impartial. At the present time they knew that one of the judges had been asked to go beyond the scope of his ordinary duty; and he, for one, was surprised and sorry that the judge in question had consented to do so. The result was inevitable. That judge had been fiercely accused of partiality and of a want of desire to do justice.'"

If Counsel may refuse a brief of an accused person.

The same issue of the *Law Times* has also a very interesting note on the duty of Counsel to defend an accused person, no matter how grave may be the offence with which he is charged and quite irrespective of Counsel's personal opinion with regard to the case or the guilt or innocence of the person accused. It is said that Sir Mathew Hale used at one time to decline briefs on the latter ground; but in some cases which he considered worthless in the course of the trial, he found them well-founded and he modified his views thereafter. This fact also supports the view we have always maintained that the fact that the cause papers disclose a *prima facie* case is no sure index of a person's guilt.

His guilt or innocence can only be determined by a judicial trial and not otherwise. It is not for a judge or even a Counsel to prejudge the guilt or innocence of an accused person and the duty of the Counsel is to present the case of the accused person to the jury or the judge from instructions and the evidence disclosed and it is for the latter to come to their findings in accordance with the law and the legal evidence.

Our contemporary says with regard to the duty of the Counsel:—

"In this country the attitude of counsel is strictly impersonal. They scrupulously abstain from giving any personal opinion on the matter in controversy, and are not identified in any degree with the merits or the demerits of their clients or their clients' claims. The impersonal attitude of counsel in these countries may be illustrated by the method of poignancy of contrast. The question has been asked, How could Cicero even think of appearing in defence of Catiline? If the profession of an advocate in ancient Rome had been the same as in England, there would be no difficulty in the matter, for the modern advocate in England does not concern himself with the guilt or innocence or moral character of his client. His duty is merely to deal with the legal evidence, and to show, if possible, that it fails to bring home the charge to the accused. And, except in some rare cases, he is, by the very fact of his profession, understood to be under an implied obligation to undertake the defence of the accused, if his assistance is required. Thus, in 1817, Sir Charles Wetherell, the most pronounced and uncompromising Tory of his time, who actually resigned the Attorney-Generalship in the Wellington-Peel Government in consequence of its avowal of a religious disabilities removal policy, defended Watson on a charge of high treason, and secured his acquittal. So, too, at the Irish Bar, Mr. (Chief Justice) Whiteside, whose Toryism was as uncompromising as the Toryism of Sir Charles Wetherell, whom Mr. Whiteside greatly admired, defended Mr. O'Connell in 1844 in the Irish State Trials, and defended Mr. William Smith O'Brien in 1848 on his trial for high treason. These cases supply illustrations of the absolute aloofness, in these countries, of counsel from his client or his client's cause, and the necessity of the preservation of the etiquette of the Bar which precludes counsel, in their capacity of advocates, from the expression of personal opinion on the merits or demerits of a case." "There have been," writes Mr. Lecky, "and perhaps still are, instances of lawyers [in these countries] endeavouring to limit their practice to cases which they believed to be just. Sir Mathew Hale is a conspicuous example, but he acknowledged that he considerably relaxed his rule on this subject, having found, in

two instances, that cases which at first blush seemed very worthless, were, in truth, well founded. As a general rule English lawyers make no discrimination on this ground in accepting briefs unless the injustice is very flagrant, nor will they, except in very extreme cases, do their client the great injury of throwing up a brief which they have once accepted. They contend that, by acting in this way, the administration of justice in the long run is best served, and in this fact they find its justification."

Strict observance of procedural law.

Many things are said to come within the scope of sec. 537 of the Code of Criminal Procedure which may be said to be the "curing" section, but this section might altogether have been omitted from the Code and certainly it is not a provision of law which is to be invoked on any and every occasion as a shield against irregularities perpetrated by the subordinate Criminal Courts. The only way to secure the proper observance of the law by the subordinate Courts is for the High Court to interfere whenever any departure from the established procedure comes to its notice. Magistrates ought to bear in mind that they are not at liberty to choose any procedure which they may find convenient. They are to follow the Code of Criminal Procedure which has been enacted to regulate the proceedings in Criminal Courts. His Lordship the Chief Justice in concurrence with Mr. Justice Chotzner distinctly said so in his judgment in the case of *Suresh Chandra Gupta v. Abdul Jabbar*, reported at page 127, where he had occasion to set aside an order of compensation made under sec. 250 of the Code of Criminal Procedure in disregard of the change effected in the section by the recent amendment. We hope the observations of the learned Chief Justice will not be overlooked, but the Magistrates in the Mofussil will realize their responsibility in administering the law according to the letter of the statute which does not seem to be always adequately appreciated.

In this connection we may refer to *Lachmi Sing v. King-Emperor*, (1924) Pat. 181, which is a decision in which sec. 537 of the Code was resorted to, to support a conviction under sec. 182, I. P. C., which was arrived at without any written complaint by the public servant concerned, in this case, a Writer Head Constable. Under sec. 195 as now amended, the condition precedent to the institution of a prosecution under secs. 172 to 188, I. P. C.,

is that the public servant concerned should make a complaint in writing on which the proper Magistrate will take cognizance. Sec. 200 of the Code has also been amended so as to obviate the necessity of examining the complainant on oath in such cases. This was certainly in view of the inconvenience which a public servant may be put to, if in the midst of his duties he has to appear before a Magistrate for examination on his complaint. Nothing can be more clear than that a written complaint is absolutely necessary in the cases referred to as being the very basis of the proceedings. We regret we cannot endorse the view taken by Kulwant Sahay, J., that the absence of a complaint in writing at the most would only amount to an error, omission or irregularity as contemplated by sec. 537 of the Code. This very section was also pleaded in justification of the irregularity complained of in the Calcutta case mentioned above, but the contention elicited the observation that Magistrates are to follow the Code of Criminal Procedure and not to give it the go-by. One curious fact in connection with the Patna case is that the trying Magistrate in response to enquiries made of him said that so far as he and the Court Sub-Inspector of Barh recollected, a petition of complaint in writing was filed by the Writer Head Constable who was examined at the time of filing the complaint in writing. Any such complaint, however, was not found on the record. Under such circumstances surely the presumption arises that there was no written complaint and the accused was entitled to complain of this irregularity and question the legality of his conviction on this ground alone.

**RIGHT OF UNRECOGNISED TRANSFEREE OF NON-TRANSFERABLE
OCCUPANCY HOLDING TO
DEPOSIT AMOUNT OF
RENT-DECREE UNDER
SEC. 170 (3), BENGAL
TENANCY
ACT.**

By RADHABOMON MOOKERJEE, VAKIL,
BENGALPORE.

(Continued from p. xxv.)

*Leading cases, Nissa v. Radha, Nalini
v. Fulmani, overruled by Full Bench
in Dayamayi's case.*

It was, unfortunately that the Full Bench in
Dayamayi's case did not expressly overrule or

affirm any of the decisions on either side. But considering the views taken by it regarding the nature of the occupancy right and the respective rights of the purchaser, the raiyat, and the landlord, it gave us sufficient indications of the rulings it intended to overrule. Thus, on the face of it, it cannot now be contended that the purchaser acquires nothing by his purchase, and therefore, all the cases in which that view was taken and which were based on it must be held to have been impliedly overruled. We are particularly interested in the decision in the case of *Nalini v. Fulmani*. It was based, as we have already seen, upon the authority of the case of *Nissa v. Radha*, which held that the purchaser was not a "representative of the judgment-debtor (the transferor) under sec. 244, nor the owner of immoveable property" under sec. 311, C. P. C., 1882, inasmuch as he had acquired no interest in the holding by virtue of his purchase, and that therefore he could not apply under those sections for setting aside a sale held in execution of rent decree. The decision in the case of *Nalini v. Fulmani* was based principally on that view of the purchaser's right, which was taken in the case of *Nissa v. Radha*, that he by his purchase acquired no interest in the holding. The Full Bench, however, in *Dayamayi's case* held the contrary view, namely, that he acquired title to the property and was therefore entitled to make the applications. It thus, by implication, overruled the decision in the case of *Nissa v. Radha*, and also the decision in the case of *Nalini v. Fulmani*, to the extent to which it was based on it. The case of *Prosunno v. Bama* only followed the decision in the case of *Nissa v. Radha* and must also be held to have been overruled along with this. [See Ram-pini's Bengal Tenancy Act, 6th Ed. by D. Chatterjee, J., 132; also 20 C. L. J. 52 footnote.]

(2) *Because he has no interest which is
valid against landlord.*

Hence, according to some decided cases, the interest to be voidable on the sale must be such interest as is valid against the landlord.

*As held in Nalini v. Fulmani, 16 C. W. N.
421: s. c. 15 C. L. J. 388.*

Thus, in *Nalini v. Fulmani*, 16 C. W. N. 421: s. c. 15 C. L. J. 388 (1912) which, though decided before the Full Bench decision in *Dayamayi's case*, is still regarded by

Stephen, J., of the Calcutta High Court in the course of his judgment observed:— "In *Hari v. Uday*, 8 C. L. J. 261 (1908), it was held that the sale was not void but merely voidable by the landlord, a rule that has been frequently followed by this Court in holding that where the landlord is not a party to a proceeding arising out of the transfer, the question of transferability does not arise. I doubt, however, whether the distinction between void and voidable contracts has not been pushed too far in the case in question. The landlord's rights were not directly concerned in the case, and, on the facts before it, in order to support the conclusion arrived at, the Court need not have decided more than that the contract was void only. If the landlord recognises a transfer, it is probably open to him to recognise it upon the footing that it is or is not the subject of an occupancy right. If the 'interest' in sec. 170 (3), Bengal Tenancy Act, is read as 'interest against the landlord,' a sense which would bring the section into line with secs. 214 and 311 of the old Civil Procedure Code, this would put an end to the distinction between void and voidable contracts as far as the present case is concerned. . . . the possibility of the reading inclines us to follow the two decisions we have followed." (*Nissa v. Radha*, 11 C. W. N. 312, *Prosunno v. Bama*, 13 C. W. N. 602) Hence, it was held in that case that the transferee by sale is not entitled to come under sec. 170 (3), Bengal Tenancy Act. It should be noted that the decision in that case was not based on the ground that the purchaser did not possess any incumbrance or other voidable interest in the holding, with which we are now primarily concerned. On the other hand, it is stated that each of the secs. 244 and 311, C. P. C., 1882, and sec. 170 (3), Bengal Tenancy Act, contemplates an interest of the same nature, namely, one which is valid against the landlord, and that even if the purchaser acquires any interest in the holding, that interest is not valid against the landlord.

(To be continued.)

Correspondence

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
Sir,

With great deference to the learned Judges, I should be sorry to point out that the decision

in the case of *Emperor v. Nabab Ali Sarkar*, reported in L. L. R. 51 Cal. 236, raises some difficulty with reference to the particular facts of the case. The important point of law made out in the judgment is that the omission to read over the deposition to the witness in accordance with Or. 18, r. 5 of the Civil Procedure Code, renders the same inadmissible in evidence against him on his subsequent trial for forgery. So far as this principle of law is concerned, there can be no dispute as it is supported by an overwhelming weight of authority. But the question is whether the provision of Or. 18, r. 5 has any application to the case. The facts alleged are that the accused was sought to be connected with the offence of forgery with which he had been charged by proving against him the statement which was made by him in his deposition before the Munsif in the rent suit. But my contention is that, having regard to the very clear language of sec. 148 (f) of the Bengal Tenancy Act, Or. 18, r. 5 has no application. Sec. 148 (f) of the Bengal Tenancy Act runs as follows:—

"The rules for recording the evidence of witnesses prescribed by sec. 189 of the Civil Procedure Code of 1882 shall apply whether an appeal is allowed or not." Sec. 148, Bengal Tenancy Act, lays down the procedure in rent suits, and the section begins thus: "The following rules shall apply to suits for recovery of rent." Now sec. 189 of the old Civil Procedure Code corresponds to Or. 18, r. 13 of the Code of 1908, and provides that in cases in which an appeal is not allowed the judge shall make a memorandum of the substance of what the witness deposes. So it is clear that Or. 18, r. 5 which lays down that the deposition of the witness shall be read over when completed in cases on which an appeal is allowed is excluded by the operation of sec. 148 (f) of the Bengal Tenancy Act in the present suit. There is nothing in the report or the judgment to show that any reference to the Bengal Tenancy Act, sec. 148 (f) was made at all. Mr. Justice Suhrawardy said in the judgment at p. 242 of the report (51 Cal.) when he quoted Or. 18, r. 5: "I may mention here that in this case the value of the suit was above Rs. 50, and, therefore an appeal lay under the law." It is obvious from the passage quoted that his Lordship was thinking of sec. 153 (b) of the Bengal Tenancy Act; but it is curious that his Lordship did not direct his attention to sec. 148 (f) of the Bengal Tenancy Act. So, I respectfully submit that in this particular case, if it is made a question of compliance with certain provisions of "law, the case should have been looked at from this point of view whether a conviction of a person can be based on a statement made by him in accordance with the provision of sec. 148 (f) of the Bengal Tenancy Act which provides summary way of recording evidence and does not require it to be read over.

Yours, etc.,

LAKSHMI KANTA SEN GUPTA, M.A., B.L.,
Pleader, Chinsurah.

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The late Sir Subramania Aiyar.

We deeply regret to record the death of Sir Subramania Aiyar. He was a distinguished Judge of the Madras High Court and was a worthy successor of Sir Muthuswami Aiyar and their lives and careers were exemplary in many ways. In many respects these eminent Judges may be said to have possessed an intellectual and moral kinship with Sir Gurudas Banerjee, who too like them was a poor Brahmin boy who from the qualities of their heart and mind had risen to eminence and commanded universal respect. Full of years and full of honours Sir Subramania has passed away at the age of 82, leaving behind him a name which will always be remembered with reverence and high regard. His life was an example to all and by those who knew him he was admired no less for moral eminence than for his strength of character and keenness of intellect. He was a sturdy champion of popular rights who never cared for favour or disfavour in following the dictates of his conscience. He was one of the little group who in 1884 formed the committee out of which grew the Indian National Congress. At its first session he took a leading part and was called upon to second a resolution advocating the reform and expansion of the Legislative Councils, local and supreme. The memorable speech that he made on this occasion was characteristic of the man and though the Madras Government paid him a high compliment by nominating him to a seat on the Legislative Council, he did not hesitate to say that the non-official members found themselves in the wrong place and under the constitution of the Councils they could not be of any use to the country.

He was the first Indian to be appointed

Vice-Chancellor of the Madras University and the second Indian Judge of the Madras High Court, the first being Sir T. Muthuswami Aiyar. Possessing a high sense of duty, ever anxious to do justice, highly cultured, always patient and courteous, Sir Subramania made an ideal Judge. He was never enamoured of the letter of the law and his aim as a Judge was always to place equity before the technicalities of the law. The judgments he delivered in cases where the rights of Hindu women were affected boldly testify to this. His judgment in the case reported in I. L. R. 21 Mad. is a clear analysis of the position of women in respect of inheritance. It is abundantly clear that he was guided more by the spirit of the rule laid down by the text of the Smiriti writers than by the letter of it. The decision in I. L. R. 28 Mad. is a more important step towards the proper safe-guarding of the interest of women in holding and enjoying property.

In 1895 he was raised to the Bench and on several occasions he officiated as Chief Justice of the Madras High Court and after nearly twelve years of strenuous work he retired and during the remainder of his life up till a few years prior to his death he took an active interest in every important movement for the spiritual, moral, social and political emancipation of the country. He acted as the Chairman of the Reception Committee of the Madras Session of the Congress over which the late Mr. Bhupendra Nath Bose presided in 1914. When the Great War was nearing its end and every country that had taken part in securing a triumph of the moral over the physical force longed for the recognition of the principle of justice and fair-play for all, Sir Subramania impelled by his deep love of his motherland appealed to the civilised world for justice for India. Those who took technical objection to his letter to President Wilson could not help admiring his honesty, courage and deep patriotism. Then again when Mrs. Besant was interned, he felt the injustice of it so deeply that he gave up knighthood and all

honours that had been conferred on him. The moral and spiritual side of his great personality commanded no less admiration than his wordly career. Though much maturer in years and occupying the high position as a Judge, he accorded his whole-hearted support to the religious, social and humanitarian mission of young Vivekananda and it was through Sir Subramania's support that it met with an enthusiastic reception and found a permanent home in Madras at its very infancy. He was also a warm supporter of Mrs. Besant and of the theosophical movement. He like Sir Muthuswami, Sir Gurudas, Ranade, Trimbak Telang, has left behind him ideals of character and duty which present and future generations will do well to emulate.

Hirer, if liable to pay extra hire to carrier when the latter detains vessel to enforce lien.

Two courses are, generally, open to a common carrier, who has earned his freight, but whose freight is not paid.

(1) He may either exercise his lien retaining the goods till the freight is paid; (2) he may deliver the goods trusting to his action for the recovery of the agreed or proper sum (as the case may be) for the carriage.

If he adopts the first course it is his "duty to deal with it in a reasonable manner, and to keep it in a reasonable place; and that this duty would generally impose upon him the obligation of keeping it at the place of delivery for a reasonable time, if he had a convenient place of deposit there"—Per Willes, J., in *Crouch v. Great Western Railway Co.*, (1858) 27 L. J. (Ex.) 345. Again in *Somes v. British Empire Shipping Co.*, (1860) 8 H. L. Cas. 338, it was laid down that "a person who has a lien upon a chattel for a debt, cannot, if he keeps it to enforce payment, add to the amount for which the lien exists, a charge for keeping the chattel till the debt is paid."

The joint effect of these two cases seems to be that if a common carrier keeps the goods on his boat hired for so much a day, in exercise of his lien, he cannot charge for the days his boat is so detained. Firstly, because it cannot be said to be reasonable, viz., what a prudent man would do under the circumstances, to detain the boat when he as well

could find a convenient place for warehousing the goods, and secondly, because he has retained the goods for his own benefit, viz., in exercise of his lien.

In the House of Lords' case above cited, the particulars of estimate submitted for the repair of a ship, contained an item as follows:—

"The cost of using graving dock for the job will be from 120 to 150 guineas"—and the ship having not been taken delivery of in time, dock hire at £21 a day was demanded for the number of extra days the ship was in the dock. Held, by Lord Wensleydale, that from that statement no agreement was made out to pay the cost of the hire of the graving dock. It might be contended on this observation of his Lordship that the case was decided on the footing that there was no agreement to pay extra dock hire. Consequently in case of a boat hired for so much a day, the period during which the boat is detained in exercise of the lien, might be put to the account of the defaulter as there is at least an implied agreement to that effect, the boat being hired for a certain sum per day. But that does not seem to be the proper reading of the case. The learned Lord expressed his concurrence in the judgment of Lord Cranworth in the case where the true rationale of the decision was laid down that the ship having been detained for the benefit of the persons exercising the lien "in order the better to enforce the payment of their demand" and not for the benefit of the other party, no dock charges could be realised apart from the consolidated charge made in the estimate.

Where the carrier retains the goods for his own benefit, for "the better to enforce his demand"—he is not entitled to excess charges on the ground of his boat being detained owing to the non-payment of freight. He could have delivered the goods and sue for his charges: if he has not chosen that course but has adopted the other he will take the benefit arising out of it along with its incidental drawback.

Pleas in bar to indictment for larceny.

It has been said that a case under sec. 211, Indian Penal Code, always bristles with points of law: so does one under sec. 379, In-

dian Penal Code. The necessary ingredients of the offence of theft are not infrequently overlooked. To sustain a conviction of theft it is necessary to prove a dishonest intention to take property out of the possession of another person. Consequently where property is removed in the assertion of a *bond fide* claim of right, the removal does not constitute theft. In *Harnam Sing v. The Crown*, 5 Lahore 56, the accused was convicted of theft and sentenced to undergo one year's rigorous imprisonment for having removed several bags of type from the press without the consent and permission of his employees. The removal of the articles was not denied by the accused but it was pleaded that the things belonged to him and he removed them because his employers failed to carry out their part of the contract which was that they would either take him as a partner in their business or purchase those materials from him for their press. It appeared that the things were removed secretly and were despatched by railway as locks and not as type but the High Court (Moti Sagar, J.) held that this fact was not sufficient to indicate that the accused had any dishonest intention.

The principle applicable in circumstances like these is well settled and is stated in works of high authority. Sir Mathew Hale in his *Pleas of the Crown* observes in his quaint style: "It is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact. If A thinking he hath a title to the horse of B seizeth it as his own or supposing that B holds of him distrains the horse of B without cause, this regularly makes it no felony but a trespass because there is a pretence of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly or being charged with the goods denies it." To the same effect is Sir Edward Hyde East in his *Pleas of the Crown*: "In any case if there be any fair pretence of property or right in the prisoner or if it be brought into doubt at all the Courts will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy."

principle and *Rex v. Hall*, 3 C. & P. 409, *Reg v. Wade*, 11 Cox. 549, *Reg v. Suppard*, 4 F. & F. 51, may be cited as the leading cases on the subject. The same principle has been recognised and applied in a long line of cases in Indian Courts which show that a conviction for theft cannot be sustained if there is a *bond fide* assertion of a claim of right, but a mere assertion of a claim does not oust the jurisdiction of the Criminal Court; whether the claim is honest must be decided by the Court from all the circumstances of the case and it should not convict unless it is in a position to say that the claim is a mere pretence. Courts very often shirk the responsibility of coming to a decision on this point wrongly invoking the principle that civil disputes should not be tried in Criminal Courts, but they forget that this very wholesome provision of law is the strongest reason why a person indicted for larceny should not be convicted when he sets up a *bond fide* claim of right in defence.

The claim of right must be an honest one though it may be unfounded in law or in fact. If the claim is not made in good faith but is a mere colourable pretence to obtain or to keep possession, it avails not as a defence. The definition of theft in the Indian Penal Code is very concise and comprehensive and leaves no room for doubt as to what sort of taking comes within the mischief of sec. 378. In England prior to the passing of the Larceny Act of 1916 there were cases which went to establish that it is not necessary that the taking should be *lucri causa* if it is fraudulent and with intent wholly to deprive the owner of the property. *R. v. Morfit*, R. & R. 307, is a somewhat curious case. The prisoners, servants in husbandry, opened the granary of their master by means of a false key and took thereout two bushels of beans to give to their master's horses in addition to the quantity usually allowed. This was held to be larceny by a majority of the judges, but it was considered by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses and therefore the *lucri causa* to give themselves ease was an ingredient in the offence. The law has been altered by 26 and 27 Vict. c. 103 (Misappropriation by Servants Act, 1863), sec. 1 of which provides that if any servant shall contrary to the orders of his master take from his possession any corn,

Judicial decisions have given effect to this

pulse, roots or other food for the purpose of giving the same or of having the same given to any horse or other animal belonging to or in possession of his master the servant so offending shall not by reason thereof be deemed guilty of or be proceeded against for felony but shall, on conviction of such offence before two Justices of the Peace, be either imprisoned for any term not exceeding three months or be sentenced to pay a fine, provided if the Justices shall be of opinion that the same is too trifling they shall have power to dismiss the charge without proceeding to a conviction.

RIGHT OF UNRECOGNISED TRANS-
FEREE OF NON-TRANSFERABLE
OCCUPANCY HOLDING TO
DEPOSIT AMOUNT OF
RENT-DECREE UNDER
SEC. 170 (3), BEN-
GAL TENANCY
ACT.

BY RADHAROMON MOOKERJEE, VAKIL.
BERHAMPORE.

(Continued from p. xxxii.)

Effect of Full Bench decision in Dayamayi's case—Position of whole purchaser.

But the case should be considered in the light of the decision of the Full Bench of the Calcutta High Court in *Dayamayi v. Ananda*, 18 C. W. N. 971: s. c. 20 C. L. J. 52; 1 L. R. 42 Cal. 172 regarding the right of the landlord as against the transferee. It has been laid down that "where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding." Hence, Chamier, C. J., of the Patna High Court points out:—"It appears to me with reference to the decision of the Full Bench (in *Dayamayi v. Ananda*) that an unrecognised transferee of an entire holding, who has not been in any way recognised by the landlord, acquires no interest in the holding as against the landlord. . . . such a transferee, therefore, does not appear to me to have an interest 'voidable on the sale,' for before the sale takes place he has no interest in the holding which he can enforce against the landlord." [*Rameswar v. Raghunandan*, 1 P. L. J. 408.] Similarly, it has been stated by the Calcutta High Court in one of the recent cases:—"A transferee of a non-transferable occupancy

holding, not recognised by the landlord, derives no interest by the transfer as against the landlord, and his interest is not, therefore, voidable on the sale." [*Mahammad v. Satyesh*, 26 C. W. N. clxx.] And in both the cases, their Lordships relied as an authority upon the case of *Nalini v. Fulmani*, 15 C. L. J. 388: s. c. 16 C. W. N. 421, decided by the Calcutta High Court. In another case which is often cited in support of the same view, *Mahanti v. Harkissen*, 19 C. W. N. clxxvi (1914) and which was decided after the Full Bench decision in *Dayamayi's* case, the question whether the interest of the transferee was valid against the landlord, and what effect that had on the decision of the point we are discussing were not at all decided, but the case was remanded for the trial of the issue as to the transferability of the holding.

*Landlord's consent validates transfer of
entire holding, so whole purchaser's
interest not void but voidable by
him, and he has the right to
deposit.*

But it is quite clear from the Full Bench decision that even where the entire holding is sold, the sale is not void, as we have already seen, but is valid as between the transferor-*raiyat* and the transferee. And as between the two and the landlord, though the transferee may not acquire any interest in the holding which is valid against the landlord entitling him to retain possession thereof as against him, as the transfer may be validated by his consent previously taken or assent subsequently obtained, it is not void but is voidable by him. There is therefore no reason why he should be deprived of the right.

*Part-purchaser entitled to possession against
landlord has right to deposit.*

But though the Full Bench in *Dayamayi's* case has decided that the landlord can re-enter at any moment as against the transferee of the whole in respect of a part, he can only re-enter if the transfer effects a surrender, or abandonment, of the holding, or a repudiation of the tenancy. And if, as generally happens, in the case of a transferee of a part, there is no abandonment, etc., by the recorded tenant, the landlord's right of re-entry does not arise. [See *Mahadeo v. Langat*, 2 P. L. J. 457 F. B. per Mullik, J.]. "And in such a case, the purchaser is entitled to possession even as against the landlord, inasmuch as the tenancy is not determined but subsists and interposes

a barrier between him and the landlord. [See *Purna v. Chandra*, 23 C. L. J. 304 F. B.]. Hence, it has been held in the case of *Sahadeo v. Kuldip*, 18 C. W. N. ccxix (1914), following the decision of the Full Bench in *Dayamayji's* case, that as in the case of the sale of a part of the holding, the landlord is not ordinarily entitled to enter on the portion sold, it confers on the purchaser an interest therein sufficient to entitle him to apply under sec. 170, Bengal Tenancy Act. [See also *Bhagraj v. Mathur*, 27 I. C. 424.]

Position of mortgagee of whole or part same as that of part-purchaser whether with or without possession.

The same rule applies to the case of a mortgagee, whether with or without possession. For the Full Bench in *Dayamayji's* case has placed the mortgagee on the same footing as a part-purchaser of the holding with regard to the landlord's right of re-entry on transfer. There it has been laid down that "where the transfer is of a part only or not by way of sale" (which includes the case of a mortgage) "the landlord is not ordinarily entitled to recover possession of the holding," unless there is abandonment or relinquishment of the holding, or a repudiation of the tenancy, by the raiyat. The execution of the mortgage does not imply a severance of the tenant with the holding, for it is on the assumption that the tenancy continues that the mortgagee can have any subsisting interest in the land. Consequently, even where the raiyat executes a usufructuary mortgage and places the mortgagee in possession of the holding, there is neither abandonment nor relinquishment of the holding nor repudiation of the tenancy to entitle the landlord to re-enter. On principle, therefore, there is no justification in holding that a tenant who has merely executed a mortgage with or without possession has abandoned his holding. [See *Mahadeo v. Panchkari*, 16 C. W. N. 322. Also author's "Occupancy Right, its History and Incidents," 265-267.]

Even where the entire holding is mortgaged and the mortgagee is left in possession of the whole, and there are circumstances entitling the landlord to *khas* possession thereof, still until the mortgagee is ejected in the due course of law, he holds a lien over the property. The transfer on that account cannot be said to be void or illegal. It is in fact a valid one as between the raiyat and the mort-

gagee, but as between the two and the landlord, its validity depends on the landlord's consent. It is therefore voidable by the landlord and not void. [See *Azimut v. Tamizan*, 56 Ind. Cas. 490 (Pat.).] Hence, it has been held that a mortgagee has sufficient interest in the holding to entitle him to deposit the money under sec. 170 (3), Bengal Tenancy Act. [*Satish v. Tufani*, 24 Ind. Cas. 9 (Cal.). See also *Parosh v. Nobo*, 1. L. R. 29 Cal. 1 : s. c. 5 C. W. N. 821 F. B.]

Contrary view in Radha v. Nitai, 38 C. L. J. 147 (1923), not supported by Authority.

In spite of all this it has recently been held by Panton, J., of the Calcutta High Court in the case of *Radha v. Nitai*, 38 C. L. J. 147 (1923) that a mortgagee is not entitled to make the deposit under that section. His Lordship relied upon the decision in the case of *Mahammad v. Satyesh*, 26 C. W. N. clxx (1922), as "the latest decision of this Court on the point in which it was held that the transferee was not entitled under sec. 170 (3) to make the deposit," which should be followed. But with all respect to his Lordship it may be permissible to point out that that was a case of a sale (probably of an entire holding) and not that of a mortgage and that the distinction between the right of the purchaser of the whole and that of the part of a holding or a mortgagee thereof as against the landlord is, as we have already pointed out, a fundamental distinction which has been recognised by the Full Bench in *Dayamayji's* case, which has held contrary to the decision in the case of *Nalini v. Fulmani*, to which also his Lordship has referred, that the latter has an enforceable right as against the landlord. The principle applicable to a purchaser of an entire holding cannot, therefore, be applied to a mortgagee. The two Patna cases cited by his Lordship also deal with the case of the purchaser, the one *Rameswar v. Raghuqandan*, 1 P. L. J. 403, with that of a whole, the other *Mahadeo v. Langat*, 2 P. L. J. 457 F. B., with that of a part of a holding. And on the very ground on which they have been based, which, as we have already stated, was not approved by the Calcutta High Court, and also on the ground that the mortgagee has a valid interest, though it is voidable by the landlord, a subsequent ruling of the Patna High Court has held that even a usufructuary mortgagee has

the right to deposit. *Azimut v. Tamzan*, 56 I. C. 490. We shall have occasion to discuss it further later on.

But question of validity of his right against landlord has no bearing upon present question.

But it seems to us that the question of the validity of the purchaser's right as against the landlord before the sale in execution of the rent-decree has no bearing on the present question, which implies a rent-sale as a result of which the interest in the holding is liable to be avoided. According to the Full Bench decision in *Dayamayi's* case—"Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding." It may be that the landlord is entitled, before suing the recorded raiyat for arrears of rent, to eject the transferee from the holding. The interest of the transferee, therefore, may properly be described as one which is voidable before and independently of the rent-sale. But that is no reason why it should also be regarded as one "voidable on the sale," i.e., after the sale actually takes place and on account of it. As pointed out by D. Chatterjee and Walmsley, JJ., of the Calcutta High Court:—"The landlord can terminate the purchaser's interest at any time, and his right to do so is independent of an execution sale. We do not think, however, that on that account his interest is not one which is voidable on the sale." [*Ahamadulla v. Hakaru*, 18 C. W. N. cccxxi; s. c. 22 C. L. J. 106. *Ahamadulla v. Prayag*, 20 C. W. N. 39 (1914).] That is a case of a purchaser of an entire holding but the same reasoning applies with equal force to the case of a purchaser of a part of the holding. Thus, the right of a transferee by sale, particularly of a part of a non-transferable occupancy holding to avoid the sale before it takes place, does not depend upon the validity of his interest against the landlord. And though the transfer is not binding upon the landlord, it is not a bar to the transferee's paying in the money under sec. 170 (3), Bengal Tenancy Act.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Oct. 30th, 1914.—Judgment was delivered by Sir JOHN EDGE in *Jai Narain v. Ujagar Lal and Prag Narain v. Ujagar Lal*, an appeal from

Allahabad heard on July 22nd and 24th last. These were two consolidated appeals, one of which was dismissed and in the other the decree of the High Court was modified.

In the Council Chamber the hearing was concluded of the appeal, *Mt. Maina Bibi v. Vakil Ahmad*, and judgment was reserved.

The hearing was commenced of *Sasi Sekharswar Roy v. Lalit Mohan* (Bengal). Under an award certain lands were divided between the Plaintiff and Defendant. Later the award was filed and became a decree. The Plaintiff is now suing for possession of certain of the lands, the subject-matter of the award and is met with the defence that no suit lies and that his only remedy was an application under sec. 47 of the Civil Procedure Code.

Sir G. Lowndes, K. C. and Mr. Dubé for the Appellants.

Messrs. L. DeGruyther, K. C. and Parikh for the Respondent.

Oct. 30th and 31st.—In the Board Room the hearing was commenced of *Debi Rai v. Pahlad Das* (Allahabad). The dispute relates to the ownership of a house and whether an alienation was rightly made by a member of the joint family.

Messrs. DeGruyther, K. C. and Dubé for the Appellants.

Messrs. Dunne, K. C. and Hyam for the Respondents.

Oct. 31st.—In the Council Chamber the hearing of *Sasi Sekharswar Roy v. Lalit Mohan Mitra* (Bengal) was concluded and judgment was delivered by LORD DUNEDIN dismissing the appeal.

The hearing was commenced of *Seth Motilal Hirabhai v. Bai Mani* (Bombay).

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellant.

Sir Geo. Lowndes, K. C. and Mr. Parikh for the Respondent.

The Plaintiff's predecessor mortgaged certain "A" shares and their accretions or sub-shares to the Defendants. Subsequently "B" shares were issued out of the Company's profits to the holders of the "A" shares and such shares were issued to the mortgagee whose name was entered in the Company's books as the holder of the "A" shares. The Plaintiff

obtained a decree for redemption of both the "A" and "B" shares. The main question for decision in the appeal is whether on payment of the mortgage money the Plaintiff is entitled to recover the "B" shares as well as the "A" shares.

Special leave to appeal was refused in *Nga Po Hman v. The King-Emperor* (Burma).

Sir John Simon, K. C. and *Mr. B. Dubé* appeared for the Petitioner.

Mr. Kenworthy Brown for the Crown.

The Petitioner, a native of Burma, 20 years of age, was charged with having on 11th January last murdered one Maung Kywet. They were intimate friends. It was alleged that, while they were both drunk, the Petitioner asked Maung Kywet to accompany him in his cart to a neighbouring village, but that he refused. The Petitioner then stabbed him in the stomach with a knife. He died a few hours afterwards from the shock and hæmorrhage. The case was tried by the Court of Session with the aid of four assessors. The Petitioner asserted that Maung Kywet tripped over a log of wood while he was entering a hut and fell on his own toddy knife. The four assessors found the Petitioner "Not Guilty," but the Sessions Judge convicted him and sentenced him to death. The High Court affirmed that decision.

The Petitioner now submitted that he was "absolutely drunk" at the time; that the assault was sudden and unpremeditated and caused by a storm of passion and provocation and that the deed was not actuated by malice or *malus animus*, or any guilty knowledge or intention. He also urged that the evidence of the witnesses proved that he was so completely under the influence of drink as to be incapable of forming an intention of committing any offence, much less of causing the death of his friend.

In the course of the argument LORD DUNEDIN said that the prerogative of mercy still remained, and that the Petitioner might get the sentence commuted if the Viceroy thought proper.

At the close of the argument for the Petitioner their Lordships did not call upon Counsel for the Respondent.

LORD DUNEDIN said:—Their Lordships have again and again accentuated their determination that this Board is not to be treated as a Court of Criminal Appeal, and that it is only

in cases where the grounds indicated in "*Dillet's case*" can be made out that an appeal can be entertained. This case seems to their Lordships far outside any of the grounds, which are put forward in "*Dillet's case*." In a criminal case, and especially where a man's life is involved, one is not entitled to use words which one would use in a civil case. If this was a civil case I should have called it an impudent attempt to try to get the judgment of this Board. In a criminal case one can understand why it should have been made; but I don't think I can say anything stronger than that one of the most eminent advocates at the Bar, whose arguments their Lordships are accustomed to admire on many occasions, has not been able to produce a case before their Lordships which seems to them to deserve even the name of stating.

Their Lordships consider that it is their duty to make it as plain as they can to those in India that it is quite useless to come to this Board and ask for leave to appeal against ordinary criminal sentences unless something can be clearly shown which will bring it within the rule in "*Dillet's case*."

Oct., 31st.—In the Board Room the hearing was concluded of *Debi Rai v. Pahlad Das* and judgment was reserved.

Mr. Kenworthy Brown appeared for the Appellant in *Gutta Bhadrappa v. Kalagara Kankamma*. The suit was brought by the Appellant for the amount claimed due on a joint promissory note and a decree was obtained. In the High Court that decree was reversed so far as the Respondent was concerned. The question at issue in the appeal is whether the note was executed by the Respondent, an illiterate woman, who contends that her mark was put to it without authority and a false thumb impression appeared.

The Respondent is represented by *Mr. K. V. L. Nardsimham*.

Nov. 3rd.—In the Council Chamber the hearing was concluded of *Seth Motilal Hirabhai v. Bai Mani* (Bombay). Judgment was reserved.

Nov. 3rd and 4th.—The hearing has commenced, and is still proceeding, of the appeal, *Sm. Katyayani Debi v. Uday Kumar Das* (Bengal).

Messrs. L. DeGruyther, K. C. and A. Majid for the Appellant.

Messrs. A. M. Dunne, K. C. and B. Dubé for the Respondent.

The suit was brought by the Respondent to recover rent of certain mouzahs in the Khulna District.

The defence to the suit was that the tenant had not been put in possession of all the lands included in the grant.

Nov. 3rd.—In the Board Room the hearing was concluded and judgment reserved in *Gutta Bhadrappa v. Kalagara Kanakamma*.

Nov. 3rd and 4th.—An appeal from Bengal, *Surajmull Nagaremull v. The Triton Insurance Co., Ltd.*, came before the Board presided over by LORD SUMNER and the arguments were concluded. The suit was for damages for failure to perform a contract to issue policies for marine insurance. Judgment was reserved.

Messrs. Stuart Bevan, K. C. and K. Brown for the Appellants.

Messrs. Dunne, K. C. and Du Pareg for the Respondents.

Nov. 4th.—In *Prabhudas v. Ganidada* (Bengal).

Messrs. L. DeGruyther, K. C. and W. Wallach applied for special leave to appeal to His Majesty in Council. A question arises as to the construction of the Indian Tariff Act. The same question had arisen for decision in Madras and the High Court there had certified it as a matter of considerable public importance on which the decision of the Privy Council was desirable. The Calcutta High Court had refused leave to appeal from its decision.

Mr. F. B. Raikes for opponents said he was unable to dispute the fact that the matter was of considerable public importance. Leave was granted.

Nov. 4th.—In the Board Room the hearing was commenced of *Bajinath Singh v. Mahmmed Abba* (Lower Burma). The question at issue is whether certain transactions were mortgages or absolute sales with contracts to resell.

Mr. Horace Douglas for the Plaintiff-Appellant.

Messrs. Stuart Bevan, K. C. and W. Jolly for the Respondent.

G. D. M.

Correspondence.

ADMISSIBILITY OF PLEADINGS AS PUBLIC DOCUMENTS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

I shall be extremely obliged if you will kindly insert the following few lines in your highly esteemed journal. Public documents are enumerated in sec. 74 of the Indian Evidence Act. The list of such documents given therein is complete and exhaustive. There is nothing in the language of the section to suggest that the list is illustrative or it is capable of expansion. Now pleadings obviously do not come within the list and cannot be characterised public documents and hence they cannot be proved by means of certified copies.

Your correspondent has concluded from the decisions reported in 25 W. R. 68 and 1 A. L. J. R. 369 that a certified copy of a plaint is admitted in evidence under sec. 74 of the Indian Evidence Act apparently on the ground that being a part of the record it is a public document. If it be so, then every paper which is on the record, being a part of the record, is a public document. But the decisions cited do not lay down any such proposition.

In 25 W. R. 68, it was held that where a suit is compromised, a petition is presented in the usual way, and the Court makes an order confirming the agreement, which with the order as well as the power-of-attorney are all entered upon the record, these papers become a part of the record and are public documents.

In 1 A. L. J. R. 369, the question was whether the certified copy of the order of a Court passed upon the petition of compromise is admissible in evidence under sec. 77 of the Indian Evidence Act. Upon this Mr. Justice Aikman says at p. 370: "It is, I hold, a copy of a document forming the record of an act of a public judicial officer being the copy of an order of a Court passed as I take it in the terms of the compromise." Further *Messrs. Ameer Ali and Woodroffe* in their treatise on the Indian Evidence Act say at p. 515: "That class of documents which consist of plaints, written statements, affidavits and petitions filed in Court cannot be said to form such acts or records of acts as are mentioned in the section and are therefore not public documents."

Yours truly,

A. P. PANDÉY, M.Sc., LL.B.,

Vakil, High Court,

Allahabad.

45, GEORGE TOWN, ALLAHABAD,
2nd December 1924.

THE Calcutta Weekly Notes.

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Journal of Comparative Legislation.

The *Journal of Comparative Legislation and International Law* for the last quarter of 1924, received last week, contains some very interesting articles. The number for the previous quarter contains summary of legislation of the different parts of the British Empire. The scheme of the *Journal* seems to be to give summary of legislation in some and special articles on the law, legislation and constitution of different countries exclusively in other issues of the *Journal*. Some of the articles are of special interest, such as the one on "City Manager Government in American Municipalities" by Mr. Dodds, Secretary of the National Municipal League of America. Among other articles in the same *Journal*, "Notes on Imperial Constitutional Law" by Prof. Berriedale Keith; "Recent Decisions of the United States Supreme Court affecting the rights of Aliens" by Prof. Garner, which contains notes of the decisions regarding the ineligibility of the Japanese and Hindus to nationalization in America, except by their children born in America; "The Colour Bar Decision in the Transvaal;" "Custom in the Punjab;" "Law Codification in China," will be found of special interest by Indian readers.

City Manager Government in American Municipalities.

The Municipal Councils in the American cities are all elected on universal suffrage. But from experience it has been found that "the spoils to the victor" system of administration led to many abuses. Chief amongst these are the distribution of patronage amongst the supporters, irregular assessments, inequitable taxation, laxity in collection, extravagance in expenditure, imperfect attention to the needs and requirements of

the city and waste of time and energy of the councillors in political controversies. To remedy this the City Manager System of administration is being largely introduced in American cities. The system consists in entrusting the executive function of the Municipalities to City Managers, who are a professional class who specialize in such administration. They steer clear of political partisanship and have no concern with party politics. As the chief executive head of a Municipality the City Manager is responsible to the Municipal Council. The Council performs the function of watch and ward over his administration but does not meddle or interfere with him unnecessarily. The Council frames rules and regulations and makes money grants. It is claimed that this system of management has resulted in better budget methods, better tax and assessment methods and better collections and reduction of Municipal indebtedness. Floating debts have been wiped out and the financial position of the cities much improved and consequently their capacity for effecting improvements much increased. There are at present 321 cities in the United States under the City Manager plan. The salaries paid to the City Managers are moderate according to the American standard. A city with a population of 50,000 pays him only 10,000 dollars or Rs. 25,000 a year. It is said at the conclusion of the article that this system "has educated millions of people to the difference between the place of politics and the place of administration in Municipal Government, and has enabled the selection of the central administrative head to be based on professional fitness."

Power to Punish for contempt.

The inherent power of Courts to punish for contempt is necessary for the preservation of order and decorum, but a power like this which is intended to maintain the dignity of the Court must be exercised with caution for an abuse of this power brings into contempt the Court itself which seeks to keep its prestige unimpaired. The fact of obstruction to

Courts is as old as the English Courts and so also is the endeavour to remove it. But the ways and means by which this end was sought to be accomplished varied with variations in the nature of the obstruction. Likewise the manner of removing obstruction was variously exercised by different Courts and at different periods. The problem was a familiar subject-matter of legislation by Parliament and in America it was included in the first Act of Congress dealing with the judiciary.

The *Harvard Review* contains a very learned article on the subject of power to regulate contempts in which the whole history of the law in America is surveyed. In the Act of Congress referred to above it was enacted "that all the said Courts of the United States shall have power to punish by fine or imprisonment, at the discretion of said Courts, all contempts of authority in any cause or hearing before the same." As pointed out in the article, the occasions for the exercise of the power thus conferred were not defined, so the door was left open for its arbitrary exercise. There was abuse and a succession of grievances against the exercise of arbitrary judicial power culminated in the proceedings of impeachment against James H. Peck, a Judge of the Federal District Court for the District of Mussoori. Judge Peck imprisoned and disbarred a lawyer for publishing a detailed criticism of an opinion while an appeal from him was pending. After the fullest consideration articles of impeachment were presented by the House of Representatives and Judge Peck was put to trial before the Senate. Peck's conduct was defended chiefly upon his good faith in following what purported to be the staunch precedents of the common law. This defence, doubtless considerably reinforced by humane considerations accentuated in this instance by the Judge's age and blindness, saved the day for the Judge. He was acquitted, but twenty-one out of forty-three Senators pronounced him guilty. Peck's case created a sensation, the whole country was roused and in 1831 Congress passed an Act limiting the power of the Courts to punish for contempt.

Fortunately instances of abuse of this inherent power of the Courts are rare in England and India as well. The modern tendency is to exercise this power less

rigorously than in olden times. Referring to the older cases Lord Coleridge observed: "There are many cases in the older Digests and Abridgments on this subject, undoubtedly of a severe and stringent nature and such as would ill bear to be applied in the present day." (*In the matter of Bentley Macleod*, 6 Jur. 461.)

RIGHT OF UNRECOGNISED TRANS-
FEREE OF NON-TRANSFERABLE
OCCUPANCY HOLDING TO
DEPOSIT AMOUNT OF
RENT-DECREE UNDER
SEC. 170 (3), BEN-
GAL TENANCY
ACT.

By RADHAROMON MOOKERJEE, VAKIL,
BERHAMPUR.

(Continued from p. xxxviii.)

Nalini v. Fulmani overruled on both grounds
by Full Bench in *Dayamayi's* case.

It may be pointed out that on the decision in the case of *Nalini v. Fulmani*, no such distinction was drawn between the position of a transferee of a portion of a holding and that of an entire holding. The effect of the Full Bench decision in *Dayamayi's* case, therefore, was that so far as the transferee of a part of the holding is concerned, the case of *Nalini v. Fulmani* must be taken to have been overruled, inasmuch as the landlord is not entitled to recover possession of the holding. He has therefore an interest which is valid against the landlord. And so far as the transferee of the entire holding is concerned, the authority of that case must be taken to have been considerably shaken by that decision, inasmuch as, as we have already stated, its principal and chief ground for holding that the purchaser's interest is void, namely, that he acquires no interest at all in the holding has been overruled by the Full Bench decision in *Dayamayi's* case, and its second ground, namely, that the purchaser even if he acquires any interest, that interest is not valid against the landlord, also can no longer be supported inasmuch as though the purchaser of the entire holding (whose right to deposit was questioned in that case) may, according to the Full Bench decision, have to give up possession thereof to the landlord, as the transfer to him may be validated by the landlord's consent, it is not void but is voidable at his instance. It may be pointed out that in none of the recent cases except that of

Mahomed v. Satyesh was this ground made the basis of the decision.

(3) *Because such interest is not valid but void against auction-purchaser.*

It is next contended that though the purchaser may have an interest in the holding which is sought to be sold in execution of a rent-decree, that interest would pass by the sale in execution thereof to the auction-purchaser. Hence, it is not such an interest as should be considered as "voidable on the sale." In other words, the expression "voidable on the sale" is intended to mean "voidable at the instance of the auction-purchaser at the rent-sale." And the question is whether the interest of the transferee is merely void or voidable at his instance. It has been stated by Chamier, C. J., of the Patna High Court in the case already referred to:—"When a landlord brings to sale an occupancy holding in execution of a decree for rent obtained against the occupancy tenant, the purchaser is entitled to disregard the transferee of the holding" (i.e., the whole holding). [See *Rameswar v. Raghunandan*, 1 P. L. J. 403.] This has been more clearly put by Newbould and B. Ghose, JJ., of the Calcutta High Court recently in *Barada v. Fojjuddi*, 28 C. W. N. cxv : s. c. 39 C. L. J. 428 (1924):—"Where the transferee of a non-transferable occupancy holding has not been recognised by the landlord, a decree (for rent) obtained against the tenant-transferor would be binding on the unrecognised transferee, and in execution of the decree the interest of the transferee would also pass along with the interest of the transferor, and the auction-purchaser gets the interests of both the persons, the transferor and the transferee, who were interested in the holding." A transferee of a portion of a holding may be entitled to retain possession of that portion, while the raiyat also retains possession of the remaining portion of it, but if the holding is sold in execution of a rent-decree, it, in its entirety, passes to the auction-purchaser, and the part-purchaser also must give up possession in favour of the auction-purchaser. Hence, it is contended that the interest of the purchaser of the whole or a portion of the holding is extinguished by the sale, and is, therefore, void so far as the auction-purchaser is concerned, and cannot strictly be described as "voidable on the sale."

Contrary view on the very same ground.

Exactly opposite conclusion was, however,

reached by other Judges of the Calcutta High Court. Thus, Mookerjee, J., of that Court observes:—"The effect of the sale in execution of the (rent decree) will be to pass to the (auction) purchaser the (holding) free of the interest of the (private purchaser). Consequently, the interest which (he) possesses is voidable on the sale." [*Jugal v. Srinath*, 12 C. L. J. 609 (1910); see also *Radhika v. Rakhal*, 13 C. W. N. 1175 : s. c. 10 C. L. J. 473 (1909), *Tarak v. Harish*, 17 C. W. N. 163 : s. c. 16 C. L. J. 548 (1912), *Chandra v. Kalli*, 1. L. R. 23 Cal. 254 (1885).] The same view was expressed by D. Chatterjee and Walmsley, JJ., of the same Court in the case already referred to [*Ahmadulla v. Hakaru*, 22 C. L. J. 106 : s. c. 18 C. W. N. cccxxi, *Ahmadulla v. Prayag*, 20 C. W. N. 39 (1914)]:—"The effect of the sale is to give the auction-purchaser the right to oust the transferee, and it has been held in *Tarak v. Harish*, 16 C. L. J. 548 : s. c. 17 C. W. N. 163 (1912), that that fact makes the interest of the purchaser one that is voidable on the sale." It may be pointed out that the view taken in this case was considered but not dissented from by N. Chatterjee and Greaves, JJ., in *Abdur v. Promode*, 22 C. L. J. 108 : s. c. 20 C. W. N. 40. The contrary view taken in the case of *Jatindra v. Durga*, 10 C. W. N. 439, has been dissented from in all the decisions cited above. That case, therefore, has no authority now, and does not seem to interpret the law correctly. There is thus ample authority for the view that the transferee, who is liable to be ejected by the auction-purchaser after the rent-sale, has an interest which is voidable on the sale. And although in these cases the point was specifically raised and decided, Newbould and B. Ghose, JJ., in *Barada v. Fojjuddi*, 28 C. W. N. cxv : s. c. 39 C. L. J. 428 (1924), were pleased to remark:—"It would, however, appear on examination of the cases cited that this point has not been considered in any of the cases in the view that has been presented before us." Even in the case of *Nalini v. Fulmani*, referred to by their Lordships, the decision was based not on the ground that the purchaser does not possess any incumbrance or other interest in the holding which is voidable at the instance of the auction-purchaser but on the ground that it is not valid against the landlord. If, as is now urged, the auction-purchaser has the right to oust the transferee of the whole or part of a holding,

it passes to him free from any claim on the part of the transferee. The interest of the transferee, whatever it might be, is thus avoided by the sale. It cannot, therefore, be rightly regarded as void, but is voidable on the sale. After the transferee has been recognised by the landlord, a decree obtained against the transferor would not bind the transferee, and therefore the interest of the transferee would not be affected by the sale. Hence, *ex hypothesi* his interest would not be voidable on the sale. But where, as in this case, it is so affected, the use of the expression "void" with reference to it is meaningless.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Nov. 6th and 7th, 1923.—In the Council Chamber the hearing was concluded of *Sm. Katyayani Debi v. Uday Kumar Das* and their Lordships took time to consider their judgment.

Nov. 6th, 7th and 10th.—The hearing was commenced of *Ramdalm Singh v. Mt. Chandrama Kuer*, an appeal from Patna. The question at issue relates to the estate of Brij Nandan Singh. The suit was brought by the reversioners of the deceased for a declaration that the 2nd Respondent was not his validly adopted son.

The question is purely one of fact.

At the conclusion of the arguments on November 10th, judgment was reserved.

Messrs. Dunne, K. C. and Dubé for the Appellant.

Messrs. DeGruyther, K. C. and Wallach for the Respondents.

Nov. 4th, 6th and 7th.—In the Board Room before LORD SUMNER, LORD PHILLIMORE, SIR J. EDGE and SIR L. JENKINS, the hearing was concluded of *Bajmath Singh v. Md. Hajee Abba* (Lower Burma). The judgment was reserved.

Nov. 10th.—The constitution of this Board was altered for the hearing of the next case, LORD CARSON taking the place of LORD PHILLIMORE and an appeal from Lahore was heard, *Inlai Ram v. Ram Saran Das*. The action was brought by the Plaintiff on a promissory note for Rs. 8,000 and interest at 5 per cent. per mensem. The original note was alleged to have been filed with the plaint, but

later, during interlocutory proceedings, both parties agreed that the document then in Court was not the original. The Subordinate Judge allowed secondary evidence of the note and decreed the suit for the principal, and interest at a lower rate. The High Court decided that no case had been made out to justify the acceptance of secondary evidence and dismissed the suit. Judgment was reserved.

Sir G. Lowndes, K. C. and Mr. Dubé for the Appellant.

Sir W. M. Finlay, K. C. and DeMello for the Respondent.

Nov. 11th.—Before a Board composed of VISCOUNT HALDANE and LORDS DUNEDIN, ATKINSON, SUMNER and SALVESEN.

Sir G. Lowndes, K. C. and Mr. Wallach applied for leave to appeal to the Privy Council from the Court of the Judicial Commissioner, Central Provinces, in *Hanmant Rao v. King-Emperor*.

The Petitioner had been convicted of abetment of cheating and his sentence had been enhanced by the Judicial Commissioner. It was contended that the conviction had been obtained through the wrongful admission of evidence. In dismissing the application LORD HALDANE reiterated the opinion of LORD DUNEDIN expressed last week that the majority of these criminal applications should not be made.

Sir G. Lowndes pointed out to the Board that under the ruling of the Attorney-General, Counsel were not entitled to refuse to make the applications and suggested that the Board might make an order that such applications should only be brought on a certificate of Counsel that they were proper matters on which the decision of the Board should be sought. LORD HALDANE thanked Counsel for what he termed "a very useful suggestion."

G. D. M.

Review.

LAWYER'S COMPANION DIARY FOR 1925. *Lawyer's Companion Office, Mount Road, Madras.*

This is a neatly got up diary, giving one page to a day. It gives a lot of information, official, postal and legal. The important provisions of the Stamp Act and Court Fees Act are also given. Lawyers will find it useful.

THE Calcutta Weekly Notes.

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[No. 8

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New Year Greeting.

We wish all our readers a happy New Year and many more returns of the same. May the New Year be marked by peace, contentment, orderly progress, mutual good will and amity between all communities and supremacy of the rule of law in all spheres of life.

New Year Honours.

We are glad to note that a Knighthood has been conferred on Mr. Justice Rankin. His work on the Bench has been much appreciated by the profession and he has won the good opinion of all by his ability, courtesy, patience, quick despatch of business and desire to do justice. He has also rendered great public service as a member of the Hunter Commission and as the president of the Civil Justice Committee and it is very appropriate that he should be so honoured.

We also offer our congratulations to Sir Evan Cotton, the President of the Bengal Legislative Council for the Knighthood conferred on him. He is the son of a distinguished father and he assisted him very materially in the singular services that he rendered to India. Sir Evan practised as a member of the Calcutta Bar for many years and on his retirement to England he edited the newspaper "India" in London. He was then returned as a member of Parliament when he took great interest in Indian questions. On the death of

Sir Syed Samsul Huda, he was appointed to his present office, where he has conducted the proceedings of the Council under very unenviable circumstances. The honour conferred on him is befitting his position.

Sir Hari Sing Gour, who is also the recipient of Knighthood, is well-known to the legal profession as the author of voluminous legal works both in civil and criminal law. He is also a distinguished lawyer in the Central Provinces. As a member of the Legislative Assembly and the author of the Act amending the law of Civil Marriage in India he is well-known. He is the Vice-Chancellor of the Delhi University and is the possessor of many academical distinctions and the honour of Knighthood has been conferred on him not a day too soon. We offer him our hearty congratulations.

The Bengal Criminal Law Amendment Bill of 1925.

We have carefully perused the Criminal Law Amendment Bill of 1925 which is proposed to be introduced into the Bengal Legislative Council on the 7th instant for the extension of the life of the Ordinance of the same name from six months to five years as also the memorandum of the Bengal Government explaining its objects and reasons. We see no reason to change our opinion that like the Ordinance it is an ill-conceived, arbitrary and drastic measure. The text of the Bill makes but slight and quite immaterial changes in the provision of the Ordinance. The first portion of the Bill provides that the Local Government may direct any person arrested under its arbitrary orders passed under the provisions of the second part of the Bill to be placed on his trial, not as a matter of course but at the option of the Executive, not before a Court of law but before a Commission of its own choice composed of judges inferior in rank to High Court Judges

without a jury and without any preliminary enquiry. Even the Criminal Law Amendment Act of 1908, Part I, which was repealed by the Indian Legislature in 1922, provided for a preliminary judicial enquiry before a Magistrate, though of a summary character and on commitment thereafter, trial by a special tribunal of three High Court Judges. The Act of 1908 was passed into law when there was a revolutionary movement of a serious character and revolutionary crimes were quite frequent. Now that a few stray and straggling revolutionaries are said to exist amongst a peaceful and law-abiding population of 47 millions and no attempt has been made by the Government to satisfy the public that such misguided persons cannot be adequately dealt with under the ordinary law, it is an outrage on the public opinion of Bengal and beyond, to propose a legislation which is more drastic in its provision than the Act of 1908 and even the disastrous Rowlatt Act which now stand repealed. The nature of the autocratic power with which the Government of Bengal seeks to arm itself under the proposed Bill, may be judged from the fact that it seeks to invest itself with arbitrary powers of arrest, detention and even putting persons into prison without any legal or judicial process and of their own free will and unfettered discretion. Since the Government is not bound to bring these persons to a trial even before a Commission, the powers of the Bengal Government are to be more drastic than even those of a general administering martial law which was defined by the Duke of Wellington as the will of the general and which by the common consensus of jurists is designated as no law at all.

The second part of the Bill is similarly a war measure and partakes of the characteristics of martial law. One has to search in vain through the pages of English history for any such powers which were never claimed even by the much maligned Stuarts during the darkest days of their rule that ended in rebellion and revolution. For analogy one would have to seek it in the history of France, Austria or Russia of the pre-revolution days or that of the Soviet rule of the present times. It is therefore with a sense of pain and humiliation that we have to review this piece of un-British legislation in

our columns. The main provision of Part II of the Bill is cl. 11, which provides that if the Government be of "opinion that there are reasonable grounds of believing" or in other words suspecting, that a person "has acted, is acting or about to act in contravention of the provisions" of the Arms Act or the Explosive Substances Act, or "has committed, is committing or about to commit" any of the scheduled offences or is suspected to be connected with any association whose objects are believed to include the commission of such offence or any person suspected to be about to interfere, by threat or violence, with the administration of justice, may not only be arrested by police or other Government officers mentioned in cl. 13, but his house searched without any warrant or legal process. Then without any trial or judicial enquiry, the Government may order (a) that he must notify his residence or change of residence to an officer named in the order; (b) report himself to the police in such manner and at such periods as directed, (c) conduct himself as directed in the order; or under (d) and (e) that he be interned or his liberty and freedom be otherwise restrained. Here we may mention that during the war when persons were interned in villages under the Defence of India Act, some internees, even when they fell ill, had to walk many miles in the early hours of morning to report themselves to the police station and walk back as in the case of default they might be visited with heavy sentences of imprisonment. Cl. 15 of the present Bill provides identical sanction for non-compliance of any of the orders of Government. These orders again are in the nature of martial law orders. May we ask, is it humane or even human to enact such a law, if it be law at all, in times of peace? But this is not all; the climax is reached when cl. 11, sub-cl. (f) provides that a person may be "committed to custody in jail" by an executive order.

Cl. 18 of the Bill contravenes a no less well-recognised principle of justice. It provides that the allegations against persons who have been deprived of their liberty by Government orders under any of the provisions of cl. 11 aforesaid shall be placed before two *kucha pucca* Sessions Judges, together with an answer, if any, to the allegations of the persons so punished with-

out trial, and these members of the subordinate judiciary whose prospects in the service largely depend upon the good graces of the Government are to advise the Government whether there is a "sufficient cause" for the Government order. The Bill, no doubt, uses the word "lawful" before "sufficient," but we have advisedly omitted it because to call upon any judicial officer to pronounce any opinion on "allegations," without offering him any opportunity to test them by any judicial procedure or to the accused to offer evidence or to be represented by counsel, is contrary to all civilized notions of law and justice. We presume that such must be the reasons of the Hon'ble Judges of the High Court of Calcutta for having declined to be consulted in such matters. Every self-respecting judicial officer would be thoroughly justified in declining to express any opinion on such materials. It is the duty of a Public Prosecutor to advise the Government whether there is any case against an accused person on the assumption that the allegations in the Government brief are true, but no fair Crown Counsel would vouch for the truth of the allegations until they are tested at a trial. Thus it will be seen that the proposed Bill offend against all the fundamental principles of law, justice, rights and liberties of the subjects and of civilized or constitutional Government. No legislature would ever think of investing the Executive of any country with such arbitrary and irresponsible powers in times of peace and we have no doubts in our mind that the non-official members of the Bengal Council will throw it out. We hope that the Government will accept its verdict and will not commit the blunder of passing it by certification against the unequivocal opposition of the people of the country. The only sensible course would be to put the arrested persons on their trial before the ordinary Courts of law under the ordinary procedure and law of the land and thus diagnose and effectively deal with the disease where it is proved to exist in our admittedly sound body politic.

Judgment of the Privy Council in the Sankaritola Post Office Murder Case.

We publish in this issue the judgment of the Lords of the Judicial Committee in the case of Barendra Kumar Ghosh generally known as the Sankaritola Post Office Murder

Case. It is an authoritative pronouncement on the interpretation of sec. 34 of the Indian Penal Code, which along with secs. 114 and 149 has always presented the knottiest problems to Courts of law.

The facts of the case must be fresh in the minds of the readers and are fully set out in the judgment. The charges preferred against the accused were murder under sec. 302, I. P. C. and voluntarily causing hurt under sec. 394, I. P. C., while jointly concerned in an attempted robbery. To the first charge he pleaded not guilty and to the second he pleaded guilty of robbery. The argument on behalf of the Appellant shortly put was that sec. 34 only applies to cases when several persons (acting in furtherance of a common intention) do some fatal act which one could do by himself. In other words in sec. 34 a criminal act in so far as murder is concerned means an act which takes life criminally within sec. 302 of the Indian Penal Code. It does not require much ingenuity to discover that if this were the correct view there would have been no necessity for a section like sec. 34 in the Code at all. As observed by their Lordships judicial opinion on the interpretation of sec. 34 for over sixty years has been uniform. The only notable instance in which a discordant note was struck was in the judgment of Stephen, J., in the case of *Emperor v. Nirmal Kanta Roy*, another case of murder in the streets of Calcutta which created great sensation at the time. In this case two men obviously acting in concert both fired at a policeman one hitting and killing him and the other failing to hit him at all, and the learned Judge directed the acquittal of the latter, who was charged under secs. 302/34, I. P. C., with murder. He held that applying sec. 34 to the case the criminal act was the killing of the policeman, that only one man killed him not both, that all the prisoner did was to try to kill him and in order to make the accused liable for murder under sec. 34 it would be necessary to say that an offence and an attempt to commit it are the same act. The learned Judge was fully aware that his decision was contrary to the view of the section generally taken, namely, when several persons unite with a common purpose to effect any criminal object all who assist in the accomplishment of that object are equally guilty though some may be at a distance from

the spot where the crime is being committed. The learned Judge defended his own view in a letter addressed to us and which we published at page 222 of the 18th Volume of this Journal. He was of opinion "that the old English law as to parties to the commission of an offence has proved too strong for the purifying effect of the Penal Code and that its complexity has proved so attractive to the most learned of our commentators and to our highest judicial officers that they have read a perfectly simple enactment in a highly artificial way in order to retain at least a flavour of it."

Stephen, J.'s view was followed in *Emperor v. Profulla Kumar Majumdar*, 21 C. W. N. 1016, but their Lordships on a consideration of the subject in all its bearing refused to accept it. They held that sec. 34 deals with the doing of separate acts, similar or diverse by several persons; if all are done in furtherance of a common intention each person is liable for the result of all.

In this elaborate judgment their Lordships also consider the scope of secs. 114 and 149, I. P. C. As to the former it is pointed out that "sec. 114 is a provision which is only brought into operation when the circumstances amounting to abetment of a particular crime have first been proved and then the presence of the accused at the commission of the crime is proved in addition." As to sec. 149 their Lordships observe that "it prohibits an assembly of five or more persons having a common object and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention for though their object is common the intention of the several members may differ and indeed may be similar only in respect that they are all unlawful while the element of participation in action which is the leading feature of sec. 34 is replaced in sec. 149 by membership of the assembly at the time of the committing of the offence."

RIGHT OF UNRECOGNISED TRANSFEREE OF NON-TRANSFERABLE OCCUPANCY HOLDING TO DEPOSIT AMOUNT OF RENT-DECREE UNDER SEC. 170 (3), BEN- GAL TENANCY ACT.

By RADHAROMON MOOKERJEE, VAKIL,
BERHAMPUR.

(Continued from p. xlv.)

Case of mortgagee of whole or part with or without possession.

A mortgage of the whole or part of a holding, with or without possession, is an "incumbrance" within the meaning of sec. 161, Bengal Tenancy Act, which is liable to be "annulled" by the auction-purchaser at a sale in execution of a rent decree. The mortgagee, therefore, has an interest in the holding which is voidable on the sale, and is entitled to make the deposit under sec. 170 (3), Bengal Tenancy Act. [See *Pareesh v. Nobo*, I. L. R. 29 Cal. 1 F. B.; s. c. 5 C. W. N. 821; *Pran v. Atul*, (1917) 22 C. W. N. 662]. Where a part of the holding is mortgaged, the landlord cannot seek for ejectment of the mortgagee, who is in possession. Even where the entire holding is mortgaged and the mortgagee is left in possession of the whole, and there are circumstances entitling the landlord to *khas* possession thereof, still until the mortgagee is ejected in due course of law, he holds a lien over the property, which is an incumbrance within the meaning of sec. 161 (a), Bengal Tenancy Act, liable to be avoided or "annulled" by the auction-purchaser at the rent-sale. The interest of the mortgagee in such a case cannot be said to be void or illegal, but is "voidable on the sale" within the meaning of sec. 170 (3), Bengal Tenancy Act. Hence, it has been held by the Patna High Court in *Azimut v. Tamzan*, 56 Ind. Cas. 490 (1919) that a usufructuary mortgagee of the holding has an incumbrance which is an "interest voidable on the sale," thereof entitling him to make the deposit under sec. 170 (3), Bengal Tenancy Act. It may here be pointed out that this view only follows as a corollary from the decision of the Special Bench of that Court already cited according to which the operation of that section is confined to incumbrances. According to the Calcutta High Court, as we have already stated, the protec-

tion afforded by it is not limited to incumbrances only.

Case of Radha v. Nitai; 38 C. L. J. 147 (1923) against previous authority.

It has, however, been held by Panton, J., of the Calcutta High Court in *Radha v. Nitai*, 38 C. L. J. 147 (1923) that a mortgagee is not entitled to make a deposit under the section. This view, as we have seen, cannot be supported, and goes against the decisions of the Calcutta and Patna High Courts to which we have just referred, but which unfortunately were not cited before his Lordship. That a mortgage is an incumbrance liable to be avoided by the auction-purchaser at the rent execution sale admits of no doubt. The plain wording of the section itself clearly shews that the interests which it intends to protect include incumbrances. And in this view both the High Courts agreed, the only difference between the two being that while the Calcutta High Court does not confine it to incumbrances only the Patna High Court does.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Nov. 13th, 1924.—The hearing of Canadian appeals has now commenced and only one Board is to hear Indian cases. At present this is constituted as follows:—

LORD SUMNER, SIR J. EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS.

Their Lordships are at present hearing arguments in an appeal from Allahabad, *Jag Prasad Rai v. Musammat Singari*. The main question in the case is whether the parties remained a united Hindu family or effected a re-union after an admitted separation.

The Appellant is represented by *Messrs. L. DeGruyther, K. C. and A Majid*.

The Respondent by *Messrs. A. M. Dunne, K. C. and B. Dubé*.

Nov. 13th.—Judgment was delivered by LORD DUNEDIN in *Saiyid Manzur Hasan v. Saiyid Md. Zaman* allowing the appeal from the High Court at Allahabad.

Owing to their Lordships' recent decision not to read in Court the reasons for their judgments, but only to give out the actual result of the appeal, it is not yet possible to

state the grounds on which the High Court's decision was reversed.

In *Ramdalim Singh v. Mt. Chandrama Kuer* mentioned in these notes last week, LORD DUNEDIN to-day delivered oral judgment dismissing the appeal. Their Lordships were of opinion that the adoption had been proved as also the authority to adopt. They were, however, of opinion that the evidence was scanty and conflicting and ordered that neither party should get costs.

Mr. Wallach applied for special leave to appeal in a criminal matter—*Gurmukh Singh v. King-Emperor*. Leave was refused.

In the Board Room before LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS, *Messrs. DeGruyther, K. C. and Wallach* presented a petition for special leave to appeal in *Wali Mahomed v. Mahomed Bakhsh*. Mr. DeGruyther, K. C. intimated that the petition required amendment as further grounds were to be added. The Board refused an adjournment and dismissed the application.

Nov. 13th and 14th.—The hearing was continued before the same Board of *Jag Prasad Rai v. Musammat Singari* where the question at issue is whether the parties remained a united Hindu family or effected a re-union after an admitted separation. Judgment was reserved.

Messrs. DeGruyther, K. C. and A Majid for the Appellant.

Messrs. Dunne, K. C. and Dubé for the Respondents.

Nov. 14th.—Mr. B. Dubé applied to the Board for leave to have an appeal to the Privy Council restored. The High Court of Patna had granted a certificate under sec. 110 of the Civil Procedure Code but the Appellant had failed to raise funds for the deposit required within time. The application was opposed by Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes. Leave was refused.

Mirza Fida Rasul v. Mirza Yakub Beg was an appeal from a decision of the Court of the Judicial Commissioner of Oudh. The validity of a *wakf* was called in question. One branch of the settlor's family had been ex-

cluded from participation in the *mutwalliship* and they alleged that the dedication had been engineered by undue influence exercised by other members.

Messrs. Dunne, K. C. and Dubé for the Appellants.

Messrs. DeGruyther, K. C. and Hyam for the Respondents.

Nov. 17th.—Judgment was delivered in *Ranodip Singh v. Parmeshwar Pershad* and *Fateh Singh v. Jagannath Bakhsh Singh* heard on October 27th last.

In each case the appeal was dismissed.

Nov. 17th.—The Board to-day was composed of the following members LORDS BUCKMASTER, DUNEDIN and SUMNER and they heard an appeal from Lahore on a question of land value, *Narsingh Das v. Secretary of State for India*. The sole point for determination is what is the market value in terms of sec. 23 of the Land Acquisition Act I of 1894 of the land belonging to the Appellant compulsorily acquired by the Punjab Government.

Messrs. DeGruyther, K. C. and A. Majid for the Appellant.

Messrs. Dunne, K. C. and Wallach for the Respondent were not called upon.

Nov. 18th.—The hearing was concluded in *Mirza Rasul Beg v. M. Yakub Beg*. The Respondents were not called upon and the judgment of the Board was delivered by LORD SUMNER at the conclusion of the Appellant's argument. The appeal was dismissed.

LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKIN'S commenced the hearing of *Dhanraj Joharmal v. Sonabai*, an appeal from the Central Provinces. The suit concerns the validity of the adoption of the Appellant. The Respondent claims to be entitled to properties at Khanapur in E. Berar if the adoption is invalid. A formal deed of adoption, was admittedly executed in May 1908 and the Respondent alleges that the adoption took place on that date. The adopted son was then an orphan and it is contended that he could not have been validly adopted. That view was taken by the Appellate Court which reversed the decision of the District Judge. The latter tribunal had held that the

Appellant had been given in adoption by his mother during her life-time and that it was merely confirmed by the deed of adoption in 1908. The Appellant is represented by *Messrs. DeGruyther, K. C. and S. Hyam*, the Respondent by *Messrs. Dunne, K. C. and B. Dubé*.

In dismissing the petition for special leave to appeal from a conviction and sentence of death in *Umra v. King-Emperor*, the Board define and apparently limit the application of *Dillet's* case (L. R. 12 A. C. 459) in regard to a review of criminal proceedings. In the present case *Sir George Lowndes, K. C.* in applying for special leave stated that the confession of a co-accused had been used in evidence against the applicant and contended that the improper admission of this evidence amounted to a grave injustice and a violation of the principles of natural justice within the meaning of *V. Pillai v. King-Emperor* (L. R. 40 I. A. 193 at p. 211).

In the course of his judgment LORD DUNEDIN says: " . . . Where the matter depends upon the particular view taken of sections of an Indian Act their Lordships could not say that to assert that upon those sections the Judges had come to a wrong conclusion is tantamount to saying that there has been substantial and grave injustice done. Even therefore if there had not been the expression of opinion " (by one of the High Court Judges) " that the other evidence was sufficient, their Lordships would not have held that the so-called miscarriage of justice in respect of a wrong interpretation of the sections . . . is such as to bring the case within the rules laid down in *In re Dillet* and insisted upon in subsequent cases."

In the judgment in *Manzur Hassan v. Md. Zaman* where there was a dispute between Sunni and Shia Mahomedans as to the right of religious processions to proceed along a certain highway in Aurangabad the Board have decided that such a right does exist and quote with approval the remarks of Turner, C. J. in *Parthasarathi Ayyangar v. C. Ayyangar* (I. L. R. 5 Mad. 309) and the decision in *Sudram Chetti v. The Queen* (I. L. R. 6 Mad. 263). With regard to the right to bring a civil suit for obstruction in holding a procession they were of opinion that the view of the Madras and Calcutta Courts was correct and that the view expressed in *Satkuvalad v.*

Ibrahim (I. L. R. 2 Bom. 457) that a suit only lay if the Plaintiff had suffered personal damage was incorrect.

Nov. 20th.—Judgment was delivered in *Palani Ammal v. M. Moniagar* (Madras). The appeal was dismissed.

In *Dhanraj Joharmal v. Sonabai*, the hearing was concluded and judgment reserved.

Nov. 20th and 21st.—The hearing was commenced of *Ahmed Khan Najoo Khan v. Ali Ibrahim Noor* before LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS. The appeal is from a decree of the Court of the Resident of Aden passed conformably to a decision of the High Court of Bombay under sec. 8 of the Aden Courts Act. The dispute relates to a trading partnership between the Plaintiff and Defendant under which the Plaintiff was to finance the Defendant who was to sell goods in Gaizan in the Hinterland. Later the partnership was determined and the Appellant claims an account of the money advanced. The Respondent contends that there has been an adjustment which, however, is challenged as being procured under duress.

Messrs. DeGruyther, K. C. and L. M. Parikh for the Appellant.

Mr. E. B. Raikes for the Respondent.

At the conclusion of the arguments the appeal was dismissed. Oral judgment being delivered by LORD SUMNER.

Nov. 21st.—*Graham v. Krishna Ch. Dey* (Bengal). Judgment was delivered in this appeal by LORD SUMNER. The appeal was allowed but without costs.

Ghatta Bhadrappa v. Kalagara Kankamma (Madras). Judgment was delivered by SIR JOHN EDGE. The appeal was allowed.

Kashigir v. Anand Bharti (Central Provinces). This appeal was dismissed for non-prosecution. The Respondent represented by *Mr. E. B. Raikes* was allowed his costs.

Nov. 21st, 24th, 26th and 27th.—The hearing was commenced of *Hashmat Ali v. Mt. Nasib-ul-nissa* (Punjab).

Messrs. Dunne, K. C. and Parikh for the Appellants.

Messrs. DeGruyther, K. C. and Wallach for the Respondents.

The question in issue relates to the succession to an estate, a special custom being alleged among the Sayads of Kharkanda.

Nov. 25th.—Judgment was delivered by LORD DUNEDIN in *Satya Niranjan Chakravarti v. Ram Lal*. The Appellants prayed that it might be declared that the Plaintiffs are entitled to and are in possession of the underground rights in the suit mouzahs.

The Respondents were *putnidars* under grants from the Appellants, and had been working minerals to the Appellants' knowledge for more than 12 years. The Board held that the suit was barred under Art. 144 of the Limitation Act, and also under Art. 120 as it was a suit for a declaration. They also held that on the construction of the grant a right to work the minerals had passed to the grantees, and dismissed the appeal.

Nov. 27th.—An appeal from Madras, *Arunachaliah v. L. Dreypur & Co.* was dismissed. The Respondent was represented by *Mr. Van Den Bergh*.

The Appellant was not represented.

G. D. M.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD AND B. B. GHOSE, JJ. S. A. No. 582 of 1923. SARAT KUMARI DEBI, Defendant-Appellant *v.* MECHER MOLLAH, Plaintiff-Respondent. The 5th August 1924.

Ex parte decree, suit to set aside, on the ground of fraud, if lies when the fraud alleged was the falsity of the claim and giving perjured evidence—Falsity of claim, found from consideration of evidence, if constitutes such fraud.

This was an appeal preferred on the 16th January 1923 against the decree of the Subordinate Judge, 4th Court of Zillah 24-Per-ganahs (Babu Nagendra Nath Ghose), dated

the 19th September 1922, affirming the decree of the Munsif, 2nd Court at Barasat (Babu Kopilesh Chandra Chatterjee), dated the 12th March 1921.

The Appellant had brought a suit against the Respondent, who appeared on several days of hearing, but ultimately an *ex parte* decree was passed against him. He then brought the present suit for setting aside the *ex parte* decree on the ground of fraud. On a consideration of the evidence in the present case both the lower Courts held that the claim of the Plaintiff in the previous suit was false to his knowledge and the decree was obtained by means of perjured evidence. On these findings both the lower Courts held that the decree was obtained by fraud and set it aside. Against that decision the present appeal was preferred.

Babu Harendra Nath Mukerjee for the Appellant contended.—In the previous suit the Defendant had ample opportunity to contest the suit. As there was no contrivance by which he was prevented by the Plaintiff of that suit from placing his case before the Court, there was no fraud practised on the Court. Assuming that the Plaintiff obtained the previous decree by means of false allegations or false evidence, that is no ground for setting aside the *ex parte* decree in question as fraudulent.

The leading judgment on the point is the judgment of Sir Comer Petheram in I. L. R. 21 Cal. 612. The cases which followed that judgment are:—14 C. W. N. 695; 16 C. W. N. 1002; I. L. R. 41 Cal. 990; 24 C. W. N. 133. The two cases which are against me are:—I. L. R. 38 Cal. 936 and 18 C. W. N. 447. The cases in I. L. R. 41 Cal. 990 and 24 C. W. N. 133 shew that the learned Judges who decided the case in I. L. R. 38 Cal. 936 have veered round to the old principle enunciated in the leading judgment of Sir Comer Petheram in I. L. R. 21 Cal. 612. In Madras the principle has been settled by a Full Bench Ruling reported in I. L. R. 41 Mad. 743. In Allahabad the cases reported in I. L. R. 37 All. 535 and I. L. R. 38 All. 7 support the principle. The English cases deal with foreign judgments. Foreign judgments stand on a different footing.

No one appeared for the Respondent.

• The Court passed the following judgment:—

In the suit out of which this appeal arises the Plaintiff sought to set aside an *ex parte* decree passed in a rent suit on the ground

that it had been secured by fraud. The suit was decreed and the decree was upheld by the lower Appellate Court on the finding that the landlord's claim in the suit was false and that the landlord got the *ex parte* decree in the said case fraudulently by adducing false and perjured evidence. It is contended on behalf of the Appellant before us, and we hold that it is a sound contention, that this suit was not maintainable and should have been dismissed. It was held by Sir Comer Petheram, Chief Justice, in *Mahomed Golab v. Mahomed Sukiman*, I. L. R. 21 Cal. 612, that a decree cannot be set aside merely on the ground that it has been secured by perjured evidence. That decision has been repeatedly followed and it is sufficient to cite the latest decision on this point where all the previous rulings have been considered. That case is *Jnanendra Nath Nata v. Hari Mandal*, 24 C. W. N. 133. There the principles on which a decree can be set aside have been set out, namely:—"That two propositions appear to be well-established. The first is that although it is not permitted to show that the Court was mistaken it may be shown that it was misled. The second is that the decree cannot be set aside merely on the ground that it has been procured by perjured evidence." The findings in the present case come to no more than that the decree was obtained by perjured evidence.

We therefore decree this appeal and set aside the judgments and decrees of the lower Courts and the suit will be dismissed.

The Appellant will get his costs in all Courts.

J. N. R. *Appeal decreed with costs.*

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Application in revision by witness for getting objectionable remarks expunged from record.

Has a witness in a criminal case, whose evidence has been stigmatised by the lower Court as false a right to move the High Court in revision to have the remarks of the lower Court expunged from the record? The question is an interesting and important one. Under sec. 439 of the Code of Criminal Procedure the High Court may in revision exercise any of the powers conferred on a Court of Appeal and under sec. 423, cl. (d) the Appellate Court may make any consequential or incidental order that may be just and proper. Sec. 423 of the Code read as a whole seems to indicate that such consequential or incidental order must be one affecting the parties to the proceeding. Even if the words of cl. (d) are interpreted to have a wider meaning the question arises at whose instance does the appeal lie? Under sec. 404 no appeal lies from any judgment or order of a Criminal Court except as provided for by the Code and under sec. 410 any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court and under sec. 411 any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees and under sec. 417 the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an Original or Appellate order of ac-

quittal passed by any Court other than a High Court. Thus it is abundantly clear that an appeal lies only at the instance of an accused who has been convicted or the Crown which prosecuted him unsuccessfully. Now so far as revision is concerned, who is competent to invoke the assistance of the High Court? The words of sec. 439 of the Code are very wide indeed. In the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge the High Court may in its discretion exercise all the powers of an Appellate Court. The words "which otherwise comes to its knowledge" indicate that the making of an application is not even a condition precedent to the exercise of the revisional powers of the Court.

For example the High Court may interfere in a case on reading a newspaper report thereof. Such an instance did happen in the Calcutta High Court several years ago when two railway employees were prosecuted before the Joint Magistrate of Ranaghat for having trespassed into a female compartment and attempted to take liberties with a female passenger. The accused were convicted by the Magistrate but wholly inadequate sentences were passed on them. Mr. Justice Chunder Madhab Ghosh and Mr. Justice Wilkinson who were presiding over the Criminal Bench at that time sent for the records of the case on their own initiative and enhanced the sentence from one month to eighteen months. The High Court has undoubtedly powers to interfere in revision in this manner but it must be for the purpose of making an order affecting one or other of the parties to the proceeding. The only difference then between an appeal and a revision

is that interference in appeal is limited to an appeal being presented to the Court whereas in the latter case the Court may exercise its jurisdiction notwithstanding that no application was made to it. But it does not follow from this that an application in revision lies at the instance of a witness or any one else.

It is ridiculous to suppose that the Legislature intended that of the witnesses examined in a case every one has a right to come up to the High Court and ask it to express an opinion as to the evidence given by him. Where a case is properly before the High Court then of course it can come to a conclusion totally different from that arrived at by the lower Court as to the veracity of a particular witness who may have given evidence either for the prosecution or for the defence. One can conceive of a case in which a Sessions Judge has gone out of his way to make aspersions against a person who is neither a party nor a witness; in such a case the person aggrieved may claim a right to move the High Court for the purpose of having the unjustifiable remarks removed from the record, be such interference in its revisional jurisdiction or in the exercise of its powers of general superintendence over all inferior Criminal Courts.

Perhaps such a case has never happened and equally rare is an application in revision by a witness who has been stigmatised by the lower Court as a perjurer. Such an instance did happen in *Amarnath v. The Crown*, 5 Lahore 476. The Petitioner was a Sub-Inspector of Police who in a certain case deposed before the Sessions Judge to having been present at a certain place at a certain time and heard some speeches that were made by some persons. The Sessions Judge being suspicious called for the diary of the witness which when produced showed clearly, as the Sessions Judge held, that the witness was at the particular time in question somewhere else. The Judge accordingly disbelieved the police officer holding that he had perjured himself and his testimony could not be relied on. The witness moved the High Court and Eforde, J., ordered the remarks to be expunged from the record. His Lordship says: "The learned Sessions Judge had no right whatsoever to put the *roznamcha*

referred to in his judgment upon the record of the proceedings; such a procedure on his part is not only highly irregular but is entirely illegal." The Sessions Judge should undoubtedly have drawn the attention of the witness to the discrepancy between the evidence given in Court and the diary and we quite agree with his Lordship that it is an elementary principle of justice that no person should be condemned without being given an opportunity of being heard in his own defence. What was actually done was to compare the entries in the diary with the evidence of the witness and discard the evidence as false. This was wholly improper for the entries in the diary could not be treated as evidence unless the attention of the witness was drawn to them. One welcomes such instances of interference by the High Court for the purpose of giving relief to persons who are injured in reputation by unjustifiable observations made in judgments but for the reasons stated above it is extremely doubtful whether an application in revision such as the one in the case in question does at all lie.

American Law regulating sale of theatre tickets.

Public interest in theatres seems to be unusually great in America. Approximately two million theatre tickets are sold each year by the speculators of New York City. The tickets are obtained under regular agreements with the managers, often weeks before the opening night of a performance. The control of the best seats through such agreements is so complete that patrons can obtain at the box office nothing closer than the fifteenth or sixteenth row. The general business law of New York prohibits any person from engaging in the business of reselling theatre tickets without a license from the comptroller and restricts the price of tickets to fifty cents in advance of the price printed on the face thereof. In *People v. Weller*, 143 N. E. 205 a notice of which appears in *Harvard Law Review*, the Defendant was convicted of reselling a ticket without a license. He appealed on the ground that the statute was unconstitutional but it was held that the regulation was valid. Says the learned commentator in the *Harvard Review*:—"The constitutional principles

governing the case are simple and familiar. If the business is clothed with a public interest the State acting under its police power may impose restrictions. The restrictions must be reasonable. . . . Is the theatre business so affected with a public interest that it is properly the subject of State regulation? The Greeks considered the support of the drama a public function. In England theatre licensing dates back to Henry VIII. And in the American States from the earliest times theatres have been subject to Government regulation. But the cases show that the theatre business cannot be pigeon-holed either as a public calling or as a so-called private business. For, on the one hand, the Courts are unanimous that in the absence of a statute, the theatre manager unlike the common carrier need not grant admission to the extent of his capacity to all properly presenting themselves. He may discriminate at his pleasure refusing admission to hostile critics, to those purchasing from street speculators or whom not. Yet on the other hand a statute abridging these powers of the manager does not deprive him of liberty or property without due process of law. It is manifest therefore that to a certain extent at least the theatre may enter the charmed circle of business clothed with a public interest. In Greater New York with its three hundred and fifty-six theatres, halls and stadiums, public interest in the theatre is unusually important. And under local conditions of recognised abuses in the control of admissions, the public concern justifying regulation would seem legitimately to extend to the intimately interwoven calling of ticket brokerage."

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Dec. 4th, 1924.—*Rikhi Ram v. Murray & Co. Ltd.* (Kumaon). Mr. W. Wallach applied for special leave to appeal in the above suit, to a Board composed of LORDS SUMNER, WRENBURY and CARSON. Leave was refused.

In *Begu v. King-Emperor* (Lahore), special leave to appeal to the Privy Council had been granted in July last.

Mr. Kenworthy Brown applied on behalf of the Respondent to expedite the hearing stating

that the record had arrived in October and no steps for prosecuting his appeal had been taken by the Appellant.

Mr. W. Wallach on behalf of the Appellant submitted that the application was unnecessary, as the Appellant was prosecuting his appeal with all diligence, and was well within the four months allowed him by the order.

The Board acceded to his contention and ordered the applicant to pay the costs of the application.

Dec. 4th.—*Hurnandrai Fulchand v. Pragdas Budhsen* (Bombay).

Mr. S. D. Porter applied for directions as to the interpretation of the Order in Council.

Messrs. Clauson, K. C. and E. B. Raikes opposed the application which was dismissed.

Dec. 5th.—Judgment was delivered in *Bainath Singh v. Vali Md. Hajet Abba* (Lower Burma). The appeal was allowed.

Dec. 11th.—The following judgments were delivered:—*Karimunnissa Khatun v. Md. Fazlul Karim* (Bengal), appeal dismissed; *Motilal Hirabai v. Bai Mani* (Bombay), appeal dismissed; *Narasingsh Das v. Secretary of State for India* (Lahore), appeal dismissed; *Maina Bibi v. Vakil Ahmad* (Allahabad), appeal dismissed; *Sm. Katyayani Debi v. Uday Kumar Das* (Bengal), appeal dismissed.

The practice of the Board now in delivering judgment is merely to state the decision arrived at. A printed proof of the judgment is later circulated to the counsel who were engaged and the proposed Order in Council is also sent for their perusal, and approval or criticism. In the circumstances the reasons for the Board's decision are not known until some time after the actual decision has been declared and have not in consequence been set out above.

Hanosa Ramosa v. Kalimchand (C. P.). Sir G. Lowndes and Mr. Parikh moved to be discharged from an undertaking given by them on an application for stay of execution heard by the Board on 31st July last.

The parties to the suit are the two sets of Jains Digambari and Sitambari and the dis-

pute relates to the image of Shri Anatariksha Parasnathji at Shirpur. The Sitambari sect hold that the idol should be covered or dressed; the Digambari hold otherwise. The Respondents had given an undertaking that no alteration should be made in the existing condition of the idol.

Messrs. DeGruyther, K. C. and E. B. Raikes represented the Appellants.

There was some discussion as to whether the idol was clothed or not at the time the undertaking was given.

The Board ordered that it should be restored to the condition in which it was on the 31st July.

In *Jacob v. Wills* (Bengal), Mr. E. B. Raikes, who had obtained special leave to appeal from the decree of the High Court in this breach of promise action, now applied for special leave to appeal *in formâ pauperis* or in the alternative to continue the appeal *in formâ pauperis*. LORD ATKINSON observed that it was the practice in the House of Lords not to grant leave to appeal *in formâ pauperis* unless their Lordships had reason to believe that the judgment of the Court appealed from was wrong.

Mr. Raikes then explained the facts of the case.

Mr. Hyam who opposed the application on behalf of the Defendant-Respondent contended that the applicant had not given a full and candid exposure of complete poverty.

Leave was granted to continue the appeal *in formâ pauperis*.

different schools of Mahomedan law in a nutshell. It is only authors who have a thorough mastery of the subject who can condense it so lucidly within such a small compass. In the present edition he has largely re-cast and re-arranged the work and rewritten important portions of it. He presents the leading general principles of succession, inheritance, marriage, gift, etc., in the form of propositions under each appropriate heading. Then the propositions are elucidated in the notes that follow, where variations and exceptions to the general rules are also noticed and references are given to the leading decisions in their connection. The Privy Council decisions which remove the conflicts amongst Indian decisions or are the last words on the subject are brought up-to-date. One can never cease to be a student and a lawyer whose notions of Mahomedan law have got rusty cannot do better than glance through this work at their leisure and we are sure they will be greatly benefited. The brevity of the work is to our mind its greatest recommendation. We have been at pains to find out any material omission and the only one that we have been able to discover is the absence of reference to Act No. XLII of 1923 which makes provision for the better management of *wakf* property and the keeping and publication of accounts in respect of such properties. But when it is remembered that the Local Government can grant exemptions regarding its provisions, this pious piece of legislation is, perhaps, of not much serious consequence. This work is undoubtedly the best first-aid one can get in acquiring a workable knowledge of a very difficult subject.

Review.

STUDENTS' HANDBOOK OF MAHOMEDAN LAW.
By the Rt. Hon'ble Ameer Ali, Syed, LL.D.,
D.L., Member of the Judicial Committee of
the Privy Council. Seventh Edition. Messrs.
Thacker, Spink & Co., Calcutta, 1925. Price
Rs. 4.

This little book which has for many years played the part of familiarising our law students and in fact all Indian lawyers with the fundamental principles of Mahomedan law, has undergone great improvement in the present edition. The whole work has been thoroughly systematised. We may say that the learned author presents the leading principles of the

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Bengal Criminal Law Amendment Bill, certification of.

His Excellency the Viceroy and Governor-General of India in his speech opening the 1925 session of the Indian Legislature at Delhi announced that His Excellency the Governor of Bengal has certified the Bengal Criminal Law Amendment Bill leave to introduce which was refused by the Bengal Legislative Council last month and Lord Reading accorded his full approval and support to it. Sec. 72E (1) provides that when such leave has been refused by the Legislative Council "the Governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject and thereupon the Bill shall, notwithstanding that the Council have not consented thereto, be deemed to have been passed and shall, on signature by the Governor, become an Act of the Local Legislature."

Cl. (2) of the section provides that on certification, "the Governor shall forthwith send an authentic copy thereof to the Governor-General, who shall reserve the Act for the signification of His Majesty's pleasure." Lord Reading announced that His Excellency proposes to adopt this course. There is a proviso to this clause that in case of emergency the Governor-General instead of reserving the Bill for Royal assent may give his assent and thereupon the Act comes into force at once subject to disallowance by His

Majesty in Council. As the Ordinance covering the same grounds as the Bill will remain in force for six months from its promulgation, it was not necessary to exercise the powers conferred by the proviso. Cl. (3) of the section provides that the certified Act which has been reserved for Royal assent "shall not be so presented, until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat." Thus the Royal assent cannot be given before the Parliament meets. On the certified Act receiving Royal assent, we expect, the Ordinance will be repealed and a Bill will be introduced in the Indian Legislature for making provision for appeal to the High Court where the Bengal Government chooses to prosecute any of the persons arrested. The Bengal Act did not make any provision in this behalf because the Government of India and the Indian Legislature are alone competent to legislate concerning the Calcutta High Court.

Appeal against an order releasing an accused on probation of good conduct.

Is "no sentence" a "sentence of less than a certain maximum" mentioned in a section? This is the question discussed in a recent case by Boyce, J., in the Allahabad High Court (46 All. 828). The question arose out of an application in revision against an order of the Sessions Judge rejecting an appeal against an order of a Magistrate made under sec. 562 of the Code of Criminal Procedure in a summary trial. Sec. 562 of the Code empowers a Court to release a first offender on probation of good conduct instead of sentencing him to punishment. Sec. 414 of the Code lays down that there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under sec. 260 passes a sentence of fine not exceeding two hundred rupees only. The precise question for consideration is whether sec. 414 bars an appeal from an order under sec. 562. Sec. 408 gives an appeal from the order of a Magistrate of

the first class to the Sessions Judge, sec. 414 bars the appeal in cases of summary convictions where the sentence passed is one of fine and the amount does not exceed two hundred rupees. When an order is made under sec. 562 the accused is no doubt convicted but in the discretion of the Court no sentence is passed on him and he is released on his entering into a bond to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour. Is this "no sentence," a sentence less than that of a fine of two hundred rupees.

We entirely agree with Boyce, J., in answering the question in the negative. The section says in what cases there shall be no appeal. It does not say in what cases there shall be an appeal. That is provided for in secs. 408 and 410, the former giving an appeal from the order of a Magistrate of the first class to the Sessions Judge and the latter, an appeal from the Sessions Judge to the High Court. Is there any inconsistency in the Legislature taking away a right of appeal where there is a definite sentence and yet allowing an appeal when no sentence is passed. The answer is not far to seek. It is quite conceivable, as observed by His Lordship, that many persons would regard an order of release under sec. 562 having to enter into a bond to keep the peace and to be of good behaviour for any period up to three years as something very much more serious than a substantive sentence of fine of perhaps ten rupees or even two hundred rupees.

Sec. 414 being then no bar to an appeal against an order under sec. 562 it follows that sec. 413 is also not. That section lays down that there shall be no appeal where a Court of Session passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees. The conclusion then is that an order under sec. 562 is always appealable. In this connection it is worth noticing that under the old Code, sec. 414 barred an appeal against a sentence of whipping only passed in a summary trial but by sec. 25 of the amending Act of 1923, sec. 414 has been so altered as to take

away sentences of whipping from the operation of the section.

Admissibility in evidence of peon's reports.

In a letter which appears in another column, Mr. Romes Chandra Bhattacharyya draws attention to the ruling of Neave, A. C. J., of the Oudh Judicial Commissioner's Court reported at 81 I. C. 533 as the last word on the controverted question as to the admissibility by themselves in evidence of process-server's reports. We do not see, however, that this decision advances matters beyond the point where they were left by the decisions reported at 13 A. L. J. 935 and 25 I. C. 529 to which the same correspondent referred in a letter which appeared at 28 C. W. N. clxxvii (187n). All of them hold that reports by Civil Court peons of delivery of possession are, without more, admissible as being public documents within sec. 74 of the Evidence Act. As pointed out, however, in our editorial note at p. clxvi (166n) of the same volume, to make a peon's report admissible by itself, it must not only be shown to be a public document, but further that it is the record of an act coming within the provisions of sec. 35 of the Evidence Act. None of the above cases deal with this latter aspect of the question, and the only case where the question is dealt with from the point of view of the applicability of sec. 35 is reported at 35 Mad. 670, to which our attention was drawn by Mr. Radharomon Mookerjee at p. clxxxvii (187n) of 28 C. W. Notes. But what is stated in that case on the point by Sundara Ayyar, J., is only an *obiter dictum* of one of the two Judges who constituted the Bench. It does not seem to us, in the circumstances, that our correspondent's expectation that the ruling in 81 I. C. 533 "will hush all opposition into silence," will be realised. Upon further consideration, in the light of the assistance we have been favoured with by our correspondents, we would still adhere to the view we expressed in our editorial note at p. clxvi (166n) of 28 Calcutta Weekly Notes upon certain suggestions made by Mr. Mahananda Chaudhuri and published at p. clxi (161n) of 28 Calcutta Weekly Notes.

HYPOTHECATION OF MOVEABLES.

In the early stages of the evolution of law, a security was looked upon only as a gage for the due discharge of his obligation by the

debtor. The creditor was not entitled to realise the debt out of the security pledged to him. If the creditor had taken a conditional transfer of the pledge, it was to be forfeited on the failure of the obligor to discharge his obligation. But subsequently this penal provision was removed and the creditor was given the right to detain the security till he was repaid the debt due to him.

In the form of security known as "pledge" the pledgee was given the possession of the security and he was entitled to keep the security in his possession till the redemption of the debt due to him. The pledgee was under a corresponding obligation to take a proper and reasonable care of the security. If the security was impaired for lack of prudent care the pledgor was entitled to damages. Hence "pledge" did not attain popularity among the Romans and was almost replaced by the Greek form of security known as "Hypotheca." In this there was neither a transfer of ownership nor a change of possession. The debtor simply agreed to hold the property as a security for the due performance of his obligation. The Roman agriculturists were enamoured of Hypotheca because it allowed them to raise a debt or enter into any contract which might give rise to pecuniary liability on the security of their farming-stock without parting with the possession of the same. Change of possession was the essence of the previous form of security and that operated very hard upon the farmers inasmuch as it brought about a complete suspension of their work. Initially, it was looked upon as a deferred pledge, more suited to contingent liabilities as in the case of arrears of rent due from a tenant, but in due course of time the hypothecatae was given the right to bring to sale the security in the event of the failure on the part of the debtor to discharge the debt.

Hypothecation of moveables is recognised by English Law and there are express provisions for this form of security in the English Bills of Sale Act.

The Hindu Law as well as the Mahomedan Law made no distinction between mortgages of land and pledges of moveables. In the Anglo-Indian Law of the present day there is no Act or statute dealing with the hypothecation of moveables. There is no provision either in the Transfer of Property Act or in the Indian Contract Act dealing with this sub-

ject. But it does not follow therefrom that such transactions are invalid or that British Courts have declined to recognise them. There are numerous cases in which mortgage of moveables has been upheld. The earliest case on the point is *In the matter of the claim of Dadie Bibee, Debnarain Bose v. A. S. Leisk* reported in Hydes Reports, Vol. 2, p. 267. On the peculiar facts of this case it was laid down therein by His Lordship Levinge, J., that to constitute a lien on any property there must be a clear agreement for the specific appropriation of the property, and further the property must be in the possession of the party who claims the lien. This case was by implication dissented from in the case of *Deans v. Richardson*, (1871) 3 N. W. P. H. C. R. p. 54. The points raised in this case were, firstly, whether a mortgage of moveables is valid? Secondly, whether the delivery of possession was a condition precedent to the validity of the mortgage? Their Lordships Turner and Turnbull, JJ., observe at p. 59: "Now, without going at length into the numerous English authorities cited by the learned Counsel in the course of their arguments, we may lay it down as the result of the latest rulings that by the common law of England where goods are mortgaged and left in the possession of the original owner the circumstance that they are so left is not to be held as a fraud *per se* rendering the mortgage liable to be defeated as between the mortgagee and third parties, such as *bond fide* purchasers or judgment creditors."

When recently the proposed Code of Contract Law was discussed in this country the provision which the Indian Law Commissioner proposed for the security of *bond fide* purchasers of chattels from persons in possession was not only denounced as at variance with the received practice of the Courts, but as undesirable in this country." To the same effect is the case of *Shyam Soonder v. Cheita and another*, (1871) 3 N. W. P. H. C. R. p. 71, wherein it has been laid down that a mortgage may be supported if proved to have been made *bond fide*, although the property mortgaged may have been left in the possession of the mortgagor and mortgages of chattels may be made by parole.

Now with reference to case-law, it is proposed to deal in this article with some of the incidents of this contract. Let us consider, firstly, whether a *bond fide* purchaser for

value of goods, subject to a lien, without notice, is bound by the lien?

In English Law it has been held that goods included in a bill of sale and left with the original owner can be purchased in the ordinary course of business by an innocent and honest purchaser: *National Mercantile Bank v. Hampson*, (1880) 5 Q. B. D. 177. The decision of this case turned on the fact that the holders of the bill of sale suffered the pledgor to hold himself out as having not only the possession of the goods but the property in them and therefore the pledgor in the ordinary course of business was entitled to sell the same to a person without notice that they did not belong to him. By leaving the property with the obligor, the obligee assists in the commission of fraud and therefore when there is a competition between the obligee and an innocent purchaser, equity inclines in favour of, and shields, the latter against the claim of the former. Again under sec. 108 of the Indian Contract Act, any person, who is, by the consent of the owner, in possession of any goods, may transfer the ownership of the goods of which he is so in possession. Much more then it would be reasonable to assume that the real owner can effectively transfer the property in the goods to an innocent purchaser which are only subject to an undisclosed hypothecation. In this connection it will be interesting to turn to the case of *Chidambara v. Muthaya*, I. L. R. 5 M. 330. In that case M pledged his ship to C as security for a bond debt of Rs. 1,500, repayable by two instalments. S seized the ship in French territory for a debt due by M and the French Court sold the ship. C made a claim on the proceeds of the sale in the hands of the Court. The Court held that "whether or not his lien was destroyed by the sale of the ship in French territory, C was not entitled to any of the proceeds of the sale either at the date of the sale or of his claim in the French Court." Their Lordships observe at p. 393: "Plaintiff had no right in the sale proceeds of the ship at the date of the sale or at the date of the claim made by him which Defendant resisted. Those proceeds in so far as they were more than available for Defendant's claim belong to Manjirasa. All that Plaintiff could claim of Manjirasa was payment at the due date which had not arrived. He could not say of anything belonging to Manjirasa save what had been pledged to

him, that he was entitled to it or had acquired any right to it." There are many other cases in support of the proposition that a *bond fide* purchaser for price without notice of the existence of the encumbrance acquires a good title.

Secondly, whether a suit to enforce the hypothecation of moveables is a suit of the nature of Small Causes?

If the hypothecatee sues for the possession of the moveables secured, the suit is of the nature of Small Causes, but a Small Cause Court cannot try a suit for the enforcement of the charge by the sale of the security. In the case of *Kalka Prasad v. Chandan Singh*, I. L. R. 10 A. p. 20, Chandan Singh executed a deed in lieu of Rs. 100 in favour of Muhammad Husain Khan on the 17th July 1885 and as collateral security hypothecated certain property described in the deed as "Khet-naishakar" (literally a field of sugar cane). The deed was duly registered. Subsequently on the 13th October 1885, the obligee of the bond, Muhammad Husain Khan, made an endorsement on the deed purporting to sell or assign the bond to Kalka Prasad, the Plaintiff-Appellant in the case. In the meantime Chandan Singh cut down the crops and sold the same to Mendu Khan and Imam Ali. The Plaintiff then brought the suit for the selling price of the sugar cane crop. Mr. Justice Mahmood, in repelling the contention that no second appeal lay on the ground that the suit was of the nature of Small Causes, relied upon the case of *Surajpal Singh v. Jainamgir*, I. L. R. 7 A. 855, and held that a suit which seeks to recover a sum of money by the enforcement of hypothecation of certain cattle by their attachment and sale was a suit not cognisable by the Small Cause Court and as such could be made the subject of second appeal. Sir Barnes Peacock has likewise held in the case of *Ram Gopal Shah v. Ram Gopal Shah and others*, 9 W. R. 136. At p. 136 the learned Judge observes: "It appears to us that this is not a suit to recover personal property or the value of personal property but that it is a suit to ascertain what is due to the Plaintiff on the mortgage deed and to have it declared that the Plaintiff has a lien on the buffaloes to that extent and to make the buffaloes available for realising the amount."

Thirdly, whether the rights of the hypothecatee are transferable?

The hypothecatee-rights are assignable and the transfer can be effected either by parole or by an endorsement on the back of the deed of hypothecation, if any. No registration is required. See *Kalka Prasad v. Chandan Singh*, I. L. R. 10 A. 20 at p. 22. Hypothecation of moveables can be created by parole or by an instrument registered or unregistered. No particular formalities are required for the creation of this form of security.

Fourthly, whether the lien of the hypothecatee attaches to the property substituted for the original security?

In the case of mortgage of immoveable property a mortgagee is entitled to a charge upon the property which, through no fault of the mortgagee, has taken the place of the property originally mortgaged. Further sec. 73 of the Transfer of Property Act enacts that a mortgagee has got a charge on the surplus of the proceeds of the sale of the mortgaged property for arrears of rent or revenue. By parity of reasoning, the hypothecatee-lien should also attach to the property replaced for the original security. But the mortgagee of moveables, in the absence of a contract to the contrary, is not entitled to proceed against the substituted property, as being subject of his charge.

It has been shown above that the hypothecatee can effectively sell the security to an innocent purchaser without notice of the lien. In that case the obligee cannot pursue his remedy against the security in the hands of the *bond fide* purchaser without notice. He can only look to the obligor for the recovery of his debt. In other words, the moment the security is sold to a purchaser without notice, the hypothecation vanishes and the relationship between the parties to the contract becomes that of debtor and creditor. Therefore if the hypothecator purchases some property with the sale proceeds, the hypothecatee cannot attach his charge to the substituted security. In the case of *Khandaswami Chetti v. Adimoola Chetti*, 47 M. L. J. 704, the owner of two bulls hypothecated them to another but he remained in possession of them. Subsequently he sold the bulls and with the sale proceeds purchased a pair of bulls some days after. When a creditor tried to attach these bulls the mortgagee claimed that his hypothecation right extended to the substituted bulls. His Lordship Justice

Devadoss held that the right of a hypothecatee of chattels does not attach itself to goods or chattels purchased with the sale proceeds of chattels or goods mortgaged unless there is a contract that he should have a right against the substituted articles. His Lordship has further distinguished between the rights of a mortgagee of immoveable property and those of a mortgagee of moveable property.

A. P. PANDEY, M.Sc., LL.B.,
Vakil, High Court,
Allahabad.

45, GEORGE TOWN, ALLAHABAD,
18th December 1924.

MEASUREMENT PAPERS PREPARED BY BUTWARA AMEENS, IF PUBLIC DOCUMENTS.

It is needless to describe the difficulties, delays and expenses that usually attend the collection of exact information about Butwara Ameens mostly working in the Mofussil. Whether they are dead or alive, their production in Court, if alive, particularly when their deposition is required long after the partition proceedings terminated, for the formal proof of the measurement papers of Butwara made by them, is by no means easy and even if they are produced in Court, they usually depose to facts stated in the records prepared by them, by refreshing their memory from these documents to be proved by them, having had no independent recollection about the same.

Though the matter is absolutely formal the process is laborious and expensive. Apparently Butwara Ameens fall within the definition of "Public Officer" as defined in sec. 2, sub-sec. (17), cls. (d), (g) and (h) of the Civil Procedure Code and sec. 21, clauses fourth and ninth of the Indian Penal Code and so the map, *chitta* or other measurement papers prepared by the Butwara Ameens as deputed by the Collector to make a partition necessarily fall within the definition of "public documents" as defined in sec. 74, sub-sec. (1), cl. (iii) of the Indian Evidence Act and as such are admissible in evidence under secs. 13 and 35 of the Evidence Act (*vide* also 2 Indian Case 367, 513).

It is submitted that the old decision in *Mohi Chowdhry v. Dhiro Misrani*, 6 C. L. R. 139, to the effect that these measurement papers are not public documents does not seem to be

good law. There is an authority to the following effect that *chittas* prepared for the purpose of distributing the public revenue on a partition of an estate is a public document and is evidence of the state of affairs then existing and admissible in evidence. (*Vide Nibendra Kishore v. Durga Charan*, 15 C. W. N. 515) and that a *butwara khasra* map brought into existence in pursuance of a partition effected under the Estates Partition Act of 1876 by a Collector is a document of title admissible in evidence under sec. 13 of the Evidence Act (*vide Ajodhya Prasad v. Kamal Narayan*, 38 I. C. 491).

Having regard to the rulings referred to above and the principles involved therein together with the definitions of "Public Officers" and public documents as aforesaid, the map, *chitta* and other measurement papers prepared by Butwara Amcens deputed by the Collector to make a partition should be declared as public documents and as such provable either by the production of the originals or the certified copies of them, to save the immense trouble and expense as narrated above.

UTPENDRA NARAYAN CHOUDHURY, B.L.

SYLHET.

CORRESPONDENCE.

PROCESS SERVER'S REPORT OF PUBLIC DOCUMENT.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

In continuation of my letter, dated 18th July 1924, published in 28 C. W. N., p. clxxxvii (187n), I have the honour to point out that my view that process server's report should go in evidence without formal proof finds also support in a recent case of *Bakshi v. Emperor*, 81 I. C. 533. In that case, it was contended by one of the parties that a certified copy of the process server's report relating to the delivery of possession is not admissible in evidence as it is not a public document. The learned Court, however, did not agree with this contention and held as follows:—

"Sec. 74 of the Indian Evidence Act includes in the definition of public documents 'documents forming the acts or record of the acts of official bodies and tribunals.' The delivery of possession in execution of a decree is undoubtedly an act of a tribunal, and a report made to the Court by an officer of the Court that its order has been carried out, which report is preserved as one of the Court records, is undoubtedly a public document. It has been proved by a certified copy as permitted by sec. 77 of the Evidence Act."

The arguments advanced by the said learned Court appear to be quite convincing and ought to hush all opposition into silence.

I shall feel obliged if you will kindly publish the above in your much esteemed journal.

I have the honour, etc.

ROMES CHANDRA BHATTACHARYYA.

*Pleader, Judge's Court,
Mymensingh.*

*Mymensingh,
The 15th January 1925.*

INTERPRETATION OF SEC. 18 OF THE CALCUTTA RENT ACT.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

Would you or any of your numerous readers kindly enlighten me as to the true interpretation of sec. 18 of the Calcutta Rent Act which has seemed to be very much perplexing to this your humble correspondent in view of the procedure followed by the President of the Tribunal?

Under Sec. 15 of the Calcutta Rent Act an application is to be made to the Rent Controller by the landlord or the tenant for standardisation of rent of any premises leased or rented by such landlord or tenant. After the application is made the Controller registers it as a case, issues notice to the Opposite Party under cl (4) of the section calling for a written statement and then fixes a day for hearing. Under sec. 17, cl (2) of the Act the Controller is to follow the provisions of the Code of Civil Procedure, so far as may be, in the matter of summoning witnesses and production of documents. The final order is passed under sec. 15, Cl. (1) of the Act and the Controller grants a certificate certifying the standard rent of the premises. This final order may be passed *ex parte* or after contest. It does not appear that the Act has made any difference so far as the nature of the order is concerned. In any case, if any party questions the order of the Controller, sec. 18 of the Act says that he may within a certain date apply to the President of the Tribunal for revision of such order. The certified copy of the Rent Controller's order is to be filed along with this application for revision. Sec. 24 of the Act says that in revising the decision of the Controller, the President shall follow, as nearly as may be, the provisions of the Civil Procedure Code for the regular trial of suits. Now how is this petition for revision under sec. 18 to be made? Does the law prescribe a special form for the petition or would a simple application to the President stating that the Petitioner questions the validity of the order of the Controller and prays for its revision serve the purposes of the section? If there is already an application under sec. 15 to the Rent Controller and if there is already a written statement in the original record, is it necessary under sec. 18 that there would be a new application with all the details of the case of the person aggrieved by the order of the Controller and that there should be a new written statement on the same lines and that the position of the parties as Plaintiff and Defendant before the Controller

may be, quite possibly, reversed under the circumstances before the Tribunal? Is there any provision for it in the Rent Act? Does not this procedure altogether start a new case before the Tribunal? Where is the guarantee that the new application and the new written statement will be exactly on the same lines with the previous ones that have been already in the record? If it is at all intended that these pleadings would be exactly identical with those that were filed before the Controller, then where is the necessity for new pleadings before the Tribunal? If it is intended that these pleadings might be other than (which is quite possible) what are already in the record then how is it pertinent to say that by an order under sec. 18 of the Act the Controller's decision is revised? If the Controller had to decide upon one set of pleadings and if the President decides entirely upon a new set, how can any reasonable man say that the one order revises the other? It is to be expected that upon a new set of pleadings, the decision must be new in most cases but is that a revision of the Controller's order? Unless at least the pleadings are identical before the inferior and the superior Court one cannot possibly say that the higher Court revises the order of the lower. Besides where is the law which provides that parties are entitled to put forward new pleadings before the Tribunal under sec. 18 of the Act? If the pleadings before the Tribunal are all new, the evidence to be adduced would necessarily be new on new points raised in the new pleadings. If this is so and if the decision of the President proceeds upon these new pleadings and the new evidence to be adduced, where is the necessity then of a certified copy of the order by the Controller to be filed and what is the meaning of the time-limit as it is provided for in sec. 18? If the proceeding before the President is completely new, then why is this link with the old proceeding before the Controller? How can the order of the President passed on the basis of these new materials be said to revise the order of the Controller? Rankin, J., says in the case reported in 49 Cal. p. 931 at p. 937 that this right of revision (under sec. 18) seems to be only a right to have a retrial of the case before a higher Court and that the existence of this right puts the Controller in the position of a Court subordinated to the Tribunal. Now what does a retrial mean? Does it mean the trial of a new case with new pleadings and new evidence on new points raised or the fresh trial of an old case? If it means the latter (as it cannot, by any stretch of reasoning, mean the former), which is the old case referred to? Necessarily it is the case before the Rent Controller and the opinion of Rankin, J., seems to be that this case is to be retried. If it is so then how is it that new pleadings are insisted upon in the Tribunal without which the finding is that the President has got nothing to adjudicate upon and the simple application for revision of the order of the Controller falls to the ground? If the proceeding before the Tribunal is admitted to be a continua-

tion of the proceeding before the Rent Controller, how can new pleadings be called for before the Tribunal? Does the Act anywhere provide by implication or otherwise, that the provisions of the Civil Procedure Code may be overridden? Does the Code of Civil Procedure provide for an alteration of one's pleadings without the permission of the Court? Does it provide that you can make a new case even with the permission of the Court? If not, how is all this allowed in the Tribunal? Is there no sanctity in the general provisions of the law of procedure before the Tribunal and where is the law that provides that there must be two plaints and two written statements in the same case?

Yours faithfully,

HEMNATH BHATTACHARYA,
Vakil.

Review.

THE INDIAN STAMP ACT (II OF 1899). By M. N. Basu, M.A., B.L. *Eastern Law House, College Sqr., North, Calcutta, 1925. Price Rs. 6.*

Mr. Basu has followed up his successful commentary on the Court Fees Act with this sister compilation on the Stamp Act. As in the case of the Court Fees Act, the various provincial amendments of the Stamp Act have made the work of preparing an All-India commentary on the stamp law a more complicated business than it used to be when there was one Stamp Act for the whole of British India. But these provincial amendments deal with the amount of stamps and have left the principles of the parent enactment as interpreted in judicial decisions untouched. Much the greater part of the book is thus taken up in annotating the sections and articles of the principal Act. The case-law has been brought up-to-date and the commentaries arranged with excellent judgment under suitable headings. This is followed by reprints of the various provincial amending Acts and of the texts *in extenso* of the repealed Acts of 1869 and 1879, and material portions of still earlier enactments, reference to these being constantly needed in practice in dealing with old documents. The notification reducing and remitting fees, Rules framed under sec. 75 and the Sale of Stamp Rules made by the provincial Governments and a concise subject index go to complete a most useful hand-book for ready reference and help on all questions of stamp law that may arise in Courts of law and outside. The get-up of the book is commendable and the price, in relation to value, moderate.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before GREAVES AND MUKERJI, JJ. S. A. No. 1589 of 1922. NALINI KANTA MUKERJEE and anr., Appellants v. HARI NIKARI and anr., Respondents. The 6th January 1925.

Suit to set aside ex parte fraudulent decree—Proceeding under Or. IX, r. 13, C. P. C., if operates as res judicata on the point of service of summons.

In 1916 the Appellants had instituted a suit against the Respondents on a hand-note and obtained an *ex parte* decree. The Respondents had unsuccessfully applied under Or. IX, r. 13, C. P. Code, to set aside the *ex parte* decree, contending that summonses had been suppressed, and finally instituted the present suit in 1920 to set aside the *ex parte* decree on the grounds that the claim was a false one and the decree was obtained by perjured evidence and that summonses had been suppressed. The Munsif dismissed the suit, but the lower Appellate Court decreed the suit on the grounds, *firstly*, that the present Plaintiff knew nothing about the *ex parte* case, and *secondly*, that the claim was fraudulent as the *hathchitta* upon which the original suit was based was made out in the absence of the alleged executants and was an untrue document. Hence the present appeal:

Held—That so far as the second ground of the decision was concerned, the balance of authority was that it was not open to raise pleas of this nature, if the suit had been decreed after contest, or if the suit had been decreed *ex parte* and it was established that summonses were served on the Defendants. As to the first ground, the decision under Or. IX, r. 13 did not in the circumstances of the present case operate as *res judicata* in the present case, and as there was a finding of the lower Appellate Court that summonses were never served on the present Respondents, the lower Appellate Court was right in setting aside the *ex parte* decree. L. R. 29 I. A. 99. *relied on*.

Babu Abinash Chandra Ghosh for the Appellants.

Babu Nirode Bandhu Roy for the Respondents.

J. N. R. Appeal dismissed.

(CIVIL REVISIONAL JURISDICTION.) Before SUHRAWARDY AND CUMING, JJ. CIVIL REV. NO. 1206 OF 1924. MOHENDRA NATH GHOSE and others, Defendants-Petitioners v. KALI DAS and others, Plaintiffs and some Defendants, Opposite Party. The 8th December 1924.

Civil Procedure Code (Act V of 1908), Or. 33, r. 3—Suit in formâ pauperis—Leave for—Pleader authorised to file applications, if an "authorised agent" under the rule.

The Opposite Parties Nos. 1 and 2 in this rule applied to the Court of the Additional Subordinate Judge, Howrah, for leave to sue *in formâ pauperis* under Or. 33, r. 3 of the Civil Procedure Code. The petition for leave on behalf of the Opposite Party No. 2, Giri Bala Dasi, a *pardanashin* lady who was then in Burma, was presented on her behalf by her pleader. The learned Subordinate Judge found that the pleader who presented the application on behalf of Giri Bala was her "authorised agent" within the meaning of Or. 33, r. 3 of the Code and granted her permission to sue *in formâ pauperis* as prayed for.

Held—That the finding of the Court below, that the pleader who presented the application on behalf of Giri Bala was her authorised agent, being one of fact could not be interfered with in revision. *Kishori Mohan v. Gourmoni*, 15 W. R. 198.

The *rakalatnama* empowered the pleader to file all applications. The rule requires presentation by "an authorised agent" and not by "duly authorised agent."

Messrs. N. N. Sen Gupta and Khitish Chandra Chackrabarty and Arun Kumar Sarkar for the Petitioners.

Messrs. Brojo Lal Chackrabarty and Rupendra Kumar Mitter for the Opposite Parties Nos. 1 and 2.

Babu Hari Das Chatterjee for the Opposite Party No. 3.

H. D. C. Rule discharged with costs.

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The Indian Seasons and Festivals.

Our contemporary of the *Englishman* recently remarked that the Indian seasons recognise no spring. But this is not so. In India the year is divided into six seasons. The *Saraswati pooja* which is just over marks the advent of the Indian spring. At the *Saraswati pooja* Indian ladies and children wear clothes of the *basanti* (light yellow) colour, which is the tint of the falling leaves and the new leaves that shoot out in the spring. *Saraswati* is the goddess of culture—literature, art and music. The worship of the Muse is thus identified with the spring in this country as it is all over the civilized world, both ancient and modern. Though *Saraswati pooja* marks the wane of winter and the advent of the spring, the months of *Falgun* and *Choitra* (middle of February to middle of April) are properly speaking the spring season. Although *Saraswati pooja* is pre-eminently a festival of the cultured classes, the principal spring festival of the masses is the *dole jatra* which is called the *Fagua* in up-country, named after the month of *Falgun* (March) which is the carnival month both in India and Europe. The *Basanti pooja*, at which the Divine Mother, the *Sakti* or the Supreme Power in Nature from which everything springs into life is worshipped, is held in the spring. The last day of the spring which closes the Bengali year, is a *gala* day of the workmen and is celebrated by the *Charak pooja* which is symbolic of the annual cycle. Then follows the summer (*Grishma*) commencing from the 1st of *Bysak*, the Bengali New Year day, and extending to the end of *Joista* (middle of June). The monsoon is expected to break usually about this time and so *Asar* and *Sraban* (middle of June to middle of August) comprise *Barsa* or the rainy season.

The principal festival of the rainy season is the *Katha jatra* (the car festival) which is believed to be of Budhistic origin.

After the middle of August the dark clouds disperse, the sky assumes a deep azure hue and white fleecy clouds float and fleet about all over the firmament, marking the advent of Indian autumn, which extends to the middle of October. The autumn is observed as the long vacation in Bengal as it is in England. The Indian autumn is called the *Sarat* and is welcomed at the end of the rainy season, when the heavy rains cease and floods begin to subside. Towards its close, on the light side of moon, when the moonlight is brighter than it is in any other part of the year, the *Durga pooja* is celebrated with as much joy and merriment as the Christmas in the European countries. The *Bhadra* and *Aswin* (middle of August to middle of October) are the autumn months or *Sarat*. After the *Sarat* (autumn) comes the *Hemanta* or the dewy season when there is more copious precipitation of dew than in any other part of the year. These are the months of *Kartik* and *Agrahayan* (middle of October to middle of December). The *Devali* or *Deepabali* (feast of light) and the *Kali pooja* are celebrated in the dark night of the new moon. The crops mature during this season of the dewy nights and sunny days. Its closes with harvesting and the advent of winter. The winter (*Seet*) months are *Pous* and *Magh* (middle of December to middle of February). Now the Christmas and the New Year are regarded all over India as much a festive season as in the Christian countries. But Bengal has also its own winter festivities of which the chief are the *Nabanna*, when the feast of new rice crop is celebrated and also the *Pous Sankranti*, the last day of the month of *Pous* (about the middle of January) when people take their holy bath in the Ganges and cakes are cooked in every home with new rice, fresh brown date-sugar and milk.

'A comparative study of the festive occasions of both in the East and the West would show that man is a nature worshipper all over the world.

The curing section of the Code of Criminal Procedure.

What is precisely the object of sec. 537 of the Code of Criminal Procedure? *

The section begins by saying "subject to the provisions hereinbefore contained," no finding sentence or order shall be reversed on account of certain defects mentioned in the section, in other words, the only defects that can be condoned under the section are those which are mentioned in the section and those only. It is not a general "curing" section governing all the provisions regarding procedure but in certain specified cases it can be invoked to cure certain defects on the ground that no prejudice has been caused or in the words of the section no failure of justice has been occasioned. Law reports abound with rulings on the interpretation of sec. 537 some of which are very misleading and have a mischievous effect on the administration of justice.

A case comes before the High Court and a certain defect of procedure is discovered and made a ground on behalf of the accused for the proceedings being quashed. The only judgment that the Court can properly give in these circumstances, if it takes a view adverse to the accused, is that so far as the particular case is concerned no failure of justice has been occasioned by the defect of procedure and the Court is not prepared to alter the finding sentence or order in that case, the defect complained of being one of those mentioned in the section. Instead of this we often find the Court laying down that the defect in question disclosed in the case before it is an irregularity which does not vitiate the trial. To make a sweeping observation like that is to say that a defect of a particular nature is really no defect at all. What is the effect of such a judicial pronouncement? The inferior Courts will naturally take the law to be that contained in sec. 537 coupled with its authoritative interpretation by the highest Court and continue to commit the error. It is idle to expect that in the face of such a ruling the subordinate Courts will be cautious not to commit an irregularity which the highest Court holds to

be a harmless irregularity, in other words, no irregularity at all, or to go a step further, something wrongly called an irregularity but really a legalised procedure.

It is incumbent on the High Courts to be very careful not to say anything in their judgments which may instead of checking an evil already existing leave open the door for the commission of fresh illegalities in future. It is a matter of regret that some of the decisions do not fulfil these conditions. If a judgment conforms to the cardinal rules regulating judgments of Courts, these shortcomings can easily be avoided. A judgment should contain the points for determination and the decision thereon. When it is pleaded that a certain deviation from the established procedure comes within the scope of sec. 537 the points for determination are—(a) Is it one of the defects mentioned in the section? (b) Has it in the circumstances of the particular case occasioned a failure of justice? The decision of the Court must be either (a) it is or it is not an irregularity contemplated by the section and (b) it has or it has not in the circumstances of the particular case occasioned a failure of justice. There is no scope for a sweeping general observation as to some departure from the regular procedure being an irregularity or not generally for all cases.

It is much to be regretted that this is very often overlooked. On a strict interpretation of sec. 537 one decision under the section cannot serve as a precedent for any future decision. That the legislature was alive to the caution and care with which the section is to be invoked and to the necessity of curtailing the scope of its application will appear from the fact that by the amending Act of 1923, cl. (b) of sec. 537 has been repealed so that want of, or irregularity in, any sanction required by sec. 195 or any irregularity in proceedings taken under sec. 476 is no longer a curable defect. The intention of the legislature as to the proper scope of the section has also been made clear by sec. 148 of the amending Act, 1923, whereby the illustration to the section which was to the effect that when a Magistrate being required by law to sign a document signs it by initials only it is purely an irregularity which does not affect the validity of the proceeding, has been taken out.

SUITS TO SET ASIDE DECREES ON THE GROUND OF FRAUD.

BY DWIJENDRA NATH PAL.

The challenge of decrees of Court on the ground of fraud is an interesting phase of litigation which seems to have been showing signs of development in recent years. It is, no doubt, a great pity that the machinery for administration of justice would afford opportunities for its wilful misuse by a dishonest litigant. But it can hardly be helped; for even the sagest legislator cannot ensure a system absolutely incapable of abuse.

The jurisdiction of Courts to vacate prior decrees procured by fraud is a necessary incident of their power of doing justice which is the very reason for their existence. A right of action in reversal of a decree for fraud has been recognised from the earliest times and illustrated by a long line of precedents. The object of such an action is to have an injustice remedied by exposing the fraud by which the course of the law was misdirected. Acts of Court are supposed to be right and just and the conscience of the Judge is never supposed to go wrong. It is a well-known rule that no suit can be maintained to set aside a prior judgment on the ground that the Court was wrong in appreciating the evidence or in judging the case; that is a matter for appeal or revision only. It can, however, be always shown that the Judge was misled unawares by the fraud of a litigant. "A judgment," as Chief Justice Jenkins observed in *Nanda Kumar v. Ram Jivan* (18 C. W. N. at p. 688) quoting the dictum of an eminent Judge, "like all other acts of the highest judicial authority, is impeachable from without; although it is not permitted to show that the Courts were mistaken, it may be shown that they were misled." Fraud is abhorrent to the judicial conscience and the slightest taint of it in judicial proceedings will not be tolerated by Courts.

But although fraud avoids acts of the highest judicial authority, any and every act of fraud or dishonesty would not justify the reversal of a decree. The solemnity which attaches to a decree of Court renders it absolutely necessary to make out a positive, tangible act of dishonesty leading to a miscarriage of justice, before it can be called in question. A decree may be passed *ex parte*, on contest or by consent, and in every case it is liable to be impeached on the ground of fraud, though *ex parte* decrees naturally present the greater

field for such litigation. One who seeks to impeach, by a suit, a decree on the ground of fraud, takes on himself a heavy burden of proof. It is not enough for him to show merely a fraudulent or malicious intention on the part of his adversary or connect him with conduct fraught with probable mischief or injury; it must be clearly shown that he was guilty of a wilful suppression of truth or suggestion of falsehood, but for which the decree would not have been passed. "The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining the decree by that contrivance." (*Nanda Kumar v. Ram Jivan*, 18 C. W. N. at p. 688).

A fraudulent decree thus implies (i) a false claim, (ii) a contrivance to keep the Court in ignorance of the truth and (iii) a decree induced by that contrivance to the prejudice of a party. All these three conditions must co-exist before a decree can be impeached for fraud.

(i) A false claim.—The essence of fraud is concealment of truth and the primary ground for setting aside a decree as fraudulent is the falsity of the claim decreed. The means by which the decree is obtained would be immaterial, unless the claim itself is shown to be untrue.

(To be continued.)

SCOPE OF SEC. 182 OF THE BENGAL TENANCY ACT.

BY ASHUTOSH GONGOPADHYA, M.A., B.L.

A very important and vexed question of law very frequently arises in Mofussil Courts regarding the scope and meaning of sec. 182 of the Bengal Tenancy Act.

Apparently the section has been specially enacted to regulate the incidents of the homestead of a *raiyyat*. The necessity for such a special provision arises in view of the fact that, but for such a provision, the incidents of a homestead tenancy, being *prima facie* a non-agricultural lease, would be governed by contract. The case-law on the subject of Bastoo lands, before the passing of the Act, was uncertain and apparently contradictory. This section is intended to make it clear. No doubt the Bengal Tenancy Act is confined to the amendment of the law regarding agricultural tenancies, and it attracts

the incidents of the homestead tenancies within its scope only where the holding of such land is in some sense ancillary to an agricultural tenancy, *e.g.*, where a *raiyyot* has built a house in a village with a view to living near his agricultural holding. Thus it is apparent that the scope of the present Act regarding homesteads is very limited.

Sec. 182 runs thus:—

"When a *raiyyot* holds his homestead otherwise than as a part of his holding as a *raiyyot*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and subject to local custom or usage, by the provisions of this Act applicable to land held by a *raiyyot*."

It follows then, that the section will not apply to tenants of homesteads who are not *raiyyots*. The incidents of such homestead tenancies will be regulated by contract and by case-law. Nor apparently does this section apply to "tenure-holders" whose rights and obligations are regulated by Chap. III of this Act and the case-law relating to tenures. The section does not of course apply to land which is leased not for purposes of cultivation, nor for purposes ancillary thereto, but for establishing a coal depot, since such a lease does not come within the purview of the Act. And lastly, this section does not apply when a *raiyyot* holds his homestead as a part of his holding as a *raiyyot*, *i.e.*, when the homestead of the *raiyyot* is but a part of his other arable lands which he holds in *raiyyoty* tenancy. In such a case the whole tenancy is governed by the Bengal Tenancy Act, not on account of sec. 182 which does not apply, but the tenancy being by itself an agricultural one under the general provisions of the Act as applicable to *raiyyots*.

The section applies to the homesteads of the *raiyyot* only when the homestead is held "otherwise than as a part of his holding as a *raiyyot*."

The right interpretation of the section depends upon the meaning of the words "otherwise than as a part of his holding as a *raiyyot*." When does the *raiyyot* hold his homestead "otherwise than as a part of his holding as a *raiyyot*?"

Let us take the simplest case. A is a *raiyyot* with respect to certain agricultural lands in the village. A takes a lease of another land for homestead purposes and builds his house on it. A's homestead lease does not include

any agricultural land. This is a case, where A, the *raiyyot*, holds his homestead apart from his *raiyyoti* holding, or to use the language of the section, "otherwise than as a part of his holding as a *raiyyot*." Therefore the section will apply here, or in other words, the incidents of the homestead lease, though *primâ facie* a non-agricultural lease, will be governed, subject to local custom or usage, by the provisions of the Bengal Tenancy Act as applicable to *raiyyots*. The result of the use of the words "provisions applicable to land held by a *raiyyot*" is very far-reaching. Thus in the above example if A, the *raiyyot*, happens also to be a settled *raiyyot* of the village, all the incidents of the tenancy of a settled *raiyyot* will accrue to his tenancy of the homestead in spite of all contracts to the contrary. Though A might acquire by his lease only a temporary interest in the homestead, he would acquire occupancy right in the homestead by the conjoint operation of sec. 182 and sec. 21 of the Bengal Tenancy Act. Similarly if A is a non-occupancy *raiyyot* with respect to his *raiyyoty* holding he will acquire a similar interest in the homestead also.

The above is the simplest case, and there is practically no difference of opinion in judicial decisions on this point. It may be noted here that there is an *obiter dictum* in 9 C. W. N. 141 to the effect that "the Bengal Tenancy Act has no application to homestead lands, whether situated in towns or outside towns." But with all respect to their Lordships it is submitted that such a proposition is quite untenable on the face of sec. 182, and as a matter of fact that decision seems to have been arrived at without considering the provisions of the section. The mistake in the above *obiter* is so apparent that the case, so far as the said *obiter* is concerned, has not been followed in any of the subsequent cases.

Difficulty arises in cases where the homestead of the *raiyyot* does not by itself form a separate tenancy, but it is only a part of a tenancy in which there are other agricultural lands. Diversity of opinion amongst Mofussil Judges on this very important and frequently arising question is notorious, and the difficulty is all the more seriously felt as there is not a single ruling exactly in point to help the Mofussil Courts.

(To be continued.)

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Remedy for corruption at elections.

The only effective means of checking corruption at election is to make the franchise so wide that it would be impossible for any one to corrupt his constituency. This result has to a great extent been achieved in England by the introduction of universal suffrage. Formerly election petitions were very common in England and the legal profession used to reap a rich harvest after every Parliamentary election. But the last election in England is marked by the practical disappearance of such petitions. The following note in the columns of our contemporary of the *Law Times* in this connection would be found interesting :—

A very marked feature of the last election is the disappearance of the invariable accompaniment of general elections in days gone by—the cloud of election petitions based on charges of corrupt and illegal practices. Sir Edward Clarke records that, on the defeat, at Cardiff in 1874, of the late Lord Halsbury by nine votes, he congratulated the future Lord Chancellor when he met him in London. “Now,” said I, “you will make a lot of money in election petitions and then they will find you a safe seat and give you office.” Again, in the general election of 1880, when Sir Edward Clarke himself was defeated at Southwark, he records: “Retainers in election petitions came pouring in. Stockport, Gravesend, Cheltenham, Wallingford, Macclesfield, Salisbury, Hereford, Plymouth, Colchester, Evesham, Canterbury, and Sandwich fell to my share.” The extension of the franchise has rendered the corrupt practices which prevailed in days gone by virtually things of the past. It may be said, the more extended the franchise the less is the danger of corrupt practices. This fact is admitted, albeit unconsciously, by an episode in our Parliamentary history. In 1872 the disfranchisement of revenue officers was proposed by the Ministry of Lord Rockingham, who said that seventy elections chiefly depended on the votes of those officers. The measure was carried by large majorities through both Houses. “Had there been,” writes Sir Erskine May, “a franchise so extensive as to leave the general body

of the electors free to vote without being overborne by the servants of the Crown it would have been difficult to justify the policy of disfranchisement.” He adds in a footnote: “This principle has since been recognised by the Legislature, and in 1868 the repeal of this qualification accompanied the extended franchises of that time (31 & 32 Vict., c. 79).” The extended franchise of 1918 has given a death-blow to corrupt practices, which cannot operate with success except in cases in which the electorate is comparatively small.

In India both for the provincial and the central legislature, the number of seats are so limited, the constituencies so large and wide in area, the polling stations at such distances from the residence of the voters, transports and communications are so undeveloped, that those who can afford to pay for the conveyance of voters score an immense advantage over those who cannot. The payment of travelling expenses, no doubt, amounts to corrupt practice. But this is more honoured in the breach than in its observance. People who possess and obtain loans of motor cars pull an immense advantage over those who cannot. Elections are becoming so very expensive in India that under the present constitution only people with a long purse or those who are backed by a caucus who can command large funds have only chances of success. Election expenses should therefore be limited here by legislation as in England. A country's legislature ought to be a place for the best brains and not merely of men of means or members of some clique or coterie who can command funds. Universal suffrage is therefore the only remedy for such abuses.

Immunity of witness from arrest when returning from Court.

Sec. 135 of the Code of Civil Procedure gives a witness protection from arrest when returning from the Court where he has been giving evidence. An interesting case under the section came up before the Allahabad High Court before Mr. Justice Boys (*Emperor v. Bihari Sing*, 46 All. 663). A man named Gopinath came from Allahabad to the Court of the Subordinate Judge of Meerut in order to give evidence as a witness though in fact no summons had been served on him. At this

time there was a warrant out against him for his arrest in certain execution proceedings. On his arrival at the Court of the Subordinate Judge he asked for protection from arrest until he should be able to return to Allahabad. He was informed that as a witness he could not be arrested and no special orders were necessary. After giving evidence Gopinath paid a visit to his son's house and he was arrested. The learned Judge held that the privilege could not be claimed by a witness returning by any route he chooses. The direct route must be taken in order to keep the privilege intact. His Lordship, however, added, "This of course does not mean that if a witness goes to his destination by a road a few yards out of the way he therefore necessarily loses his protection."

Conflict of laws—*Lex Loci Contractus*.

Where a contract is made in one country to be performed wholly or partly in another country the Court will look at all the circumstances to ascertain by the law of which country the parties may be presumed to have intended the contract to be governed and will enforce it accordingly unless it should contain stipulations contrary to morality or expressly forbidden by positive law. The principle that in case of a conflict of laws the presumed intention of the contracting parties is the governing factor in the question what law is to be applied was affirmed by the House of Lords in *Hamlyso & Co. v. Talisker Distillery*, (1894) 'A. C. 202. In a recent case, *Jones v. Oceanic Steam Navigation Company, Ltd.*, (1924) 2 K. B. 730, the Plaintiff, a British subject, claimed to recover damages for personal injuries sustained by him while he was a passenger on a steamship belonging to the Defendants, a British Company, owing to the negligence of the Defendants' servants. The Plaintiff alleged that under a contract made in Detroit he was received by the Defendants as a passenger to be carried from New York to Southampton, that the Defendants by their servants were negligent in not properly securing the port-hole glass in his room, and that in consequence his left hand was seriously injured. The Defendants pleaded that they were exempted from liability under the terms of their contract which was to the effect that the carriers were not to be made liable for loss, damage or injury arising from causes of any kind beyond the carriers' control even if such

loss, damage or injury might have been caused or contributed to by the neglect or default of the carriers' servants.

The Lord Chief Justice before whom the action was heard held that under the American law the contract was void but it was valid under the English law, and acting according to the well-recognised principle of law enunciated by the House of Lords (in the case mentioned above), the contract was to be interpreted according to the English law, as it was clear that that was the intention of the parties. For the Defendants it was contended that the contract was to be construed very widely and it exempted the Defendants from liability for the negligence or default of their servants, whatever might be the nature of such negligence or default provided that it was beyond the carrier's personal control. It was argued for the Plaintiff on the other hand that the rule of *ejusdem generis* applied to the words "causes of any kind" and that only such negligence or default was comprised in the condition as related to the matters specified or matters *ejusdem generis* therewith. His Lordship held that the principle of *ejusdem generis* applied in the case and the Defendants were not absolved from liability for the injury of which the Plaintiff complained. The Plaintiff, however, lost on the ground that notice of claim was not given to the Defendants within the time stipulated in the contract, the condition whereof bearing on this point was printed on the back of the passenger's tickets which the Plaintiff did not take care to read and follow.

SCOPE OF SEC. 182 OF THE BENGAL TENANCY ACT.

By ASHUTOSH GONGOPADHYA, M.A., B.L.

(Continued from p. lxxvi.)

Let us take another case to illustrate the difficulty. A is a *raiyyot*; he takes an under-*raiyyoty* lease of lands which include both homestead and agricultural lands. Will sec. 182 apply in this case?

Some hold that in such a case the section will not apply, and the case will be governed by the ordinary provisions of the Bengal Tenancy Act as applicable to an under-*raiyyot*. The reason for such a view apparently is that as the lease itself is an agricultural lease the provisions of the Bengal Tenancy Act will apply to it even without the intervention of

sec. 182, which was enacted to cover those special cases only which would not ordinarily fall within its scope, but yet owing to the exigencies of the circumstances of the case they must be drawn within its ambit for the better protection of the interest of the *raiyyot* in his homestead. We shall discuss the merits of this view after we have given the other view and the reasons that support it.

That other view is that, in the given example, the provisions of sec. 182 will still apply provided the circumstances of the case do not militate against the requisite conditions mentioned in the section. Those requisite conditions to attract the operation of the section are the following :—

(a) A person must be a *raiyyot* (of any description) with regard to certain agricultural lands in the village.

(b) The homestead must be the *raiyyot's* homestead.

(c) The homestead must not form a part of the *raiyyoti* holding mentioned in (a), or in the language of the section, the *raiyyot* must hold the homestead "otherwise than as a part of his holding as a *raiyyot*."

Let us see if the circumstances of the given case fulfil all the above conditions.

In the given case, (1) A has a *raiyyoti* holding.

(2) The homestead certainly belongs to him or in the language of the section, it is his homestead.

(3) The homestead does not form a part of his *raiyyoti* holding mentioned in (1), or, in other words, the *raiyyot* holds his homestead otherwise than as a part of his *raiyyoti* holding, inasmuch as he holds the homestead as a part of his under-*raiyyoti* holding.

Thus this case satisfies all the required conditions, and there seems to be no bar to the application of the section to the case above.

(To be continued.)

SUITS TO SET ASIDE DECREES ON THE GROUND OF FRAUD.

By DWIJENDRA NATH PAL.

(Continued from p. lxxv)

The worst and the essential part of the contrivance is the putting forth of a false claim and it is easy to see that, in the absence of this element, the contrivance would lose all its powers of mischief. Thus in the case of *Narsing v. Rafikan* (I. L. R. 37 Cal. 197), where the claim was not shown to be untrue,

the Court refused to vacate a decree on the mere ground of non-service of summons and ignorance of the suit. A distinction has naturally arisen between non-service of summons and suppression of summons, as the latter only can be called a fraud. Suppression of summons is, no doubt, an intentional contrivance to keep the adversary and the Court in ignorance of the facts, but it is difficult to see how it can give a right of action where the claim decreed is true. The claim being true, the suit must ultimately have the same result even if it be retried after due service of summons and no useful purpose is served by vacating the prior decree. It seems therefore that even mere suppression of summons should be no ground for a fresh suit, unless the claim is shown to be false. Though a fraud of the worst kind, it is, in itself, inchoate and incomplete, unless combined with other elements. In practice, however, actual suppression of summons is seldom proved and the inference from non-service of summons to suppression of summons is often a long step, not always justified.

Neither would the Court entertain a suit for reversal of a decree on the ground of its being obtained on perjured evidence, where the reality of the claim is not challenged. This was clearly pointed out in the cases of *Mosul Huq v. Surendra Nath* (16 C. W. N. 1002) and *Kashiswar v. Amiraddin* (23 C. W. N. 133). If a person gets a true claim decreed by adducing false evidence, there is, in reality, no injustice and consequently no right of action. Courts have also refused to entertain such suits on grounds of public policy. Falsehood, perjury, fraud or dishonesty will, of course, never be tolerated by Courts, but, in their anxiety to punish fraud or trickery, they will never open fresh gates to litigation by nullifying prior judgments where there has been no miscarriage of justice. The supposed remedy will, in such a case, be worse than the disease itself, for a fresh litigation always means a fresh field for fraud and perjury which render the attainment of justice very uncertain.

(ii) *A wilful contrivance*.—The placing of a false claim before the Court is no doubt the essence of fraud, but even this can be no ground for reversal of a decree where there has been no contrivance to keep the Court and the adversary in ignorance of the truth. The success of a false claim is impossible unless it has the appearance of truth. The contrivance which gives it this disguise and thereby mis-

leads the Court, is the other element of fraud which must be proved in each case. In the absence of any such contrivance the decree is final and binding on the parties. The matter, in such a case, reduces itself to the question of *res judicata*. In contested or consent decrees, there may be a fraud in disguising the truth, the fact of the suit being known to both the parties. In case of *ex parte* decrees the fraud may moreover amount to a contrivance preventing a defence of the suit. The truth may be concealed or a litigant may be kept out of Court by a hundred devices. The inventions of fraud practically defy enumeration or even a satisfactory generalisation. But the kind of fraud that would justify reversal of a prior decree is indicated in the case of *Mahammad Golab v. Mahammad Sulleman* (I. L. R. 21 Cal. 612) in which Petheram, C. J., pointed out that "where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it, may be set aside by a Court of justice in a separate suit." The learned Judge has observed that to hold otherwise would be to ignore the law of *res judicata*. It is now settled that a suit for setting aside a decree on the ground of fraudulent suppression of summons would lie even after an unsuccessful application under Or. 9, r. 13 of the Civil Procedure Code, as the question raised in such a suit is substantially different. (*Pramnath v. Mahesh*, I. L. R. 24 Cal. 543; *Khagendra v. Pramnath*, I. L. R. 29 Cal. 395.) The point is not whether the service of summons was regular or sufficient but whether non-service of summons was a part of the scheme and the means or one of the means by which the fraud was committed. But in *Lakshmi Charan v. Nur Ali* (15 C. W. N. 1010) a contrary view was taken. It was held in this case that "the jurisdiction of the Court trying a suit of this kind is not limited to an investigation merely as to whether the Plaintiff was prevented from placing his case properly at the trial by the fraud of the Defendant. The Court can and must rip up the whole matter for determining whether there has been fraud in the procurement of the decree," and the Plaintiffs' knowledge of the prior suit was thought immaterial. This view of the law was not accepted in the later case of *Mosuful Hug v. Surendra Nath* (16 C. W. N. 1002) and has not found favour with Courts since then. A reconciliation of the conflicting views was

attempted by Fletcher, J., in *Kedar Nath v. Hemanta Kumari* (18 C. W. N. 447) which was, however, decided on the principle laid down in *Mahammad Golab v. Mahammad Sulleman* (I. L. R. 21 Cal. 612). It has very recently been held in *Nalini Kanta v. Hari Nikari* (29 C. W. N. lxxii notes) that the balance of authority is that it is not open to raise pleas of a false claim and perjured evidence, if the suit had been decreed after contest or it was established that the summonses were served on the Defendants.

The mere plea, though true, of a false claim having been decreed would thus be unavailing to the Plaintiff in a suit to set aside a decree for fraud, unless he shows that the Defendant was guilty of a contrivance to conceal the truth or prevent him from entering on a proper defence of the suit.

(iii) *Decree induced by a contrivance to the prejudice of the Plaintiff*.—If the first two points are established, the third will, in most cases, follow as a matter of course, unless perchance the Court is astute enough to see through the fraud and prevent its perpetration. There may, however, be cases in which a wrong decree may be made, not on account of any fraud or contrivance of a litigant but by a mistake of the Court or otherwise. In such cases, no suit lies to set aside the decrees as fraudulent as the judgment cannot be said to have been induced by any fraud. In *Manindra v. Hari Mandal* (24 C. W. N. 133) the Court refused to set aside a decree as fraudulent as it was not shown to have been induced by any fraud. It was observed that "it is not permitted to show that the Court was mistaken; it may be shown that it was misled; in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment." The same observations have been repeated with approval in the very recent case of *Sarat Kumari v. Mecher Molla* (29 C. W. N. li notes).

The jurisdiction to vacate a prior decree for fraud has been universally recognised by the legislature and the Judges but as Jenkins, C. J., pointed out in *Nanda Kumar v. Ram Jiban* (18 C. W. N. 681), "It is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation."

(Concluded.)

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REPORTS (See Index.)

The late Babu Kalinath Mitter.

It is with a deep sense of loss that we record the death of Babu Kalinath Mitter, which took place at his residence in Beadon Street on Monday last, at the ripe age of 88. He was one of the oldest attorneys of the Calcutta High Court having been enrolled in 1868. Even at this great age he used to come to his office and visit the High Court up to the close of the last year. He was a very able member of his profession. For his strength of character and straightforwardness in his speech and conduct he was greatly respected by all who came in contact with him. In the days of his active professional life he won the golden opinion of the Bench and the Bar and made many friends amongst the members of the legal profession and public men. Although he was one of the busiest solicitors of the Calcutta High Court, yet he was a man of remarkable energy and commanded a large criminal practice in the Calcutta Police Court and attended also to civic duties. It was he and Sir Surendra Nath Banerjea, who by their joint efforts, transformed the Calcutta Municipal Corporation, from a bureaucratic body to a popular institution. In those days Sir Henry Harrison was the Chairman of the Calcutta Corporation and also the Commissioner of Police and the official influence in the Corporation was supreme. Surendra Nath Banerjea and Kalinath Mitter, both of whom were elected members, gave lead to the non-official members and made their counsel prevail in

the administration of the Corporation funds and of the Municipal affairs to the great benefit of the rate-payers of Calcutta. They were not obstructionists and would not oppose for oppositions' sake. But they devoted special study and attention to the details of municipal administration and took a keen interest in the improvement in sanitation, drainage, water-supply, roads and *busters* and succeeded in effecting all-round improvements without casting any additional burden on the rate-payers. Sir Henry Harrison, the Chairman of the Calcutta Corporation, was a member of the Indian Civil Service and had great administrative ability. Notwithstanding his bureaucratic bias he soon came to recognise the ability and the public spirit of these leaders of the representatives of the rate-payers and co-operated with them in conducting the affairs of this city as the responsible executive of a self-governing institution. This state of things continued till Sir Alexander Mackenzie became the Lieutenant-Governor of Bengal. This independence of the Calcutta Corporation was, however, too much for an autocrat like Sir Alexander Mackenzie. He introduced an Act in the Bengal Legislative Council for restoring executive control over the Calcutta Corporation by curtailing the popular representation and Surendra Nath, Kalinath and Bhupendra Nath put up a valiant fight against it. But when all opposition both in the Legislative Council and outside was ignored and the measure was carried by a nominated official majority in the Council, Babu Kalinath was one of the 28 who resigned their seats in the Calcutta Corporation by way of protest and kept to his determination not to go back to the Corporation till the Act was repealed. Kalinath all the same was held in high regard by the Government and C. I. E. was conferred on him. He seldom took any active part in the country's politics. But he served the interests of his profession and the city of his birth with rare independence and great ability. The legal profession and the

civic life of Calcutta are poorer to-day through the death of Babu Kalinath.

The late Mr. Sofiar Rahman.

While mourning the loss of the veteran Babu Kalinath Mitter, we cannot pass over a death in the rank of junior solicitors with but a bare reference. The late Mr. S. M. Sofiar Rahman who died last Wednesday was one of the few Mahomedan solicitors we have in Calcutta. Having had his training with the firm of Messrs. Watkins & Co., he was expected to render a good account of himself in conveyancing and he fully justified such expectations. His honesty and other sterling qualities of the head and heart were already a matter of warm appreciation on the part of the Bar and the officers of the High Court. He had just begun a useful career as a councillor of the Calcutta Corporation where his services were as much appreciated as in Old Post Office Street. It is a matter of deep regret that such a promising career was cut short at the time when Bengal was badly in need of able men like him free from communal narrowness.

Scope of the Legislative authority of the Governor-General in Council.

Sec. 2 of the Indian Divorce Act (IV of 1869) provides that the Courts shall not grant any relief under the Act except in cases where the Petitioner professes the Christian religion and resides in India at the time of presenting the petition. Since the year 1869 the Courts in India have consistently acted upon the doctrine that mere residence conferred upon them jurisdiction to divorce persons who were not domiciled in India. The validity of a divorce granted by a competent Indian Court to persons merely residing within its jurisdiction was not questioned even in England until the year 1921 when a dissentient note was struck for the first time in *Keyes v. Keyes*, 1921 P. D. 204. In delivering the judgment in that case Sir Henry Duke, the President of the Probate Division, expressed the opinion that the Indian statute in basing jurisdiction on residence transgressed the limits imposed by the Imperial Parliament upon the Indian legislature. There was no appeal against the judgment of the learned President, but at the instance of the Secretary of State for India the British Parliament passed the Indian Divorces (Validity) Act, 11 and 12 Geo. V. c.

18, which enacted that decrees granted under the Indian Divorce Act and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom and any order made by the Courts in relation to any such decree shall, if the proceedings were commenced before the passing of the Act, be valid in all respects as though the parties to the marriage had been domiciled in India. This Act, however, does not touch the question of jurisdiction in cases instituted subsequent to the passing of the Act.

In *Lee v. Lee*, 5 Lahore 147, the High Court of Lahore was invited to determine whether mere residence within the forum confers jurisdiction upon the Indian Courts to grant a decree for the dissolution of a marriage between persons who are not domiciled in India. The matter is one of very great importance to European British subjects residing in India and a Full Bench of the Lahore High Court sat to consider it. The question arose whether in enacting the Indian Divorce Act the Indian Legislature exceeded the authority conferred upon it by the British Parliament. The scope of the legislative powers of the Governor-General in Council was considered by the Lords of the Judicial Committee in *Empress v. Burah*, 4 Cal. 172, as far back as 1878. In delivering the judgment of the Privy Council Lord Selbourne made the following pertinent observations:—
“The Indian Legislature has powers expressly limited by the Act of Parliament which created it and it can do nothing beyond the limits which circumscribed those powers. But when acting within these limits it is not in any sense an agent or delegate of the Imperial Parliament but has and was intended to have plenary powers of legislation as large and of the same nature as those of the Parliament itself. The established Courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question and the only way in which they can properly do so is by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power and if it violates no express

condition or restriction by which that power is limited it is not for any Court of justice to inquire further or to enlarge constructively those conditions and restrictions.' The Full Bench held that under the Indian Councils Act, 1861 the Indian Legislature had power to confer on Indian Courts the jurisdiction contemplated by the Indian Divorce Act, which falls within the ambit of the affirmative words of sec. 92 of the Indian Councils Act, whereby the Governor-General in Council is vested with plenary powers to make laws, of every description, it being immaterial whether the laws so made do or do not affect the status of non-domiciled British subjects. It was held that under the Indian Divorce Act *bonâ fide* residence in India confers jurisdiction upon the Indian Courts to grant a decree for the dissolution of a marriage between parties who are not domiciled in India.

Power to summarily punish contempt if should be extended to offences not committed in *facie curiæ*.

We publish in another column a communication by a member of the Provincial Judicial Service who appears to feel that, in cases of obstruction to execution offered by contumacious judgment-debtors, the remedy provided by the power given to the Court to complain under sec. 195 or sec. 476, Cr. P. C., is not sufficiently effective and that the power given by sec. 74, C. P. C., to send the obstructor to civil prison is illusory. We do not see our way to agree with his view and fail to see why these remedies should be put aside as of no account whatever. We cannot assent to Civil Courts being clothed with additional powers summary or otherwise for bringing this class of offenders to justice unless and until the powers now possessed are resorted to and demonstrated to be ineffective. Further, we have the strongest objection to his proposal to extend the power given to Courts by sec. 480, Cr. P. C., to punish contempts committed *in facie curiæ* to cases of contumacy occurring beyond the ken of the judicial officer—cases which must depend for proof upon evidence adduced in Court. On the other hand, we consider it highly undesirable that these cases should be tried, even by non-summary procedure, by the very judicial officer whose orders the judgment-debtor is alleged to have disobeyed or obstructed—as such officers would be naturally inclined to take too

severe a view of contempt of their own authority and would be subject to a natural bias against persons accused of something akin to *lesé majesté* against their own authority. This is not to say that there are not obstructive litigants who may prove too much for the Court, their opponents and even the law itself. Such people, like the poor, are always with us. But because this is so, we are not prepared to recommend that they should therefore be all declared outlaws and handed over for summary punishment by officers whose authority they are charged with having treated with contempt. We may mention that the County Courts in England are not entitled to punish any person for contempt not committed *in facie curiæ* and it is only Courts of Record which may punish any disobedience of its orders summarily. But the superior Courts are very reluctant to exercise such powers in any but exceptional cases.

SCOPE OF SEC. 182 OF THE BENGAL TENANCY ACT.

BY ASHUTOSH GONGOPADHYA, M.A., B.L.

(Continued from p. LXXIX.)

Now, what is the material difference between these two views? According to the first view, as the lease is an agricultural one, Bengal Tenancy Act will apply to the homestead together with the other arable lands forming one complete under-*raiyyoti* tenancy apart from sec. 182. According to the second view as the *raiyyot* satisfies all the conditions required by sec. 182, subject to local custom or usage, Bengal Tenancy Act will apply. So far there is no difference. But according to the first view the result of the application of the Bengal Tenancy Act is that A, in the given example, will be an under-*raiyyot* under the Act, and the provisions of Chap. VII of the Act will regulate the incidents of the whole tenancy comprised of the homestead and other arable lands. And according to the second view, not only Bengal Tenancy Act will apply, but something more, *viz.*, the provisions that regulate the tenancy of a *raiyyot* under the Act will also govern the homestead; and the result will be that if A, in the given case, happens to be an occupancy *raiyyot* with regard to his *raiyyoti* lands he will acquire occupancy right in the homestead also, though under the lease he may have only the

interest of an under-*raiyyot*. The conditions under which the rent of the homestead will be enhanced will be the same as that applicable to a *raiyyot*, he will be ejected only under the conditions under which an occupancy *raiyyot* may be ejected.

According to the first view the section is applicable only when the *raiyyot* holds the homestead singly, and the section does not apply if the homestead is a part of a holding whether *raiyyoti* or under-*raiyyoti*.

According to the second view the section applies even when the homestead is held by a *raiyyot* as a part of an agricultural holding provided the agricultural holding is not a *raiyyoti* holding, i.e., the section will apply to all homesteads held singly or jointly with agricultural lands, save and except to cases where the homestead is a part of the *raiyyot's raiyyoti* holding.

In order to support the first view we shall have to read into the section words that are not there. The section undoubtedly imports that it will not apply when the homestead is held as a part of the holding as a *raiyyot*. The words "part of the holding as a *raiyyot*" are very significant. Their meaning emerges from all doubts when we read them in contra-distinction with the words "as a part of the holding of an under-*raiyyot*." The section speaks of the holding of a *raiyyot* and not of an under-*raiyyot*. If the section, as it stands, does not bear the interpretation, why should we import into it words that are not there only to come to a specific conclusion?

It may be said that there cannot be a thing like the "holding of an under-*raiyyot*." The term "holding," though apparently limited by the definition (sec. 3, cl. 9) to a parcel or parcels of land held by *raiyyot*, has been indiscriminately used in the Act to refer to lands held by *raiyyots* as well as under-*raiyyots*. This is clear from the terms of the sec. 113 and sec. 121 of the Act where the "holding of an under-*raiyyot*" is referred to together with the "holding of a *raiyyot*." Thus we find that the general scheme of the Act allows the use of the phrase "holding of an under-*raiyyot*." If that is so, the conclusion is safe that the legislature purposely used the phrase "otherwise than as a part of a holding as a *raiyyot*," in order to exclude "the holding of an under-*raiyyot*" from the list of disqualifying conditions which would be a bar to the application of the section.

Another and a stronger argument of the supporters of the first view is that where the homestead is a part of an agricultural holding provisions of the Bengal Tenancy Act will apply apart from sec. 182 because the lease is an agricultural lease. Apparently the argument, as it stands, commands considerable force. But one important thing is overlooked, namely, the main purpose of sec. 182. As we have already said, the section finds its place in the Act to confer some special and peculiar advantages to the homestead of a *raiyyot*. Those advantages do not simply mean the application of the general provisions of the Bengal Tenancy Act to homesteads. The intention of the legislature clearly is to apply the provisions applicable to the *raiyyoti* holdings to the homesteads under the conditions specified in sec. 182, which certainly means much more than mere application of the ordinary provisions of the Bengal Tenancy Act. A homestead is yet a homestead though held as a part of an agricultural holding. Once we accept the proposition that the section is enacted for the protection of a *raiyyot*, the conclusion seems to be inevitable that the section is applicable to all homesteads whether held singly or as a part of other agricultural lands provided other conditions postulated by the section are satisfied. That a liberal and very wide interpretation of the section is desirable is also supported by case-law on the section (Vide 50 I. C. 8).

Of course, it may be said that such an interpretation of sec. 182 would result in great anomalies; if the temporary tenant of a homestead acquires occupancy right by virtue of this section, it may so happen that such tenant would acquire thereby greater rights than those of his superior landlord; if the section is given effect to even when the homestead is held with arable lands, then the *raiyyot* may acquire occupancy right with regard to the homestead only, though he may be ejected from the agricultural portion of the tenancy, and in that case difficulties will arise regarding apportionment of rents. Their Lordships of the Calcutta High Court were also conscious of some of the above difficulties in 19 C. W. N. 914 which was a case of pure homestead only, but, for all that, they did not fail to give effect to the section. The rights mentioned in the section are special rights given to the *raiyyot* by a special provision for special reasons. So it is useless to cry over the fact that they are

not always logical. When we find that the provisions were made for the protection of the *raiyyot*, that the status is given by law and not by act of parties, then we can be easily reconciled to the results however anomalous they may seem to be.

In interpreting the section Rai Surendra Chandra Sen Bahadur has commented on those rulings which hold that the section is applicable even when the *raiyyot* holds his *raiyyoti* holding and his homestead tenancy under different landlords. According to the above authority, the words "landlord" and "*raiyyot*" are relative terms, and therefore when the section provides "where a *raiyyot* holds his homestead," it means, "where a *raiyyot* holds his homestead under the landlord whose *raiyyot* he is." According to him the section should be made applicable only in those cases where the *raiyyoti* holding and the homestead are held under the same landlord. With all respect to that great authority, it is submitted that there is no reason why we should alter the plain meaning of the section by introducing into it extraneous words which are warranted neither by the recognised principle for interpretation of a statute nor by the purpose of the section.

(Concluded.)

PRESENTATION OF DEEDS FOR REGISTRATION BY MINORS.

BY SARADA CHARAN GHOSE.

The points which I propose to discuss are, *firstly*, whether a document presented by a minor claimant is a valid presentation under the Registration Act, and *secondly*, whether an application under sec. 73 of the Registration Act can be presented by him for registration.

In order to fully appreciate the importance of these two points, I shall strictly confine myself to the Registration Act which alone should be our guide. In the Registration Acts (Act III of 1877, and Act XVI of 1908) the word "minor" means a person who according to the personal law to which he is subject has not attained majority.

When the definition of the word minor already appears in Act IX of 1875—The Indian Majority Act—what reason could there be for giving a new definition in the Registration Acts passed subsequently in the year 1877 if the legislature had not intended to put a new

construction upon the word minor for registration purposes? The Government of India (Home Department) by its notification numbered 535, dated 16th April 1897, declared that for the purposes of the Registration Act all persons domiciled in India being British subjects of whatever race or religion are to be considered minors until they have reached the full age of 18 years. So the position created by the above definition was qualified by the above notification of 1897. In other Acts such as the Probate and Administration Act—Act V of 1881—we find that the definition of minor is made to depend on the Indian Majority Act. But when the Registration Act was re-cast in the year 1908, the amending form of the above notification was not, however, accepted. The word minor was defined independently of Act IX of 1875 or of the above notification of 1897 and the definition appears in its original form showing thereby that the legislature did not intend to follow the notification. Then the inference is irresistible that for registration purposes a minor is as contemplated by the Registration Act—Act XVI of 1908 which is a special Code complete in itself (*Vide* 18 Mad. p. 99). Moreover each Act is to follow its own definition otherwise there would be no justification for adding definitions in an Act (*Vide* 4 Cal. p. 665).

Now according to the personal law of the Hindus and the Mahomedans, a minor attains majority on his completion of the fifteenth and sixteenth years respectively (*Vide* Trevelyan on Minors, p. 1). Therefore for registration purposes a Hindu or a Mahomedan attains majority on the completion of the fifteenth and sixteenth years respectively (*Vide* Rustomji's Registration Act, p. 21).

In sec. 32 of the Registration Act it is exhaustively stated by whom a document can be presented for registration. The section states that a document can be presented for registration by some person (a) executing or claiming under the same or (b) by the representative or assign of such person or (c) by the agent of such person, representative or assign duly appointed by an authenticated power of attorney. It is now necessary to know the meaning of the word "person" so that it might be ascertained what kind or class of persons is contemplated by the Registration Act. The word in its wider signification includes any human being even a juristic per-

son (*Vide* Holland's Jurisprudence). But this need not trouble us as being foreign to our present purpose. In the definition of the word "minor" as given in the Registration Act we see that a minor means a person. Therefore the word person includes a minor. Therefore a minor executant or a minor claimant can present a document for registration under sec. 32 of the Registration Act, Act XVI of 1908. Also in cl. (b) of sec. 32, the word representative occurs which includes a guardian either of a minor executant or claimant. The use of the word "or" in "or by the representative or assign" is rather significant and contemplates two distinct cases. The cl. (a) of sec. 32 is quite general in its use; no limitation has been put upon the word "person" which may mean either a major or a minor. Therefore a major executant or a major claimant can present a document for registration. Also a minor executant or a minor claimant can present a document for registration. But of those minors who have their guardians already appointed they may under cl. (b) of sec. 32 present document for registration either themselves or through their guardians. This is what I understand by the use of the word "or" before cl. (b) of sec. 32.

There is no denying of the fact that a minor can be a recipient under an instrument of gift (*Vide* sec. 127 of Transfer of Property Act) or will. He can also be a mortgagee. That being so it requires no further authority nor any elaborate reasoning to support the contention that the word person as used in sec. 32 includes a minor. But sec. 35 of the said Act lays down that registration shall be refused if the executant appears to be minor, etc. In Act XX of 1871, we do not find this clause. Sec. 35 does not say that when the executant is a minor, etc., the document cannot be presented by him, neither is there any restriction on the part of the registering officer to accept it for the purpose of registration. But secs. 20, 21, 23 and 26 of the Registration Act (Act XVI of 1908) lay down that in cases of non-compliance with the provisions of those sections the document shall not even be accepted for registration. This difference in wording in secs. 35 and 20, 21, 23 and 26 is very significant. Therefore it comes to this that a presentation of a document can be made by a minor under sec. 32 of the said Act and the document can be

accepted by the registering officer but if the executant appears to be minor, etc., the registering officer shall refuse registration (*Vide* Banerjee—Registration Act, p. 293). Moreover as the registering officer is not a Court, its duties in the main being administrative (*Vide* 15 I. C. p. 652 F. B.), the act of presentation is merely a physical act of handing over the document for registration (*Vide* Rustomji's Registration Act, p. 163). It can therefore be done by those who are physically capable of doing so. This is also clear if we turn to sec. 36 of the Registration Act which lays down: "If any person presenting any document for registration or claiming under any document which is capable of being so presented. . . ." Here in case of a claimant it is said that if the document is capable of being presented, it can be presented by such claimant. Whether the claimant has any such capacity to present the document for the purpose of registration is not at all mentioned. In secs. 40 and 41 in cases of will and authority to adopt, the testator himself or after his death, any person claiming as executor or otherwise under a will or the donor himself or after his death, the donee of any authority to adopt or the adoptive son may present to any Registrar or Sub-Registrar for registration. In these two sections no mention has been made of any agent or representative. Would it not be fair to suppose that the legislature did contemplate a distinction between a minor executant and a minor claimant? Thus it is clear that no legal disability can be ascribed to the act of presentation by any person in the absence of any provision of law. That is, presentation can be made by all except those to whom that right is specifically denied by the legislature. I have shown that sec. 32 imposes no bar to minors as such to invite the registering officer to initiate registration of documents presented by them. But sec. 35 seems to exclude the executants who appear to be minors, etc. Therefore the probable inference would be that the legislature gives sanction to minor claimants to present documents for registration (*Vide* 33 I. C. p. 33). When A and B both can present documents for registration which is expressly refused in case of A, the intention of the legislature must necessarily be that registration shall not be refused in case of B provided other requirements of the Registration Act have been complied with. From a negative we

may come to an affirmative rule. Even if the registering officer registers a document in contravention of sec. 35 or other similar provisions it would not necessarily be null and void. Such errors or defects are "defects in procedure" (*Vide* 24 W. R. 75 P. C.). The law nowhere lays down that registration of a document, execution of which is admitted by a minor, is *ipso facto* void as against such minor or void for want of jurisdiction on the part of the registering officer (*Vide* 21 Cal. p. 872). If that be the intention of law with regard to minor executants for which the section is express we can easily guess the meaning of the intentional silence of the legislature with regard to minor claimants. Therefore when a minor executant or a minor claimant presents a document for registration, there is nothing in the Registration Act to oust the jurisdiction of the registering officer to accept it for the purpose of registration.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Jan. 15th, 1925.—The Hilary Sittings of the Privy Council will commence on the 20th January 1925 and the list contains one Australian, four Canadian and two Crown Colony Appeals, the latter being from the Straits Settlements.

The Indian list is a long one containing 24 appeals, five from Madras and three each from Bombay, Lahore, Bengal, Patna and Allahabad, two from Central Provinces and one each from the Punjab and Lower Burma. There are only three Indian Appeals in which judgment was not delivered during the past term.

An interesting case was recently decided by the Privy Council on appeal from Egypt, in *Bartlett & Bartlett*. A testator, a Mahomedan British subject, domiciled in Egypt, died in 1918 leaving his mother him surviving. She died in 1919 leaving two sons who were the Defendants in the action. The testator prior to his death made a Will in which he appointed his brothers his executors and left his property to his widow and children. The Plaintiffs in the action were his surviving children and they claimed that only the beneficiaries named in the Will were entitled to the testator's estate and sought a declaration

that the Appellants had no beneficiary interest. The Appellants counter-claimed that by the Moslem law of inheritance the mother of the deceased testator who survived him was entitled to 1/6th of the estate in spite of any testamentary disposition. They maintained that the testator could not dispose by his Will of his mother's heritable share and that *pro tanto* the Will was inoperative. The Egyptian Courts were of opinion that a British subject who would otherwise be bound by Moslem law can at his option invest himself with a wider disposing power than the Moslem law gives him by making a Will in conformity with the Wills Act, 1837, but the Privy Council decided that the provisions of the Egyptian Mixed Civil Code provided that the law applicable should be the principles of English law "as far as the circumstances admit" with a proviso in the nature of an exception similar to the rules established in British India that Moslems and Hindus shall enjoy and be bound by the law of their communities in matters such as the present. They held accordingly that the mother's right was preserved and placed beyond the reach of the testamentary disposition which her son purported to make.

Jan. 22nd.—The Privy Council commenced their sittings on January 20th and the following members were present:—LORD SHAW OF DUNFERMLINE, President, LORD CARSON, LORD BLANESBURGH, SIR JOHN EDGE and MR. AMEER ALI.

An application was made by *Messrs. DeGruyther, K. C. and Hyam* for special leave to appeal from a decree of the Oudh Court in *Md. Sher Khan v. Mt. Kamalunnessa*. The value of the subject-matter was over Rs. 10,000 but the Appellate Court confirmed the decision of the trial Court on the ground that there was no question of law of general importance involved.

The applicant contended that the decisions turned on the construction of a document which involved an important question of Mahomedan law and that inasmuch as the value of the subject-matter of the suit satisfied the provisions there was an appeal as of right whether the question of law was or was not of general importance. Leave was refused.

Jan. 20th and 22nd.—The first appeal to be heard was *Adappa v. Gundappa* (Bombay). The claim was for possession of certain im-

moveable property and arrears of rent under the terms of a rent note and possession was also claimed under a mortgage. The defence which had been negatived by the Indian Courts was that the rent note was the consequence of the mortgage and that the mortgage was fictitious and without consideration.

Mr. Kenworthy Brown for the Appellants.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

The argument for the Appellants has not yet concluded.

G. D. M.

Correspondence.

RESISTANCE OF EXECUTION AND A PLEA FOR EXTENSION OF COURT'S SUM- MARY POWER TO PUNISH CON- TEMPT.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

Resistance to execution of decrees of Civil Courts is a matter of not infrequent occurrence in the mufasil and, in certain parts of Bengal, it is a positive scandal. Instances are not unknown of serious criminal cases arising out of resistance to seizure of moveables or delivery of possession in execution. The fact that no immediate risk of punishment is incurred by such resistance, as the Court concerned cannot take cognisance of the offence, seems, to a certain extent, to encourage the idea of such resistance in a defeated litigant, who naturally desires to put off execution as long as possible. The Code of Civil Procedure, no doubt, gives him all possible opportunities of delaying execution, if he is so inclined, but the worst of all manœuvres is to take the law into his own hands. It is not only productive of the law's proverbial delay, so much regretted in these days of expedition and economy, but is also a serious handicap in the administration of justice. The present procedure is to draw up a formal complaint in writing under sec. 195 or 476, Criminal Procedure Code, and send it to a Magistrate for trial. But those who are intimately connected with the working of the law, in this respect, will perhaps agree that this procedure does not always satisfactorily meet the exigencies of the situation. Instances have been found of obstruction to Court officers more than once in course of the same execution proceeding. How often can a Court of law make complaints in writing against a litigant before it? How long are its hands to be stayed by mere criminal force in securing to a litigant the legitimate fruits of a decree in his favour? What consolation would it be to a litigant to be told, "Here is a solemn declaration of your victory in the litigation, but nothing can be done to put

you in enjoyment of it against your fighting adversary?"

In spite of the provisions of secs. 195 and 476, Criminal Procedure Code, a civil Court can, under sec. 490 of the same Code, take cognisance of certain offences affecting administration of justice and punish the offender when the offence is committed in the view or the presence of such Court. It is unfortunate that sec. 183 and 186, Indian Penal Code, which deal with contempt of lawful authority of public servants and cover cases of obstruction to execution of decrees, are not mentioned in sec. 480, Criminal Procedure Code, nor can such obstruction be brought under the wording of sec. 188, Indian Penal Code. The offences mentioned in secs. 183 and 186, Indian Penal Code, evidently affect the administration of justice, which includes not only adjudication of the rights of contending litigants but also securing to them the fruits of that adjudication. Resistance to seizure of property or obstruction to delivery of possession in execution would no less paralyse the work of the Court than the refusal of a person to produce a document (sec. 175, Indian Penal Code) or to take oath (sec. 178) or to answer a question (sec. 179) or to sign a statement (sec. 189) when so required by a lawful authority. Sec. 480, Criminal Procedure Code, empowers a civil Court to punish the latter offences but not the former.

It is true, sec. 480 comes into operation only when the offence is committed in the view or the presence of the Court. Perhaps the view of mufasil Courts is not long enough to cover the acts of their own officers sent out to execute their own orders, not to speak of their presence in places where their officers are engaged in their official duties. No interruption is a contempt of their lawful authority which is not offered *in facie curiæ*, under their very nose. However a slight amendment of sec. 480 so as to extend its operation to offences under secs. 183 and 186, Indian Penal Code, is expected to afford a considerable check to defiance of civil processes by defeated litigants and others, but for which the Civil Court's power of execution would, in certain cases, seem to me entirely ineffective. The power of detaining the obstructor in civil prison at the instance and cost of the decree-holder or the auction-purchaser, given to civil Courts by sec. 74 of the Civil Procedure Code, appears to be illusory, for the person who can resist seizure of his property under orders of Court can equally resist a warrant of civil arrest and drive the Court to make a complaint to a Magistrate under sec. 195 or 476, Criminal Procedure Code, and defeat or at least delay execution of the decree.

As the question strikes at the root of the authority and efficiency of civil Courts, it deserves the attention of the Legislature in any scheme of revision of the law that the shortly expected report of the Civil Justice Committee may necessitate.

Yours truly,
DWIJENDRA NATH PAL,
Munsif.

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REPORTS (See Index.)

The Magna Carta, Art. 39, if guarantees trial by jury and personal liberty.

Mr. Walter Clark of Raleigh (N. C.) contributes a very interesting article in the *American Law Review* on the Magna Carta and Trial by Jury. The learned writer referring to the result of researches made by the historical study of English law during the present and the latter part of the last century, both in England and America, shows that the views of Coke and Blackstone that jury trial was granted or guaranteed by the *Magna Carta* is without any foundation. We shall briefly quote the authorities on which he relies. It will appear from these quotations that the claim that an Englishman usually puts forward that his right to be tried by a jury of his own countrymen is guaranteed by the Magna Carta has no foundation in fact. The Magna Carta in this respect conferred no rights on the Englishmen at large but only a special privilege to the Barons and Bishops for trial by their *peers*. However, the one thing that the Magna Carta guaranteed and for which it is rightly recognised as the greatest Charter of Liberty known to history, and of which the English people may feel justly proud, is that the Charter for the first time formulated the legal and constitutional doctrine that there shall be no "condemnation without trial." The personal liberty of the citizen in all constitutional countries may be said to rest on this "rule of law." It grieves us, therefore, very much to find Englishmen at the helm of affairs in India violating this doctrine. We are sure the following extracts from the article will be found instructive and interesting:—

McKechnie on Magna Carta, p. 158, speaking of the traditional relation of Magna Carta to trial

by jury says: "One persistent error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury. This belief, however, which has endured so long and played so prominent a part in political theory, is now held by all competent authorities to be entirely unfounded.

The barons in their combination against King John were not only anxious to protect themselves against the arbitrary power of the king, but to fence off and prohibit the jurisdiction of the common law Courts of the kingdom as to themselves, and hence arose the much misunderstood expression in Magna Carta that they should be tried solely by the judgment (not a jury) of their peers. The king's judges were appointed and removable by him at will. They were not the peers (i.e., the equals) of the barons and they wished to guarantee, therefore, that when the king assumed any cause of complaint against them they should be tried not by judges appointed by the king, but should be investigated and judgment rendered by their own associates and they should be under the jurisdiction of *judicium parium*, that is, they were entitled to demand the judgment of their peers.

Magna Carta was a contract between King John and thirteen barons and twelve bishops made at Runnymede, three miles below Windsor Castle on the Thames, on Friday, the 19th June 1215. The object of this contract was to restrict the power of King John and for the protection of the feudal privileges of the bishops and barons who had been pillaged and oppressed by the king through his judges who were appointed and removable at will by him, and who, of course, did his bidding without scruple.

The language of Chap 39 of Magna Carta, which, like all legal instruments of that day and for hundreds of years later, was written in Latin, is as follows: "Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre." It has been translated as follows: "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land."

"It has been usual to read it as containing a guarantee of trial by jury to all England; as ab-

absolutely prohibiting arbitrary commitment; and as undertaking solemnly to dispense to all and sundry equal and exact justice, full, free and speedy. The traditional interpretation has thus made it, in the widest terms, a promise of law and liberty, and good government to every one. A careful analysis of the words of the clause, read in connection with its historical genesis, suggests the need for modification of this view. It was in accord with the practical genius of this great document that it should direct its energies, not to the enunciation of vague platitudes and well-sounding generalities, but to the reform of a specific and clearly defined group of abuses. Its main object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as 'Jeddart justice.' It forbade him for the future to place execution before judgment.

"Second, it required '*per judicium parium*,' i.e., that the judgment must be rendered by one's peers. This was a stipulation that while the king might dispense justice to the common people through his judges, as to proceedings against the barons, the judgment should be rendered only by their peers. The king's judges were not peers of the barons and therefore this much-misunderstood stipulation was a contract for their protection that they should be tried, both civilly and criminally, by their peers and not by the king's judges. A fragment of this provision still remains in the English law by which peers of the realm are tried in certain cases on the criminal side of the docket by the House of Lords. Therefore, instead of being, as so often construed, a guarantee for a trial by jury, it was a stipulation for the special privilege that in matters affecting the barons they were to be tried by men of their own order. It was a stipulation for a special privilege and not a guarantee of equality. Another instance of this stipulation was that for centuries under John's Charter, the 10th April 1201, in all actions against Jews, they were entitled to '*judicium parium*' by Jews, and by later statutes a foreign merchant was entitled to a jury, half of whom should be alien to his own country—*de mediata lingua*. In the case of a proceeding against a Welshman, he was entitled to a trial by men drawn equally from both sides of the boundary line between Wales and England."

The third provision, that the trial should be '*per legem terrae*, i.e., by the "law of the land," meant not as is now generally understood, but it meant trial by battle or ordeal or compurgators. No other method of trial was known. This stipulation of Magna Carta promised that no plea, civil or criminal, could henceforth be decided against any freeman until he had failed to claim or had waived his right to a trial by one of those methods.

The scope of the protection afforded, that he should not be taken nor imprisoned, did not mean literally that he could not be provisionally arrested and detained but merely that he was entitled to a trial before condemnation.

The barons intended to prevent the arbitrary

arrests to which they had been subjected by an arbitrary king. The words that the king "will not set forth nor send against him" were also clearly intended for the purpose of preventing attacks by forces in arms against men unjudged and uncondemned.

The main cause of the misconstruction of this section is the use of the words "No freeman should be molested in ways above made illegal." But it is very clear from a history of the times and from the conditions of society that the word "freeman," which is the translation given to the term *liber homo*, applied only to owners of a knight's fee. It included in the protection neither the property nor the persons of villeins or those holding unfree lands. The whole subject is so fully discussed in McKechnie on Magna Carta, pp. 435-439, and in other treatises upon the history of the early English law, that it is not necessary to say more.

In the most recent and one of the most valuable works on the common law, Holdsworth's History of the English Law, vol. 1, p. 59, it is said: "It is also clear that the words *judicium parium* do not refer to trial by jury. A trial by royal judge and a body of recognitors who found the facts was exactly what the barons did not want. What they did want was firstly a tribunal of the old type in which all the suitors were judges both of law and fact, and, secondly, a tribunal in which they would not be judged by their inferiors. Some of them did not consider that the royal judges, and none of them would have considered that the body of recognitors, were their peers. It is in this respect that the thirty-ninth section of Magna Carta is reactionary." Holdsworth further says that the words "by the law of the land" referred only to the previous mode of trial by battle, ordeal or compurgation; that is, the barons were seeking for a trial for themselves by their peers, that is, by other barons: and, on p. 84 of the same volume, he says: "There is no historical justification for the identification of trial by jury with the judgment of their peers." Indeed, Lesser says, quoting MacLachlan Esq. Cve., 326, that "until about the reign of Henry VI (1442-1461) trial by jury to all intents and purposes was a trial by witnesses."

PRESENTATION OF DEEDS FOR REGISTRATION BY MINORS

By PASHUPATI NATH CHAKRAVARTI, M.A., B.L.

(Continued from p. lxxxvii.)

Acceptance does not mean that the document so accepted shall as a matter of course be registered. The registering officer can accept a document under certain sections of the Act and when he is satisfied that other provisions of the Act have been complied with he must register it. Although he has accept-

ed the document he can refuse registration when requirements of the Act have not been fulfilled. But the case would be different when the document is presented for registration by an unauthorised person. Here the registering officer has no jurisdiction to accept it because the power of jurisdiction of the registering officer comes into play only when he is invoked by some person having a direct relation to the deed. It is for these persons to consider whether they will or will not give to the deed the efficacy by registration. The registering officer could not be held to exercise the jurisdiction conferred on him if hearing of the execution of the deed he got possession of it and registered it and the same objection applies to his proceedings at the instigation of a third party who might be a busy body (*vide* 5 C. W. N. p. 177, P. C.). Thus we see that in case of presentation by an unauthorised person, the registering officer has no jurisdiction at all, but in case of a minor executant or a minor claimant having a direct relation to the deed the registering officer cannot be said to have no jurisdiction to accept it (see however sec. 23A of the Registration Act—Act XV of 1917—Irregular presentation validated by registration). It then might be argued that a lunatic or an idiot can also present a document for the purpose of registration. Is there any bar in the Registration Act that they cannot do so? But would that be physically possible for them to present a document in the proper office within the proper time and also to proper officer? Then again, can a lunatic or idiot be said to have any discretion or judgment that can be found in a minor? If an idiot or lunatic can be said to have discretion or lucidity are they any longer idiot or lunatic?

But the consideration of our case has been made difficult by the explanatory notes appended by the Inspector-General of Registration under sec. 32 of the Registration Manual, 1918, Part I, which is described as the Indian Registration Act—Act XVI of 1908 with annotations of sections. By that annotation the Inspector-General means to say that as the minor belongs to the category of a lunatic or idiot and as a lunatic or idiot cannot present a document for the purpose of registration, the minor claimant also will not be eligible for doing the same thing. But where is the bar to a lunatic or an idiot presenting a document for the purpose of registration? Their cases must not be prejudiced by extraneous considera-

tion, i.e., by importing into the Registration Act principles of other laws.

Because the word minor occurs in the same sentence which contains the words lunatic and idiot, it cannot be said that they all are of one and the same type for all purposes and at all times. What is there to suggest that the disability or the capacity of a minor is on a line with that of an idiot or lunatic. If it be conceded for the sake of argument that the disability of a minor for some purposes falls in a line with that of an idiot or lunatic, it cannot be said that the capacity of a minor is also on the same line. It would be a great insult to our imagination if we want to link the minor in the same chain with an idiot or lunatic. Under the Guardians and Wards Act (Act VIII of 1890) when a minor can form an intelligent preference as to who should be his guardian, the Court may give effect to his wish (*vide* sec. 17 (3)). A minor may be appointed a guardian of his minor wife or other minor members when he is the managing member of the family—mark the word “managing.” A minor may be appointed an executor of a Will while a lunatic or idiot cannot (*vide* Majumdar's Hindu Wills Act). A minor can sue or be sued in a Criminal Court. In England a distinction is being made between an infant and a minor and a minor can act in Admiralty Divorce or Probate Cases. In the case of an infant a guardian is assigned by the Court but a minor may elect his own guardian (*vide* Hals., Vol. 17, p. 500). Idiots and lunatics under the Hindu law are regarded as disqualified persons and are incapable of inheriting or holding any property or estate (*vide* J. Bhattacharyee's Hindu Law, p. 349, 2nd Edition). Under the Presidency Small Cause Court Act (Act XV of 1882) a minor can act (*vide* sec. 32). It has been held in England that there are several acts which can be done only by infants and not by their guardians (*vide* Simpson on Infants, p. 34, Farewell on Powers, 3rd Edition, p. 133, *In re S. S. B.* (1906) 1 Ch. 712]. From the above it is clear that disability of a minor cannot be deduced as a general principle. In spite of his having disability under certain circumstances, a minor has got some capacity.

It is now necessary to say some words with regard to the explanation given by the Inspector-General of Registration. In order that the explanation given by him may be binding it

must find a place in the body of rules which are required to be made by him under sec. 69 of the Registration Act. Before a rule made by the Inspector-General acquires the force of law, it must be submitted to the local Government for its approval and the necessary sanction having been obtained it must be published in the Official Gazette (*vide* sec. 69; 35 I. C. p. 718). The said rule must also be consistent with the Act (*vide* sec. 69; 16 W. R. p. 182). The Inspector-General in his annotations confesses that the case of a minor claimant is neither contemplated nor sanctioned by the Registration Act. That being so, can it be maintained for a moment that the annotations he had appended under sec. 32 are consistent with the Registration Act? When it is neither contemplated nor sanctioned can he contemplate and sanction on behalf of the legislature and create a law which is quite foreign to the Act itself? Even the Judicial Committee refuses to legislate in the name of interpretation and highly condemns the practice of engrafting new law under the guise of interpretation of existing law. The Rt. Hon'ble Montague Smith says in L. R. 1 I. Ap. 167 :—"It is impossible that any Court can add to the statute that which the legislature has not done. . . . This Act (meaning the Limitation Act) contains no such saving and their Lordships would be legislating and not interpreting the statute if they were to introduce it."

But there is a dictum of Justice Muthusamy Ayyar which appears in I. L. R. 18 Mad. 109. The points for determination in that case were whether sec. 7 of the Limitation Act (Act XV of 1877) is applicable to the Indian Registration Act (Act III of 1877) and whether the said Registration Act is a complete code in itself and the decision was that the Registration Act being a special Act complete in itself, the provisions of sec. 7 of the Limitation Act do not apply. Thus we see that the dictum is quite uncalled for and was not at all required for the decision of that case. The passage runs thus :—"Sec. 32 provides that every document must be presented for registration by some person executing or claiming under the instrument or by the representative or assign of such person or by the agent of such person. The section does not apparently contemplate the case of disability and does not make a special provision in regard to it and the probable inference is that when a document is executed in favour of a minor his legal

guardian is taken to represent him for the purpose of registering it." Even the learned Judge admits then that the section does not apparently contemplate and make special provision for a minor claimant while the Act does so for a minor executant. The Act is as I understand intentionally silent on this point and what the effect of this silence is, I have shown before. Can any Court add to the word of the statute and give a new complexion to the section? Then there is the latest pronouncement by the Burma Chief Court reported in 33 I. C. p. 33. That case was decided in the year 1916 and it was held that there is no bar imposed by the Registration Act to presenting a document for registration by a minor claimant. That was the state of law just before the legislature had amended the Registration Act (Act XV of 1917). In connection with the above, the passage in the judgment of Justice Mookerjee reported in 24 C. W. N. p. 14, may be re-called with profit—"It is a well-established principle of construction that the legislature is presumed to know not only the general principles of law but also the construction which the Courts have put upon particular statutes and therefore where a section of an Act which has received a judicial construction is re-enacted in the same words such re-enactment must be treated as legislative recognition of that construction." Since the decision of the case reported in 33 I. C. p. 33, the Registration Act has been amended (Act XV of 1917) but the legislature has introduced no alteration with a view to nullify the effect of the decision in question, the conclusion is irresistible that the legislature meant to accept the correctness of that decision. The legislature knows what the law is and has the power to alter the phraseology if it transpires that its true intention has not been given effect to in judicial decision; the absence of such actions on the part of the legislature may well be taken to indicate that the Court has rightly ascertained its intention specially if in the interval the statute has been amended in other respect. From all I have said above the natural conclusion would be that a minor claimant can make a valid presentation of a document executed in his favour. This much disposes of the first point.

(To be continued.)

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REPORTS (See Index.)

Lord Birkenhead on Fusion and Costs.

In the *Law Journal* of the 24th January last, there is an editorial note on Lord Birkenhead's article on "Fusion." It recommends for the consideration of the Bar Council the question whether the time is not come when Barristers should be permitted to have direct access to the lay public, in advising them on matters of law. The article points out and indeed, very pertinently, that public welfare could not suffer thereby. In fact such access would be a distinct advantage to the public. Under the present state of things, if a lay client desires Counsel's opinion, he has to pay two lawyers' fees for it. But if the Barristers are allowed to advise direct, hold consultation with the client, the advice could be obtained for one fee.

Now that our High Court has enrolled vakils and attorneys as advocates it is not reasonable that such barriers should be maintained. It may further be urged that barristers and advocates may be allowed to act if they so choose to do. This is a matter which deserves serious consideration. When in England where people are so much more better off, this question is receiving attention of the profession and the public for reasons of economy, how all the more needful it is in this country to consider the question of reducing the cost of litigation. This is all the more so, when a barrister of ex-Lord Chancellor Birkenhead's eminence has directed his attention to the matter and instead of condemning the idea of "fusion" he seems to be of opinion that within certain limits, the fusion may be allowed. His Lordship has in the issue of the *Law Journal* received last week contributed another article on "Costs" in which he pleads

for the establishing of more uniformity in this respect in all Courts than exists at present. He is, however, careful in not treading on vested interests. But no such obstacle exists with regard to the reduction of costs of litigation in this country and any reform in this direction would be greatly appreciated. Let not professional etiquette or the vested interests of a very limited number stand in the way of a much-needed reform in this direction.

High Court's revisional powers wider than appellate powers.

We have from time to time pointed out that the revisional powers of the High Court are very wide. It is noteworthy that these powers are wider in scope than appellate powers. The arm of the High Court is long enough to reach any kind of wrong done by the Courts subordinate thereto. Apart from sec. 107 of the Government of India Act, sec. 439 of the Code of Criminal Procedure clothes the High Court with sufficient powers of interference. As far back as 1894 the question arose whether the High Court could interfere in proceedings pending in the lower Court and quash them at any stage (*Chandi Pershad v. Abdur Rahman*, I. L. R. 22 Cal. 131). The case was argued before Petheram, C. J. and Beverley, J. and both parties were very strongly represented, Mr. Jackson appearing in support of the rule and Mr. Pugh on the other side. The Petitioner Chandi Pershad applied to the Municipal Commissioners of Monghyr for a license for two carriages and six ponies which was granted but his statement was sent for verification to the Overseer of the Municipality who reported that Chandi Pershad had eight ponies and one horse. Thereupon the Chairman of the Municipality directed the prosecution of Chandi Pershad for making a false statement regarding the number of animals. On the following day Chandi Pershad offered to pay the tax on the other three animals but pleaded that he did not think he was liable to take out a license for them as they were old and diseased and unfit for work.

Prosecution was launched in due course and the accused was summoned by the Court. The High Court was moved at this stage and Mr. Pugh appearing on behalf of the Municipality contended that the High Court should not interfere under its revisional powers to quash the proceedings pending before the Magistrate at the stage at which they were and before the Magistrate had concluded them and come to a finding. The learned Judges quashed the proceedings and observed : " When it is brought to our notice that a person has been subjected for over two months to the harassment of an illegal prosecution it is our bounden duty to interfere." This case has always been regarded as the leading case on the subject and has been followed by all the High Courts.

This exceptional power is exercised by the High Court under sec. 439 of the Code of Criminal Procedure, which is to be read with sec. 435 and sec. 438 of the Code within the four corners of which this extraordinary power can hardly be brought. The only basis therefore is to be found in sec. 439 itself. The sections dealing with the powers of a Court of Appeal necessarily deal with those orders only from which under the Code there is an appeal provided; with reference to such orders the sections lay down the powers of a Court of Appeal. *Ex hypothesi* the revisional powers of the High Court are invoked when no right of appeal exists and although in some cases the High Court in exercising the powers conferred on a Court of Appeal may be able to correct an error it does not follow having regard to the variety of orders or proceedings which it may be called on to revise or deal with in its Revisional Jurisdiction, that it can, by exercising those powers, only redress a wrong or do complete justice. In other words, sec. 439 does not say that the High Court shall exercise only those powers that are conferred on a Court of Appeal but on the other hand it enacts that among the powers possessed by the High Court are the powers conferred on an Appellate Court. The legislature in enumerating the powers of the Court of Appeal had before its mind only a certain class of orders and in the very nature of things that enumeration cannot be found complete or exhaustive when the Court is called on to deal with orders of a different kind, orders not in the contemplation of the legislature when it was defining the powers of a Court of Appeal.

PRESENTATION OF DEEDS FOR REGISTRATION BY MINORS.

By PASHUPATI NATH CHAKRAVARTI, M.A., B.L.

(Continued from p. xcii.)

The second point which I want to deal with is whether an application made under sec. 73 of the Registration Act by a minor is meaningless by reason of his minority or valid and whether his verified application should be rejected as being invalid without giving him an opportunity of making a fresh application through a proper person although the period of one month provided in the said section has in the meantime expired.

Sec. 73 of the Registration Act says that in cases of denial of execution the Sub-Registrar shall refuse registration and record his reasons for doing so. The party aggrieved may within thirty days of that order apply to the Registrar for the purpose of registration. The application to the Registrar should be in writing and the statements in the application must be verified in manner required by law for the verification of plaints. Now the law that requires that a pleading shall be verified is to be found in Or. 6, r. 15 of the Civil Procedure Code, which lays down that (1) save as otherwise provided by any law for the time being in force every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case; (2) the person verifying shall specify by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true; (3) the verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. Also sec. 4 of the same Code provides that (1) in the absence of any provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Civil Procedure Code does not mean to limit or otherwise affect any special or local law. It would not therefore be reasonable to suppose that the legal incidents attaching to a plaint under the Civil Procedure Code must govern a case under the Registration Act, a special Code complete

in itself. Sec. 73 of the Registration Act says that an application is to be verified and as there is nothing in the Registration Act to give information on this point so the applicant is referred to Orr. 6 and 15 to learn the particulars there and to know the manner in which verification is to be made. There is no indication suggesting the capacity or otherwise of the party by whom verification is to be made. The rule simply lays down what is to be done in case of verification and that is everything contained in the rule. The phrase "in manner" may be taken to mean in imitation of. Otherwise what a claimant, an executor or an adoptive son under secs. 40 and 41 would do for whom no agent or representative is provided in the Act in case they apply under secs. 72 and 73?

If it be the intention of the Registration Act—and I think it is so—that a minor claimant can present a document for the purpose of registration the Civil Procedure Code cannot limit or otherwise affect his capacity to act as it does not limit the power of a minor to act under sec. 32 of the Presidency Small Cause Courts Act. If we are satisfied that a minor claimant can present a document for the purpose of registration he can also file an application which is merely continuation of the proceeding initiated by his act of presentation. From above it is evident that a minor can file an application under sec. 73 and the verification made by him is quite proper. Even r. 2 of Or. 32, places a discretion upon the Court as to what it should do in case a plaint is filed by a minor. The rule does not lay down that the plaint should be thrown off and case dismissed.

Now under part VI of the Registration Act we find that the Act contemplates that both the Original and Appellate Jurisdiction of the Registrar should be exercised under Part XII of the Act. Sec. 74 lays down the procedure both in matters Original and Appellate. In case of this Appellate Jurisdiction no question of presentation would arise. The Registrar would enquire whether the document has been executed and whether the requirements of the Registration law have been complied with to entitle the document to registration (*Vide* Beng. Reg. Man. p. 41; 40 Ap. 434 at p. 444). Even if the application does not contain verification the defect is merely an irregularity, i.e., a defect in procedure which does not take away the jurisdiction of the Registrar to con-

sider the application on its merits. The object of verification is clear if we turn to sec. 82 of the Registration Act by which a person is made punishable for giving a false evidence under sec. 193 of I. P. C., from which a minor is not excepted. Even if it be held that a minor claimant is quite incompetent to present a document under sec. 32 on the score of his minority being of imperfect discretion it is so held for his benefit and ultimate good. The very fact that a minor does present a document or file an application discloses his lack of appreciation of his interest which he injures by doing the act himself. If under the circumstances the law denies him the remedy without giving him an opportunity to rectify the mistake, the very object of law becomes frustrated because what was meant for his benefit, in effect does him irreparable injury. Even the hardship created by the cases of *Majbunessa* and *Jambhuprosad* has been met by the amending sec. 23A of the Registration Act by which the legislature has done away with the above mischief. This section lays down that even in cases of improper registration on a presentation by an unauthorised person, the invalidity may be cured by presenting the document for re-registration by the claimant within four months of the discovery of the mistake that the document has been improperly registered. If the legislature can excuse improper registration made in pursuance of a presentation made by an unauthorised person on behalf of the claimant it would be inconceivable that the legislature would not give an opportunity to a minor claimant who only applies for registration.

In view of the departmental instructions issued by the Inspector-General of Registration a great difficulty might possibly arise in cases of presentation by minor claimants for registration of documents executed in their favour as the registering officers are expected to follow the instruction rather than the intention of the law. I, therefore, beg to invite the attention of the legislature to make an early announcement declaring the eligibility of minor claimants to make a valid presentation for registration. Or if in spite of what I have shown it be held that minors as a class are quite incompetent to present documents for registration or file an application to the Registrar the legislature may enact suitable provisions similar to those contained in sec. 23A of the Registration Act so that an op-

portunity might be given to minors in cases of invalid registration or refusal of registration both by the Original and Appellate Courts to present their documents for re-registration or registration as the case may be within a definite period and in such manner as the legislature may deem fit and proper so that justice may not come in conflict with equity and good conscience.

The writer has endeavoured to tackle a knotty point of the Registration Law which not unoften arises in the presentation of documents for registration. There is an obvious conflict between the view taken by the Burma High Court in 33 J. C. p. 33 and that taken by the Legal Remembrancer of Bengal, and the fact that although an amendment of the Act was made since the decision of the Burma High Court, the legislature took no step to correct the view of that High Court leaves it in greater doubt than before as to which view is right.

(Concluded.)

Correspondence.

SUGGESTED EXTENSION OF COURT'S POWER TO PUNISH CONTEMPT.

To THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

With reference to your observations in your last issue of 16th February, regarding extension of powers of Court to punish summarily contempts not committed *in facie curiæ*, I beg to point out that the wider question discussed by you was not meant to be raised in my letter referred to therein. Resistance to execution of decrees of Civil Courts by defeated litigants was the only act of contumacy regarding which extension of Court's summary powers to punish the obstructor was suggested. The suggestion, no doubt, breaks in upon the traditional limits of the powers of inferior Courts to punish contempts of their lawful authority; but, with all respect for your valuable opinion, I beg to say that this particular act of contumacy stands on a somewhat different footing, and, from the point of view of expediency, the suggested enlargement of powers would not altogether be unjustifiable. As regards the apprehended danger of allowing a Court to punish an alleged disobedience of its own authority, it can be said, that the Legislature has already entrusted Courts with such powers in case of allied offences under secs. 175, 178, 179, and 180, Indian Penal Code, when committed *in facie curiæ* and likely to give equal, if not greater, annoyance. (Sec. 480, Cr. P. C.).

As to other cases of contempt, my letter had absolutely nothing to do.

Yours truly,
DWIJENDRANATH PAL,
Munsif.

Review.

ECONOMICS OF SHIPPING. By S. N. Haji, B.A. (Oxon.), Bar-at-Law. Tata Publicity Corporation, Ltd., Bombay.

India with her vast coast line once possessed a mercantile marine and Indians used to trade with distant countries across the seas. But in this line she did not keep pace with the progress made by the Western people. Naturally Indian mercantile marine has become extinct. With the awakening of national self-consciousness which spread over the whole of India since the *Swadeshi* movement, there were attempts made in Bengal, Madras and Bombay to revive Indian-owned shipping. They have not met with much success yet. In Bengal and Madras, the first attempts proved failures. But those who are discouraged by failures never attain success. In Bombay they are manfully combating with difficulties. Mr. Haji is the Manager of the Scindia S. N. Co., Ltd. at Rangoon. His education, knowledge of law and practical experience in the shipping line has enabled him to produce a work which is quite unique in India. Having a practical experience of the difficulties, he is able to suggest how they may be overcome. But his work is not a political brochure but a methodical and scientific work which gives one an insight into the incidental questions connected with shipping. The learned author has put before the public a clear analysis of the science of shipping, a careful study of which will be highly beneficial to those who are interested in the subject. Professor Radha Kumud Mukherjee has compiled some historical accounts of Indian shipping in the past. Mr. Haji's book is a mathematics of the present. We endorse fully the view of Sir Dinsha E. Wacha that the "publication of this book at a time when the Indian Mercantile Marine Bill is to be placed on the anvil of the Indian Legislative Assembly is most opportune." Every page of the book is full of useful facts and information and there is no doubt they will not only be of assistance to the members when the Bill will be discussed in the Indian Legislature but also to those who are interested in the development of Indian shipping.

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Contempt of Courts Bill.

The Contempt of Courts Bill is in many respects a misconceived measure. It owes its origin to the decision of the Calcutta High Court in *The Amrita Bazar Patrika* case (17 C. W. N. 1253), in which it was held that the High Court has no power to commit a person for contempt of a Criminal Court in the Mofussil. The High Courts in the Indian Presidencies are superior Courts of record and their power to punish for contempt of their own authority has never been doubted. The offence of contempt of Court and the power of the High Court to punish it are the same in such Courts as in the superior Courts in England. The High Court has thus the power of summarily punishing for contempt out of Court in relation to any of its jurisdictions.

In the month of May in 1913 a prosecution was started in the Court of the Additional District Magistrate of Barisal against forty-four persons on charges under sec. 121A, I. P. C. Shortly after the institution of the case a series of articles appeared in the *Amrita Bazar Patrika* which contained comments on the aforesaid prosecution and which in the opinion of the Government of Bengal constituted serious contempt of Court. On the application of the Advocate-General proceedings in contempt were taken by the High Court against the Editor and Manager and the Printer and Publisher of the *Patrika*.

It was contended by the Advocate-General that the King's Bench Division in England can deal with a case of contempt in the course of a proceeding before an inferior Court and

it followed that the High Court in India had a similar power of dealing with any case of contempt in the course of a proceeding before an inferior Court subject to the High Court in its Appellate and Revisional Jurisdiction and subject also to its supervision under the charter. A special bench consisting of Jenkins, C. J., Stephen and Mookerjee, JJ., held that neither the Supreme Court nor the Sudder Dewany Adawlat nor the Sudder Nizamat Adawlat had jurisdiction to commit a person for contempt of a Criminal Court in the Mofussil and the Calcutta High Court, which has inherited all jurisdictions and every power and authority in any manner vested in the Supreme Court, the Sudder Dewany Adawlat and the Sudder Nizamat Adawlat, has not derived any such jurisdiction from any of those Courts.

The jurisdiction to commit for contempt of an inferior Court by summary proceeding which the King's Bench Division of the High Court in England assumed in *Rex v. Davies* [L. R. (1906) 1 K. B. 32], has been inherited by it from the old King's Bench and not from the other Courts of record which became amalgamated in the English High Court. That jurisdiction rested on the special power of that Court to correct and protect against extrajudicial error and to punish every kind of misdemeanour on a summary proceeding as well as on indictment or information as *custos morum* or the guardian and protector of public justice throughout the Kingdom, a dignity that reverted to it or was revived on the abolition of the Star Chamber. The common law powers as *custos morum* never belonged to the Supreme Court of Calcutta at least in regard to contempts of inferior Courts outside the Presidency Towns and the Calcutta High Court cannot lay claim to this power by inheritance or by reason of its having been constituted by charter a Court of record or by reason of its power of superintendence over the Courts of Mofussil Magistrates.

Opposed to the view of the Calcutta High Court is that of the Bombay and Madras High Courts which have held that they have ample authority to protect the Courts subordinate to them against contempt; in other words, they have the powers of the King's Bench Division of the High Court of England which are as unrestricted as the powers of the High Court to punish for contempt of its own authority.

In this state of things a bill was introduced in the Legislative Council in 1914 which purported to increase the classes of cases of contempt of Court punishable as offences under the Indian Penal Code, but this measure was dropped on account of the war.

The bill now before us defines the offence of contempt, makes it punishable with imprisonment for a term up to six months or with fine or with both and declares the power of the High Courts in India as also the Courts of the Judicial Commissioners to punish for contempt of their own authority or that of a Court subordinate to them. At the same time it declares that the powers of the aforesaid Courts to punish for contempt will be limited to the powers vested in them by this legislation.

The present bill thus goes very much beyond what is necessary and in providing for the protection of subordinate Courts it bars the inherent powers of the High Courts in respect of contempt of their own authority. After the decision of the Calcutta High Court the only thing that the Legislature was called upon to do was to remove any doubt as to the powers of the High Courts of Judicature in regard to the protection of the subordinate Courts from contempt but instead of doing that the bill proposes to curtail the existing jurisdiction of the High Courts as superior Courts of record as regards contempt of their own authority which they have exercised ever since their creation.

No doubt the powers of the High Courts in this respect are unlimited and the highest judicial authorities have expressed themselves about the necessity of care and caution with

which the weapon of committal for contempt should be used and because their powers are unrestricted and uncontrolled the High Courts have always used them sparingly and with the greatest reserve consistent with the exercise of jurisdiction unfettered by any limitations imposed by statute. In its origin all legal contempts will be found to consist in an offence more or less direct against the sovereign as the fountain head of law and justice. Proceedings for contempt of Court should not be lightly taken for instead of upholding the dignity of the Court they have a contrary effect and this principle has always been followed by the highest Courts. The reluctance of the Courts to take action except in cases of great gravity may be traced, as pointed out by Mookerjee, J., in the *Patrika* case (17 C. W. N. 1253), to quite respectable antiquity. Historians record that when Emperor Augustus desired to punish a historian for contempt Mecaenus advised him that the best policy was to let such things pass and be forgotten. Caesar said on a similar occasion that to retaliate was only to contend with impudence and put oneself on the same level and even Tiberius acted upon the same view. The Theodosian Code also made this the law and expressly declared that slanderers of His Majesty should be unpunished, for if this proceeded from levity it was to be despised, if from madness it was to be pitied and if from malice it was to be forgiven for all such sayings were to be regarded according to the weight they bore.

In view of the decision of the Calcutta High Court in opposition to that of the other High Courts the legislature should only provide that the High Courts will have power to punish for contempt of subordinate Courts as much as for contempt of their own authority. Even as to the expediency of this measure we have grave doubts. No one will countenance the idea of a Court of Justice being brought into contempt but at the same time it must be remembered that proceedings conducted in a Court of Justice should always be open to public criticism which acts as a wholesome check on the vagaries of judges and magistrates which are not unfortunately uncommon and we apprehend that an enactment like the one contemplated by the bill in question will have the effect of stifling such criticism.

In the statement of objects and reasons we regret to notice certain inaccuracies in the reference to judicial decisions. It has been stated that the Calcutta High Court has taken a view contrary to that of the other High Courts "in the cases of *King-Emperor v. Girindro Mohan Das and others* (17 C. W. N. 1285) and *Legal Remembrancer v. Moti Lal Ghosh* (I. L. R. 41 Cal. 173)." In the first place the two cases are one and the same being reported in 17 C. W. N. 1253 (not 1285) and 41 Cal. 173, secondly, the contempt proceedings in the High Court arose out of the prosecution going on at that time in the Court of the Magistrate at Barisal against Girindro Mohan Das and others, but the decision of the High Court is reported in the Calcutta Weekly Notes under the cause title *In re the Amrita Bazar Patrika* and in the Indian Law Reports as *Legal Remembrancer v. Moti Lal Ghosh*. It may be noteworthy that the application for the issue of a writ of contempt as originally filed purported to be made by the *Legal Remembrancer* but the Court refused to entertain the application on the ground that the *Legal Remembrancer* had no *locus standi* in the Crown side of the High Court and thereupon the application was made by the Advocate-General on behalf of His Excellency the Governor in Council. That being so it is more correct to say that the judgment of the High Court was pronounced not in *Legal Remembrancer v. Moti Lal Ghosh* but in the matter of the *Amrita Bazar Patrika* in which proceedings in contempt were taken against that newspaper on the application of the Governor of Bengal.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Jan. 23rd.—In *Monilal Gandhi v. Haji M. H. Mahomed* (on appeal from Bombay), an agreement had been entered into between the Appellant and Respondent for sale to the latter of certain immoveable property in the town of Bombay. Delay took place in the completion of the contract and the Appellant, after notice to the Respondent that the purchase should be completed within a fixed time, rescinded the contract. The Respondent sued for specific performance and his suit was dismissed by the trial Judge who held that the notice for completion gave the Respondent a reasonable time in which to conclude the things that re-

quired to be done. The Appellate Court allowed an appeal from this decision and decreed specific performance.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellant *ex parte*.

At the conclusion of the argument their Lordships delivered judgment and allowed the appeal.

Jan. 23rd and 26th.—In *Sura Lakshmiah Chetty v. Kothandarama Pillai* (Madras), *Messrs. DeGruyther, K. C.* and *Dubé* represented the Appellants *ex parte*.

The suit was instituted by the Respondent as heir of his mother Lakshmi Ammal for a declaration of title to property in the Madras District. The property was purchased by Chockalinga, the father of the Respondent, in the name of his wife Lakshmi, and the question for determination is whether Chockalinga or Lakshmi was the real owner of the property. Chockalinga having since been adjudged an insolvent, the trial Judge found in favour of Chockalinga's title but the Appellate Court reversed that decision.

The appeal was heard by the following members of the Judicial Committee:—

LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE and MR. AMEER ALI. Judgment was reserved.

Jan. 26th, 27th and 29th.—*Diwan Chand Kirpa Ram v. Weld & Co.* is an appeal from Lahore and raises a question on the construction of a mercantile contract. The Respondents were the agents of the Appellants in certain contracts for the purchase and sale of cotton. The contracts provided for a margin to be deposited with the Respondents. The latter demanded a certain sum by way of margin from the Appellants and were met with the reply that the amount demanded was unreasonable inasmuch as funds belonging to the Appellants were already in the hands of the Respondents.

Messrs. A. M. Dunne, K. C. and *Hyam* for the Appellants.

Messrs. A. T. Miller, K. C. and *Dickinson* for the Respondents.

Jan. 29th and 30th.—In the Council Chamber before LORDS SHAW and BLANESBURGH, SIR JOHN EDGE and MR. AMEER ALI, *Tilakdari*

Singh v. Mesho Prosad Singh, an appeal from Patna, was heard in which the dispute was as to the area of an estate liable to accretion and diluvion from the action of the Ganges.

The accreted estate had been formed into a mahal named Nowbara and settled with the ancestors of the Appellants. Later it was purchased on a sale for arrears of revenue on behalf of the Dumraon Raj. The Appellants contended that the property in dispute in the present appeal was of greater area than that settled as Nowbara and they contended that the surplus was really an accretion to their estate of Gungbara. The Courts in India had decided against them and the Privy Council after hearing the argument of the Appellants decided that no appeal lay.

Sir Geo. Lowndes, K. C. and *Mr. Douglas McNair* for the Appellants.

Messrs. L. DeGruyther, K. C. and *Parikh* for the Respondent.

Jan. 29th and 30th.—In the Board Room before LORDS WRENBURY, PHILLIMORE and CARSON was heard the appeal of *Hope Prudhomme & Co. v. Hamel and Horley* (Madras). This appeal was in respect of a counter claim by the Respondents for damages for failure by the Appellant to deliver 300 tons of ground nuts. The Respondents acted as selling agents for the Appellant and in 1916 they reported to him an offer for the goods which he accepted. The Appellant, booked freight for the contract but the vessel was requisitioned by Government and no other freight was procurable. In fact the Respondents had contracted to sell the goods to a London firm who were brokers, for a firm in Marseilles in the hope of making a secret profit. Proceedings were taken in the Court of Trade at Marseilles and the French firm were awarded damages. On receiving information of the award the Appellant for the first time became aware that the award was against a 3rd party and not against the Respondents as his agents and he accordingly repudiated liability. The Appellate Court in India held that the Appellant had adopted the Respondents' contract and they reversed the judgment of the trial Court which had dismissed the claim. Judgment was reserved.

Mr. E. B. Raikes for the Appellant.

Messrs. A. Nelson, K. C. and *O'Hagan* for the Respondents.

Feb. 2nd.—In the Council Chamber, in *Dhanraj Joharmall v. Sonabai* (Central Provinces), judgment was delivered by MR. AMEER ALI and the appeal dismissed.

An application for special leave to appeal was made by *Messrs. Dunne, K. C.* and *R. Hills* in *Secretary of State v. Steel Bros.* (Rangoon). They stated that the question on which a decision of the Board was required was a question of law under the Indian Income Tax Act, and involved a finding which might reconcile the decisions in *Swan Brewery Co. v. The King*, 1914 A. C. 231 and *Inland Revenue v. Blott*, (1921) 2 A. C. 171. *A. M. Latter, K. C.* and *Cyril King* contended that the decree of the lower Court was an interlocutory decree and that the Appellant should have applied for leave to the High Court. Leave was refused but their Lordships did not state their reasons.

Jan. 30th, Feb. 2nd, 3rd and 5th.—The hearing is still continuing of an appeal from Bengal in *Pramatha Nath Mullick v. Pradyumna K. Mullick*, where the question for determination is whether during his turn as *shebait*, the Appellant is entitled to remove three Thakurs from the Thakur bari to his own house.

Messrs. A. M. Dunne, K. C. and *Hyam* for the Appellant.

Messrs. L. DeGruyther, K. C. and *Parikh* for the Respondents.

Only one Board is now sitting for the hearing of Indian appeals.

G. D. M.

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Political rivalry in the spirit of ahinsa.

Referring to the congratulations that the Earl of Oxford and Asquith received from the leaders of all political parties on the conferment on him of a peerage by His Majesty the King, our contemporary of the *Law Times* quotes the tribute which Professor Redlich, who is the author of the most comprehensive and reliable treatise on the English constitution and parliamentary practice, pays to the party system in England. The opinion of this learned author is all the more valuable because he is not an Englishman. He has come to form his opinion after the study of the constitution and the activities of the political parties not only in England but throughout the continent of Europe. The aim of the different political parties in England is to serve the best interests of the country and its people. There is thus always a healthy rivalry between the parties in this respect and a singular absence of ill-will or rancour. It is somewhat akin to the spirit of opposing counsel at the Bar. There is often no fundamental difference between the policy followed by one party or the other. For instance, the question of unemployment which was one of the chief concerns of the Labour Party has been taken up by the Conservative Party with no less zeal and earnestness. The same may be said with regard to the consolidation of European peace or other questions of national or international interest regarding which the aims and objects are the same, only the party programmes differ

in details. The daily parliamentary reports furnish ample evidence of this. It is this generous rivalry amongst the parties that makes for the orderly political progress and the assimilation into the country's constitution of new ideas and ideals without any violent disruption of society. This spirit of service to one's country and people, healthy emulation and freedom from any feeling of bitterness, malice or bad-blood between political rivals is akin to our ideal of *ahinsa* about which we talk so much and observe so little in our public life. It is only by cultivating this spirit that we shall be able to promote national unity which is the condition precedent to the country's progress.

We therefore commend the following to our readers' attention :—

Professor Redlich, to whom, as a foreigner, the working of the British Constitution presents many novelties which are the subject of his acute and intelligent observation, emphasises the fact of the absence of party spirit, in the discussion and treatment of many questions, which he regards as a typical and distinguishing trait, which, when rightly grasped, is a clue to the inmost meaning of the whole English party system. There are always a number of important political subjects which are treated and discussed by the House of Commons in a spirit of unity with a feeling that it represents the nation as a whole. Such matters are not, therefore, dealt with on party lines. This conduct springs from the very character of the great English parties. Again, Professor Redlich writes: "The two parties which compete for power are not separated by the maintenance of irreconcilable principles, but by differences of method in approaching individual concrete questions of domestic, foreign, financial, economic, social and ecclesiastical policy, their differences, however important they may appear to eager partisans, are but varieties of method among men standing upon the broad platform of common national policy, common fundamental conceptions, and common interests. The marvellously strong national feeling, the intensely living historic tradition, and the deep conservative spirit which are

so ingrained in all classes, carry the unexampled political and social cohesion of England, as compared with other States, to a height transcending all partisanship. This is the ultimate reason, and real explanation, of a characteristic phenomenon of both centuries of Parliamentary Government, namely, that in the classic land of party Government and party warfare the great collective interests of the State have at all times been, expressly or by tacit consent, removed from the province of party."

After quoting the above our contemporary proceeds:—

To this great characteristic of British public life—that the great Parliamentary parties are not divided by any unbridgeable chasm in the social life of the nation—is due the attitude of mind which makes the conferring, while his political opponents are in power, of a signal honour on Mr Asquith, one of the most formidable leaders of opposition in his generation, a subject of widespread gratification. This attitude of mind has found its expression in the raising, while they were sitting in opposition to the Government of the day in the House of Commons, to the position of Privy Councillors of Sir Edward (Viscount) Grey, Mr (Viscount) Haldane, and Mr. F. E. Smith (Earl of Birkenhead). Earl Balfour, speaking at Haddington on the 26th Sept. 1902, thus expounded and explained the limitations of party warfare in this country which has evoked the admiration of Professor Redlich. "The British Constitution," said Mr Balfour, "as it is now worked, is essentially a party system, but a party system can only be worked under really healthy conditions, can only be worked, at all events, under the best conditions, when the differences between the parties, though real, are not fundamental, essential, or of so revolutionary a character that they divide the classes of society or the sections of opinions in hopeless alienation from one another. The evil from which some of our continental neighbours have, in the course of their history, bitterly suffered is that they have attempted to work the party system, when the division between parties is so vital and fundamental that the 'ins' desire to destroy the 'outs' and the 'outs' attempt to become the 'ins' by revolutionary methods if no other methods are open to them. This is not the condition of things in which you can, in my judgment, work the representative system with any prospect of success, and it is because we have avoided that more by our own good fortune than by deliberate intention, because there seems to be some natural moderation in our British blood . . . that we have made the British Constitution the success it is."

Mandamus.

A curious case of mandamus arose in the American Courts. Zenophon Jones was con-

victed of man-slaughter. Governor Walton granted Jones a full valid and unconditional pardon. The pardon was regularly presented to the Secretary of State but he declined to attest it or affix the seal or record it in his office. Jones moved the Court praying that an alternative writ of mandamus might issue commanding the Secretary of State to perform these acts. The District Court denied the writ. Jones appealed. The appeal was dismissed on "the ground that as the pardon was incomplete Jones could take no interest under it and therefore had not the special interest requisite for maintaining the writ.

The learned commentator in the *Harvard Law Review* points out that the Court was in error in not granting the writ. "A writ of mandamus issues to compel the performance of a purely ministerial duty on the petition of one having a 'special interest' in the performance of that duty. This opinion assumes that the acts of sealing, attesting and recording a pardon are purely ministerial. The requisite special interest must be distinct from that obtaining in the general public but need not differ in kind. Persons owning land on both sides of a highway who wish the township to keep it in good repair, property-owners desirous of having the drainage commission remove drainage conditions injuring their property, riparian owners who want the Secretary of State to publish a bill providing for the creation of a levee in their district, all these have been held to have sufficient special interest to support mandamus. The interest of the expectant recipient of a pardon in its completion would seem to be an equally distinct and a more compelling interest than any in the cases cited."

In this country Chap. VIII of the Specific Relief Act confers upon the High Courts in the Presidency Towns power to compel a public servant to do a particular act. These Courts formerly enjoyed the right to issue the writ of mandamus as part of their ordinary jurisdiction, but now the exercise of this jurisdiction depends upon sec. 45 of the Specific Relief Act. Where the conditions mentioned in the section are satisfied it is competent to the Court upon a petition to that effect made by a person whose property franchise or personal

right has been likely or is likely to be injured to make an order for the enforcement or prohibition of the specific act in question. The procedure prescribed has been borrowed from English practice and the High Courts generally follow the principles applicable to a writ of mandamus in dealing with an application under Chap. VIII.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

Feb. 6th.—The hearing was concluded of *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*. The arguments of Counsel had occupied 5 days and at the conclusion their Lordships intimated that they would consider their judgment. The case was referred to in the London Notes last week and relates to the right of worship of certain family Thakurs. The Appellant as one of the *shebaitis* claimed to be entitled during his term of office to remove the Thakurs to his own residence. That claim was contested by other members of the family on the ground that it was in contravention of an express declaration in a deed of trust.

Feb. 6th and 7th.—*Kedarnath Goenka v. Anant Prasad Singh* (Patna). This appeal was heard *ex parte*, the Appellant being represented by Messrs. A. M. Dunne, K. C. and E. B. Raikes. In a suit for possession and mesne profits reported in 17 C. W. N., p. 485, the present Appellant's father was successful in establishing his claim, and an order in Council provided for the ascertainment "at the execution stage" of mesne profits. The decree-holders died about 4 years later in 1918 and no application was made by their representatives within 6 months for substitution. In 1920 the Appellant applied for a declaration that the suit had abated and 3 weeks later the representatives of the deceased decree-holders obtained *ex parte* an order for substitution. The application now under appeal was made by the Appellant for cancellation of the order for substitution and for a declaration that the suit had abated. Both Indian Courts rejected the application holding that the inquiry as to mesne profits was a proceeding in execution of a decree within the meaning of Or. 22, r. 12 of the Civil Procedure Code and that therefore r. 3 of that order was not appli-

cable. That view was endorsed by the Privy Council and the appeal was dismissed.

Feb. 9th and 10th.—*Probhudas v. Ganidada* (Bengal). This appeal referred to sugar contracts entered into between the parties. The Appellant was the purchaser and the Respondent seller. Delivery was effected *ex-godown* and the contracts were concluded but the present matter came before the Courts for determination in the form of a special case. The buyer claimed a refund from the seller of an amount calculated on the difference in the tariff value placed on sugar during the pendency of the contracts, the duty having been decreased from Rs. 26-4 to Rs. 16-4. The determination of the question depends on the construction of secs. 3 and 10 of the Indian Tariff Act. The Courts in India decided in favour of the seller. Judgment was reserved.

Mr. W. Wallach for the Appellant.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondent.

Feb. 9th and 10th.—*Ghulam Rasul Khan v. Secretary of State for India* (Lahore). The Appellant in this case had purchased agricultural land in the neighbourhood of Ludhiana and applied to have his name brought on to the Register. Leave was refused on the ground that the applicant was barred by the provisions of the Punjab Land Alienation Act, 1900 in that he was not a member of an agricultural tribe. The suit was then instituted by the applicant for a declaration that he was a mohal Rajput by caste and as such entitled to be a land-holder. The applicant was by profession a vakil. The appeal Court reversed the decision by the trial Court in the applicant's favour. Judgment was reserved.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.

Messrs. Dunne, K. C. and Kenworthy Brown for the Respondent.

Feb. 10th, 12th, 13th, 16th and 17th.—The hearing of an appeal of considerable importance was concluded on February 17th, *Vaithialinga Mudaliar v. Srirangath Anni* (Madras). A Hindu widow Chokkammal purported to adopt her husband's younger brother in 1862. The adopted son died 2 years later and his widow Murugathal obtained possession of the

properties in suit and retained it until 1882 when Chokkammal regained possession.

In 1887 Murugathal brought a suit for the properties, in which she was successful; it being held that although the adoption was invalid she had a title by adverse possession. Murugathal subsequently transferred the property to the contesting Respondents in this appeal. Chokkammal died in 1902 and the suit under appeal was brought by his reversioners in 1905. They claimed that the Respondent's title came to an end on Chokkammal's death and that adverse possession was good only against her and for the period of her life.

The Respondents contended that the widow Chokkammal represented the estate and that a title by adverse possession against her bound the reversioners. They further contended that the claim of the Appellants was *res judicata* by reason of the 1887 suit and was barred by reason of Art. 129 and sec. 29 of the Limitation Act, 1871.

Sir G. Lowndes, K. C. and Messrs. W. Wallach and R. Pillai appeared for the Appellants.

Messrs. L. DeGruyther, K. C. and K. V. L. Narasimham for the Respondents.

The Board was composed of the following members LORD SHAW, LORD CARSON, LORD BLANESBURGH, MR. AMEER ALI and SIR JOHN EDGE.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before SANDERSON, C. J. and RANKIN, J. CIVIL REVISION NO. 1025 OF 1924. KESHORAM PODDAR, Petitioner *v.* NANDA-LAL MULLICK, Opposite Party. The 12th January 1925.

Civil Procedure Code (Act V of 1908), secs. 109 (c) and 110—Leave to appeal to Privy Council from decision of High Court in Revision—Case involving substantial question of law and a question of general public importance, if a fit case for granting leave.

The Petitioner Keshoram Poddar was a tenant under the Opposite Party in respect of certain premises, the standard rent of which, on the Petitioner's application, was fixed by the Controller of Rents at Rs. 4,500. Against this order both parties applied to the President of the Calcutta Improvement Tribunal, for revision in November 1922. These cases ultimately came on for hearing in August 1924, when the President held that the Calcutta Rent Act (III of 1920 and II of 1923) had expired on 31st March 1924, when the Calcutta Rent (Amendment) Act (I of 1924) came into force, whereby premises carrying a rental of over Rs. 250 per mensem were excluded from the operation of the Act, and all proceedings taken in respect of such premises terminated *ipso facto* and that he was *junctus officio* after 31st March 1924 and that he had no jurisdiction to entertain the applications for revision. The Petitioner thereupon obtained a Rule from the High Court on the ground that the Calcutta Rent Act, being an existing statute, the proceedings were saved by the General Clauses Act (I of 1899), but the Rule was ultimately discharged. Thereupon the Petitioner applied for leave to appeal to the Privy Council under secs. 109 (c) and 110, C. P. Code and contended that there was a substantial question of law and a question of general public importance and that there was a right of appeal to the Privy Council. Referred to 14 C. W. N. 667 :

Held—That there did arise a question of general public importance and there was a substantial question of law involved in the case. It was therefore a fit case for appeal to His Majesty in Council.

Mr. B. L. Mitter, Standing Counsel (with Babu Profulla Chandra Chakravarti) for the Petitioner.

Dr. D. N. Mitter (with Babu Narayan Chandra Kar) for the Opposite Party.

J. N. R. Leave to appeal granted.

THE Calcutta Weekly Notes.

Vol. XXIX.]

MONDAY, MARCH 23, 1925

[No. 13.]

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EDITORIAL NOTES—

REPORTS (See Index.)

The Late Lord Curzon of Kedleston.

It is with deep regret that we record the death of Marquess Curzon of Kedleston. He was one of the distinguished men of the present times, who has left his mark in the pages of Indian history and that of Europe as well. Born of a noble family who had by their talent and ability secured a high position in English society, George Nathaniel Curzon not only maintained its high traditions but also shed additional lustre on it. While at Oxford he distinguished himself not only as a scholar but also by his great command of speech and language. He was elected President of the Oxford Union and naturally aspired like its ex-presidents, Gladstone and Asquith, to be one day the Prime Minister of England. He received his early political training under Lord Salisbury and when in 1892 the elective principle was first introduced in the Legislative Councils in India by that conservative Prime Minister, Lord Curzon was the Under-Secretary of State for India. Like his master the Prime Minister and like the present Secretary of State, though professing to be a conservative, he was a bit of a free lance during his Parliamentary career. His rise in public life was rapid. He travelled extensively in the far East. India was a dreamland to him from early life. He published an account of his travels which bears a remarkable impress of his imaginative and youthful mind. He was the centre of an intellectual group of rising Imperialist politicians. In the Conservative Ministry he soon attained the position of the Under-Secretary of the Foreign Affairs. In 1899, his ambition to be the Viceroy and Governor-General of India was fulfilled. No Viceroy after Lord Dalhousie became Governor-General of India at such a comparatively early age. He was an indefatigable worker and unlike other incumbents of this high office, he personally supervised over the responsible work of every department of the State. He began his

career in India brilliantly. He was a man of remarkable courage and had a strong desire to do justice even to the humblest and meanest of His Majesty's subjects quite regardless of powerful opposition. In this connection we need only remind our readers of Lord Curzon's resolution on the *Chapra Constable's* case. A poor constable had gone home on leave and suffered great injustice in the hands of the local executive. Despairing of getting any relief from the local Government he petitioned the Viceroy and Lord Curzon personally intervened and not only gave him relief but punished and censured those who had oppressed him. Then in the 9th *Lancers'* case, where a poor Indian cook was killed and the culprits would not come forward, he censured the regiment and cancelled their leave. In thus espousing the cause of the poor he at one time incurred the severe displeasure of the civilians and the military in India. Similar instances may be multiplied. It will suffice to say that many a poor clerk wrongfully dismissed from the department got relief by memorializing the Viceroy. He effected great improvement in departmental administration. The work he did for the preservation of the ancient monuments of India and the impetus he gave to archeological research in India was worthy of his great culture and would make his name memorable in the pages of Indian history for all times. The present discoverer of Mohengo Daro would have never been heard of but for Lord Curzon admitting him in the archeological department of the Government of India and encouraging him in his researches. Of course we had our differences with him and very serious ones too over the Partition of Bengal. But out of evil cometh good and we are grateful to him that his autocratic rule in this connection gave birth to nationalism and popularized the *Swadeshi* movement throughout India. We fought him and Sir Bamfylde Fuller over a public cause but all the same we must say, we never failed to recognise at heart, the good qualities that were in them. Sir Bamfylde Fuller, before he was forced to retire from India, publicly ex-

claimed regarding the Partition "Every great act required a sacrifice and I am the sacrifice." Lord Curzon might have erred in his policy but we bear him no ill-will on that account. Later in life he changed his ideas about India and during the Dyer debate in the House of Lords, his and Lord Birkenhead's speeches were the most sympathetic towards India. His services in connection with the restoration of peace in Europe and beyond after the Great War are too well-known to require repetition. A man of wonderful talent, energy and devotion to his own country's cause, he worked to the last moment of his physical capacity and actually died in harness. We join in paying this humble homage to his greatness, pray for his eternal peace and ask for forgiveness if we have ever wronged him in life.

Contempt of Courts Bill.

We noticed in these columns last Monday week (9th March) the objects and reasons of the contempt of Courts Bill, which was introduced into the Legislative Assembly this session and which is being circulated for opinion. Its object is two-fold. In the first place it seeks to limit the powers of the High Courts, including those that are Courts of Record, to punish contempt to imprisonment not exceeding six months or fine or both and in the next place to extend the jurisdiction of the High Courts, including the Courts of Judicial Commissioners of the Central Provinces, Oudh and Sindh, not only with regard to contempts in the nature of interference with or obstruction to the administration of justice in such Courts or in Courts subordinate thereto, but in respect of contempts in the nature of what is known as "scandalizing the Court itself." We reproduce below cl. 2 of the Bill:—

2. (1) Whoever, by words either spoken or written or by signs or by visible representation or otherwise, interferes with or obstructs or attempts to interfere with or obstruct the administration of justice in, or brings or attempts to bring into contempt, or lowers or attempts to lower the authority of, a Court specified in the Schedule or a Court subordinate thereto, is said to commit contempt of Court.

(2) Whoever commits any contempt of Court in respect of a Court specified in the Schedule or of a Court subordinate thereto may be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

With regard to the first portion of cl. 2 which seeks to invest the High Courts, specially those which are Courts of Record, with powers to punish interference with or obstruction to the proper administration of justice in Courts subordinate thereto, there can hardly be any reasonable objection. It will be remembered, as we pointed out in noticing the objects and reasons of this Bill, that the Madras and Bombay High Courts have held that as Courts of Record they have this inherent jurisdiction. But Jenkins, C. J., held in the Calcutta High Court in the *Amrita Bazar Patrika* case, when its Editor was charged with contempt, for having commented on a case which was being tried in a Magistrate's Court at Barisal, that the High Court had no jurisdiction to take cognizance of such contempt. Such jurisdiction was exclusively enjoyed by the King's Bench Division in England. His Lordship may have been technically right.

But it appears from *R. v. Davies*, [1906] 1 K. B., p. 32, that the King's Bench Division exercised this jurisdiction only in recent times, there being no reliable earlier authority in this respect excepting that of *R. v. Parke*, [1903] 2 K. B., p. 432. Wills, J., who delivered the judgment of the Court (Alverstone, C. J., Darling, J. and Wills, J.) observed that the King's Bench alone exercised this jurisdiction because it had the power of superintendence and revision over the subordinate Courts. The Chancery and other Divisions of the High Court were no doubt all Courts of Record and could punish summarily for contempt but had no concern with the subordinate Courts. Now the High Courts in India have also powers of superintendence and revision over the Courts subordinate thereto. The High Courts at Calcutta, Madras and Bombay also claim to have inherited common law jurisdiction like the King's Bench Division in many respects. The Madras and the Bombay High Courts, therefore, held that they have as much power to punish contempts of the subordinate Courts as the King's Bench Division. Sir Lawrence Jenkins, however, held that the King's Bench Division according to the doctrine of English common law is *custos morum*, i.e., guardian of the morals of the nation, and in that capacity could exercise this special jurisdiction when occasion required, but the High Courts in India could not exercise any such jurisdiction.

In view of this divergency of opinion in the Presidency High Courts, it is no doubt desirable to remove the conflict by legislation. If the Indian Legislature sought to do this by providing that the High Courts in India could punish at their discretion interference with or obstruction to the administration of justice in the Courts subordinate thereto as is contemplated in *R. v. Davies*, we would hardly have taken any exception to it. We have this confidence in the High Courts that they would not avail themselves of such discretionary powers in any but very exceptional cases. We are further of opinion that the provisions of sec. 228 of the Indian Penal Code and sec. 480 of the Code of Criminal Procedure are ordinarily sufficient to meet cases of contempt committed in the presence of the subordinate Courts. In England such contempts of subordinate Courts are punished by indictment and the same is the case with regard to insults or interruptions made punishable under sec. 228, I. P. C. Sec. 480, Cr. P. C., provides a summary remedy but limits the punishment to Rs. 200. The only cases which are not covered by the existing provisions of the statute law in India are where cases under trial in the subordinate Courts are made the subject-matter of comment in the public press. In such cases there can be no harm in conferring discretionary powers on the High Court to take cognisance of such contempts on the lines laid down in *R. v. Davies*. In this case a woman was charged, with abandoning a child and pending the preliminary enquiry before a Magistrate and before commitment, grave allegations regarding the antecedents and character of the woman were published in a newspaper by Davies, its editor and publisher. A rule was applied for before the King's Bench, which was issued and heard and Davies was fined £100 and ordered to pay costs of the whole proceedings.

Contempt by "scandalizing the Court itself."

But we do most strongly object to invest the High Court and the Judicial Commissioner's Court with powers to attach & commit persons for contempt for offences the dignity of the subordinate Courts, as is contemplated in the latter part of Cl. 2 (1). So far as the High Courts, which are Courts of Record, are concerned, they have long enjoyed

the power exclusively in respect of contempts of their own authority and it is seldom that they make any use of it. After *Surendra Nath Banerjee's* case, the Calcutta High Court has not committed any body to prison for any such contempt. Considerable changes in the judicial interpretation of this power have taken place since then. The High Courts in India would now surely follow the principles laid down by Lord Morris in *McLeod v. St. Aubyn*, [1899] A. C., p. 549 : s.c. 3 C. W. N. (notes) p. cccxvi. Lord Morris said with regard to such contempt that "it is not to be used for the vindication of a judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice."

Lord Morris later on in the judgment says : "Committals for contempt of Court by scandalizing the Court itself have become obsolete in this country (England)." With regard to this the judgment of Russel, L. C. J., in *R. v. Gray*, [1900] 2 Q. B., p. 36, may be cited in support of the view, that it has not become quite obsolete. But in that case the gross character of the contempt coupled with the fact that the Assizes over which Darling, J., was then presiding were not over, weighed with the Lord Chief Justice in exercising this extraordinary jurisdiction. Still in this case no sentence of imprisonment was passed and it may be said to have become a rule since then that only fines are to be inflicted for such contempts. If, however, punishment by imprisonment is now provided by legislation, this rather obsolete form of punishment may again be revived. In ordinary cases where no mischief has been done, an apology ought to suffice.

Lord Morris, no doubt, said, that although such committments have become obsolete in England yet in small colonies consisting of coloured population the exercise of such jurisdiction may in proper cases be considered necessary. But it must also be noted that in this particular case their Lordships held that *McLeod*, a barrister, had been improperly committed for contempt by St. Aubyn, Officiating Chief Justice of St. Vincent, to a

fortnight's imprisonment and fine. The conviction and sentence were quashed and the Chief Justice was ordered by the Judicial Committee of the Privy Council to pay the costs of the proceedings. This decision shows conclusively that the Privy Council is of opinion that the summary power of contempt as exercised even by the superior Courts should be sparingly used and even then with great caution and only in the interest of justice and not from any false notion of personal dignity.

It is therefore altogether unjustifiable on the part of the Indian Legislature to seek to extend the law for promoting a false notion of dignity in our Mofussil Courts. *R. v. Davies*, which marks the farthest limit to which the jurisdiction of the High Courts may be extended in the interest of administration of justice in respect of contempts of the subordinate Courts, far from laying down or suggesting that the King's Bench Division would ever take proceedings in contempt for the maintenance of the dignity of such Courts, expressly says that it should not. At p. 40, Wills, J., repudiates the idea that "the offended dignity of a particular Court or of the persons who compose it is the subject of punishment in such a case," and his Lordship quotes with approval the principle laid down by Lord Justice Bowen in *Helmore v. Smith*, [1886] 1 Ch. D., p. 155, that "the object of the discipline conferred by the Court is, in case of contempt of Court, not to vindicate the dignity of the Court or the person of the Judge but to prevent undue interference with the administration of justice." We have seen that Lord Morris lays down the law in identical terms in *McLeod v. St. Aubyn*. The Indian Legislature will therefore be well-advised either to drop the Contempt of Courts Bill altogether or, in any case, omit the latter part of cl. 2 (1) which, contrary to all principle or precedent, seeks to extend contempt in the nature of "scandalizing the Court itself" to the scandalising of even subordinate Courts and make such offences punishable by the High Courts and Judicial Commissioner's Court in India.

Provisions in the Penal Code and Cr. P. Code for punishment of contempt or obstruction to justice in subordinate Courts.

Sec. 228 of the Indian Penal Code lays down that whoever intentionally offers any insult or

causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

Judicial proceeding being a proceeding in which evidence is or may be legally taken on oath the section covers all Civil, Criminal and Revenue Courts as also Registrars and Sub-Registrars.

Sec. 480 of the Code of Criminal Procedure provides a summary procedure for the trial of these cases of contempt but if this summary procedure is adopted the sentence is limited to a maximum of a fine of two hundred rupees. The section lays down—when any such offence as is described in sec. 175, sec. 178, sec. 179, sec. 180 or sec. 228, I. P. C., is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may if it thinks fit take cognizance of the offence and sentence the offender to a fine not exceeding two hundred rupees and in default of payment to simple imprisonment for a term which may extend to one month unless such fine be sooner paid.

Sec. 480 may be enforced by any Magistrate even if the offender is a European British subject. The offences contemplated by the other sections of the Indian Penal Code mentioned in sec. 480 of the Code of Criminal Procedure may be said to be cognate to the offence of contempt of Court properly so called coming within the purview of sec. 228, I. P. C. Sec. 175 deals with omission to produce a document to a public servant by a person legally bound to produce it. Refusing oath or affirmation duly required by a public servant to make punishable under sec. 178. Sec. 179 with refusing to answer a public servant's question and a person refusing to answer any statement made by him when required to sign that statement by a public servant legally competent to require that he shall sign that statement is punishable under sec. 180 of the Indian Penal Code.

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MONDAY, MARCH 30, 1925

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Verification of confession and identification parade.

There are certain things which Magistrates are sometimes called upon to do during police enquiry. The most noteworthy of these are verification of confessions and identification parades. Almost in every important case in which an accused makes a confession the police ask for a Magistrate being deputed to verify the confession. The Magistrate is taken by the investigating police officer to the place of occurrence where the confessing accused is produced before him and is made to repeat his statement and point out the places referred to therein. As far back as 1902 when Mr. Justice Prinsep was presiding over the criminal bench a reference was made by the Sessions Judge of Gaya for the confirmation of a sentence of death passed in a case in which verification of confession had been resorted to by the police. The prisoner Radha Halwai was arrested by the police almost immediately after a murder said to have been committed by several persons was reported. The very next day he was placed before a Magistrate and made a confession. On the application of the investigating police officer the Magistrate, who was holding the preliminary enquiry deputed a Subordinate Magistrate nominated by the police officer to verify the statement of the accused who was remanded to police custody for that purpose. The Magistrate went to the spot and the accused pointed out to him various places connected with the occurrence and also made some statements to him describing how the murder was committed and giving some details not previously mentioned.

Mr. Justice Prinsep strongly condemned the procedure adopted and observed as follows :—"The proceedings taken before the Magistrate seem to us to be open to the strongest objection. The verification system apparently has been recently introduced in consequence of a circular issued by the Inspector-General of Police last year and there is scarcely a case of any heinous crime in which it is not now put into operation. It can very rarely be adopted for any useful purpose. Its real object seems to be to add fictitious weight to a confession recorded after an accused has been for twenty-four hours in police custody and to embarrass a Judicial Officer when he has to determine at the trial whether that confession which has been repudiated and denied immediately after it was made and on the first opportunity when the prisoner was free from all influences, real or imaginary, from the police, was voluntarily made and whether it is a true statement of what actually took place. From this point of view we think that the practice is very objectionable. The general effect of a verification so conducted would be to give the sanction of a Magistrate's presence to anything that the investigating police officer might bring before him. Such verifications are surely always committed to a Magistrate of the lowest class and of little or no experience. How would the rural and unintelligent public regard proceedings so conducted by a Magistrate in close connection with the police? Is it likely that any complaint would be made to such a Magistrate regarding misconduct of the police? The villagers would certainly not feel that such a complaint would receive proper attention and they would therefore abstain from making a complaint which, if not established, would render them liable to serious consequences." One would naturally expect that a practice so strongly condemned by a Judge of the position and eminence of Mr. Justice Prinsep would be abolished but unfortunately the system of

verification of confession is still in vogue and bears testimony to the disinclination of the police and the executive to give up objectionable practices in spite of the protests of the Hon'ble Judges.

The other objectionable practice is that of holding identification parades in jails. A Magistrate is taken to the jail and the accused mixed up with some other persons are made to stand in a row before him. The police produce persons who profess to be eye-witnesses to the occurrence in question and they identify the accused in the presence of the Magistrate. These persons figure as the important witnesses to the occurrence at the trial and the Magistrate is called to depose that they identified the accused in his presence. The obvious object with which these identification parades are held is to pin the witnesses down to the statements made by them to the police. It is said that one abuse leads to another and *Lal Sing v. Crown*, I. L. R. 5 Lahore 396, is an instance in point. The Magistrate in whose presence the identification parade had been held in jail was called as a witness in the Sessions Court. Instead, however, of stating in Court the details and the results the witness merely referred to certain documents which were described as exhibits in which he stated that his evidence was to be found. These documents were put on the record as his evidence. This strange method of recording evidence called for the strongest remarks from their Lordships. As pointed out by Eforde, J., there is no doubt that it would shorten the labours of a trial Judge if he were to be permitted to record written statements of witnesses in the form of exhibits by the mere production of the witnesses and their testimony that the exhibits embody the details of their evidence, but any person with any knowledge of and regard for judicial procedure should know that such a method of recording testimony would if applied to the witnesses reduce the trial to a mere travesty. As regards the evidentiary value of a statement describing what took place in an identification parade the learned Judge says :—"The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean

that the witness happens to know that person. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight." In the *Barrah dacoity* case Sir Lawrence Jenkins took serious objection to identification parades and held that they are of little probative value.

Courtesy between political rivals.

We noticed in a previous issue the spirit of healthy emulation and generous rivalry that exists between political opponents in England in the service of the country. This never stands in the way of their offering each other courtesy and social amenities in public functions or in private life. We note that Mr. Lloyd George and Mr. Ramsay MacDonald were amongst the pall-bearers at the funeral service held for the late Lord Curzon at Westminster. The following extract from the *Law Times* describes the reception that Lord Oxford and Asquith had on his being introduced into the House of Lords :—

The circumstances accompanying the introduction to the House of Lords of Lord Oxford and Asquith constitute an object-lesson of the most delightful feature of public life in this country—that political differences do not affect personal relationships, and that the foremost political opponents are not infrequently the most intimate personal friends. One of the introducers of the new peer was Lord Balfour, who for more than a generation had faced him in uncompromising opposition in the House of Commons. Lord Curzon, as Leader in the House of Lords of the Government to which Lord Oxford is in opposition, referred to his accession to the House of Lords as conferring an additional lustre and distinction on that assembly, while the House itself was filled with members who desired, by their presence, to manifest their hearty personal goodwill to Lord Oxford, whose old colleagues in the House of Commons, of all parties, filled every available space for strangers in the Chamber of the House of Lords for the purpose of witnessing, with interest and sympathy, the ceremony.

HINDU POLITY.

HINDU POLITY. By K. P. Jayaswal, M.A. (Oxon), Bar-at-Law. Butterworth & Co., Calcutta.

Mr. Jayaswal commenced his researches on the above subject when he was a member of the Calcutta Bar and received considerable encouragement in his work from the late Sir Asutosh Chaudhuri and the editor of this journal: The results of his early researches on the subject were published in our columns in the course of 1911-1912. These issues of the Calcutta Weekly Notes were forwarded to some German savants and they expressed high appreciation of Mr. Jayaswal's work. We can personally testify that Mr. Jayaswal was quite original in his researches in this direction. So much so, that when he used to read the texts that he had collected together and the conclusions that he had drawn from them, we used to chaff him and at the same time ask him to give us more of his *kahani* (fables) before he would convince us that his interesting theories were after all based on a solid foundation of facts. Our scepticism encouraged him to devote critical examination to his data and what is more, to exercise more care and caution in drawing his conclusions, with regard to which he spared no pains to test and verify them himself, and even to court adverse criticism. In the present work he has digested the results of his researches to which he has devoted so many years of industry and scholarship of a kind for which he has a genius all his own. In the present work he has strung together facts and given us a pen and ink sketch of the ancient Hindu polity as he found them recorded in authentic treatises without any dash of colour for distorting our vision. While he was engaged in recasting his published early researches in this scientific form, many an aspirant for cheap literary notoriety sought to bedeck themselves in borrowed plumes and attempted to parade before the public as the pioneers of such research. But Mr. Jayaswal's great contribution to the early history of the Hindus has survived all such spurious attempts to take the shine out of his work and after the many vicissitudes that it had to undergo since it attracted the attention of the Calcutta University, it has emerged as one of the most original contributions to the history of ancient India from the pen of an Indian non-Brahmin

scholar of the present democratic age. We do not say that what Mr. Jayaswal contributes to the stock of knowledge regarding the ancient institutions of Hindusthan is the last word on the subject but we say that he has let in new light into an unexplored region of the ancient civilization of Aryavarta.

This book comes as a surprise to many who are ignorant of the East and as a revelation to those who are learned in its ancient lore. Political institutions of the kind noticed in this work are believed to be comparatively modern in their origin. The author has struck out a new path for himself, which both Indian scholars and European orientalisks will do well to pursue for widening the field of knowledge with regard to this ancient land and thus establish a closer link between the past and present.

We give below a short outline of what this remarkable work principally deals with.

We can all remember the day when it was universally thought that monarchy, absolute and autocratic, was the only constitution that appealed to the Indian mind—and that alone suited the genius of the folk, and consequently the future too (being rooted in the past) would have to be a replica of some form of personal despotic rule.

But Mr. Jayaswal lays the authorities before us. He demonstrates plainly that the root of the constitutions at the dawn of history were the Vedic *Samiti* and *Sabha* and when a King did exist, he had to rule with the consent of these assemblies.

Then the author traces the rise of Hindu republics and their early origin and there was a number of them before the advent of Buddhism. *Sanghas* were political bodies known to Panini and *jana* and *gana* were synonymous expressions which meant the people at large and signified the democratic character of these assemblies. These political *Sanghas* faded into religious organisations modelled after them in Buddhistic times, when this humanitarian religion absorbed within its fold all the moral activities of life. Mr. Jayaswal after noticing the action and re-action between the religious and temporal activities of the ancient Hindus goes on to throw additional light on its outer fringe such as the Licchavis, a liberty-loving republican people whom Dr. Rhys Davids rescued from obscurity.

The *Arthasasthra* has of late been too often quoted by anybody and everybody who poses

as an authority in ancient Indian history, but not with much fruitful result. It is in the hands of the author of *Hindu Polity* that it has done so and been made to yield its quota to his valuable contributions on the subject and led to its general appreciation.

The Greeks have often been quoted only to prove the absence of civilisation in the country, but Mr. Jayaswal proves the mystery of Megasthenes and his successors.

As we have observed before our author is brilliant in generalisation and careful in his details. He gives us a comprehensive survey not only of republics which actually existed in early Hindu times, but also of theories dealt with by the ancient authors.

The evidence of the Mahabharata has been the stock-in-trade of the oriental and occidental scholars of ancient Indian polity but never before have our reasons been roused, our heart touched and our mind convinced.

Our author next passes on to Asoka and his age, and the *Sangha* period which terminates with the advent of the Guptas.

Monarchies next come in for consideration and our readers are already familiar with the magnificent coronation oath originally published in these columns, and dealt with by the author. We are also told of the election of the King in Vedic times as also how he was deposed and re-elected.

The kingship does not degenerate into a mere hereditary office even in the Brahman age. The ancient Hindus, intensely religious and spiritual as they were, avoided the dangers inherent in the theory of Divine Right. Perhaps they regarded any such doctrine as blasphemous. We get too a complete account of the checks and balances which neutralised the evils associated with undiluted despotism. And in details of administration, such as, justice and the raising and disposal of taxation, safe-guards are worked out with admirable logic.

Monarchy leads on to Imperialism, and in this realm there is enough to satisfy the most blatant chauvinistic mentality.

For, in truth, the ancients worked out each theory to its logical consequences.

To appreciate the real worth of the work, it must be carefully studied. It reflects all the more credit on the author that in a truly scholarly spirit he claims no personal credit for it and throws open the wealth of information collected by him for the benefit of

the public and appeals to co-workers in the same field to regard them as their own and make any use of them they like for the advancement of human knowledge. We congratulate him for lifting the darkness that has so long hung heavily over this land of mystery and hope, it will contribute to a better understanding of the East by the West.

MORTGAGE OF NON-EXISTENT PROPERTY.

By A. P. PANDAY, M.Sc., LL.B.

An instrument, professing to convey property not in existence at the time, is void at law for the simple reason that the subject-matter of the contract does not exist at the time and therefore there is nothing upon which the contract can operate. Likewise, in equity, an assignment dealing with property which does not exist is inoperative and ineffective as an immediate alienation for the reason aforesaid. To quote the weighty pronouncement of Phillimore, L. J., in *Industrial Finance Syndicate, Ltd. v. Lind*, [1915] 2 Ch. D. 315, "a man cannot, in equity, any more than at law, assign what has no existence." But equity does not stop here. It proceeds further and gives effect to an assignment of future property by treating it as a contract to assign when such property comes into existence. The moment, the assignor comes to own the property, answering the description given in the contract, equity looks upon the ownership of the assignor as that of a trustee for the benefit of the assignee in accordance with the maxim, which Lord Thurlow said, he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any one claiming under him, voluntarily or with notice, raises a trust." In the initial stage of the contract, the assignee is only an equitable assignee, but he, at once, acquires the legal estate and becomes entitled to the conveyance of the property when it comes into existence. The principle is not far to seek. It is only an enunciation of the rule that equity considers that as done which ought to be done. A contract for valuable consideration engaging to transfer property to come into existence at some time in future, is looked upon as a complete transaction when the property answer-

ing the description given in the contract comes into existence, and equity treating that as done which ought to be done, compels the assignor to convey the property to the assignee. In other terms, a man may contract to assign property, of which he is not possessed at the time, for valuable consideration and equity will fasten upon the property when it does become possessed of it. Obviously, therefore, an assignment of this description is recognised not as an immediate alienation but as a contract to come into force when the promisor happens to possess the property contemplated by the contract.

But a transaction of this class ought not to be mixed up and confused with executory contracts. The assignee, at the time of the assignment, fulfils his part of the obligation. The only thing that remains to be done is the performance of his obligation by the assignor when the property comes into existence. To be more precise, an assignment of this class is a present transfer to come into force at a subsequent period on the happening of a certain contingency and equity comes to the rescue of the assignee when the contingency takes place. But the nature of the relief granted by equity is dependent upon the terms of the contract and the class of property involved in the transaction. In the case of moveable property, the ends of justice are satisfied if damages are awarded to the assignee when the assignor fails to carry out his part of the obligation. But if the assignment relates to immoveable property money is hardly a consolation to the aggrieved assignee. Land has got its own special value and is incapable of assessment in coins. Under these circumstances, the equitable doctrine of specific performance comes into play, and the assignor is compelled to convey the legal estate in the property to the assignee. But the condition precedent to the award of a decree for specific performance is the existence of something specific in respect to which performance can be directed. In other words, the subject-matter of the assignment must be so phrased as to be capable of identification. It is not necessary that it should admit of identification at the time of the assignment but it should be capable of identification when the assignment is sought to be enforced. Then again, the terms of the assignment should not be so broad and comprehensive as to cover too wide an area. A contract engaging to trans-

fer all the after-acquired earnings of an individual is inequitable and offensive to public policy because it is so comprehensive as to denude the mortgagor of the means of maintaining himself. An assignment, embracing so wide and extensive a subject-matter, will not be enforced by a Court of Equity.

The leading English case—rather the classical case—with reference to this transaction is *Holroyd v. Marshall*, 10 H. L. C. 191. The facts of the case, in short, are that Taylor, the owner of certain machinery in a mill, executed a deed in favour of Holroyd by which it was declared that the machinery was the property of Holroyd and it was further covenanted that all machinery which would henceforth be brought into the mill will belong to Holroyd. The Sheriff seized the machinery so brought in by Taylor, Holroyd claimed them as an equitable assignee. Therefore the question was as to what was the position of Holroyd. Lord Westbury answers: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives consideration for the contract and afterwards becomes possessed of the property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee immediately on the property being acquired . . . It follows, that immediately, on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagee, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question."

Another case of equal importance is *Edward Tailby v. The Official Receiver*, 13 App. Cas. 523. Herein, the question for determination was whether an assignment, by way of security, of certain book-debts due and owing, or which might during the continuance of the security become due and owing, to the mortgagor in any trade which he might, thereafter, carry on in any place was valid so as to give the assignee a good title to them when they came into existence. "There is," says Lord Watson, at p. 533, "but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall

answer the description in the assignment, or in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse* or *in posse* (in actual or possible existence), will not affect the assignee's right to those things which are capable of ascertainment or are identified."

The case of *Collyer v. Isaacs*, to be found in 19 Ch. D. 342, provides interesting reading on the question whether a debtor, after the order of discharge, is free from liability due to a mortgagee of this class if the mortgagee does not choose to prove his security bond in insolvency proceedings. The debtor, in this case, executed a mortgage-security to his creditor which contained in form an assignment of all future chattels which should be brought upon certain premises. Then the debtor applied in insolvency that his affairs should be liquidated and subsequently obtained an order for discharge. The debtor, after his discharge, brought other chattels on the premises, and the creditor claimed these chattels under his mortgage-security. The debtor brought this action to prevent, by injunction, his creditor from selling his after-acquired chattels. Jessel, M. R., says, "The creditor had a mortgage-security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels Until the property comes into existence, the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence, it is a contract for the breach of which he will incur liability." As the creditor did not prove his mortgage-security in the course of the insolvency proceedings, it was held, that the debtor, after the order of discharge, was exempted from every obligation under the mortgage-security and no liability attached to the chattels brought on the premises subsequent to the order of discharge.

The cases of *Belding v. Read*, 3 H. & C. 955 and *In re Clarke, Coombe v. Carter*, 36 Ch. D.

348, illustrate that mortgage of future property is valid.

Now let us turn to the law of this country and find out whether there is any act or provision of law which sanctions transactions of the type under consideration. The Transfer of Property Act, *prima facie*, deals with disposition of property *in presenti*. It does not expressly provide for the transfer of future property.

The words "transfer of property" have been defined by sec. 5 of the said Act as, "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons." The presence of a comma after the word "property" and before the words "in present or in future," suggests that the words "in present or in future" govern and qualify the verb "conveys" and not the noun "property." It is unfortunate that the Legislature did not deem it advisable to lay down a definition of the word "property" with which the Act deals. Now, this argument is strengthened by the collocation of sec. 6 which enumerates a list of exceptions to the rule that "property of any kind may be transferred" and mentions in the forefront that a mere chance of succession, a mere expectation to receive a legacy on the death of a relation or any other mere possibility of allied nature is inalienable. In other words, it prohibits transfer of a particular class of future property. As a matter of academical interest, it will be an excusable digression, to mention here that there is a divergence of opinion in the English Judiciary on this particular point. Lord Hardwicke has held in *Channey v. Graydon*, 2 Atk. 610, that though in law a possibility is not assignable, yet in equity where it is done for a valuable consideration, it has been held to be assignable and transmissible to the representative of the devisee. While, to the contrary, Lord Eldon has observed in *Carleton v. Leighton*, 3 Merivale 667 (1805) at p. 671, "That the expectancy of an heir-presumptive or apparent (the fee simple being in the ancestor) was not an interest or a possibility nor was capable of being made the subject of assignment or contract." But so far as this country is concerned, the section has settled that such a property is not capable of alienation and for a very good reason, if speculation is permissible. The transfer of such a possibility is an offence

against public policy, inasmuch as the transferee, in order to achieve the fruit of his bargain, may yield to the temptation of bringing about, somehow or other, the end of the life which stands between his transferor and the property, the subject-matter of the contract.

Now the next question is, does sec. 6 of the Act forbid transfer of future property of every description? In other words, does the expression "any other mere possibility of a like nature" embrace future property of every description or is its scope to be confined to the property *ejusdem generis* with those immediately preceding? It is a settled rule of interpretation that the general word which follows particular and specific words of the same nature as itself, takes its meaning from them, and is presumed to be restricted to the same genus as those words. [See the observation of Willes, J., in *Fenwick v. Schmulz*, L. R. 3 C. P. 313.] Further to construe this into an absolute prohibition against transfer of future property will be imputing ignorance to the framers of the Act in respect to the well-known cases of *Holroyd v. Marshall* and *Paiby v. Official Receiver*, noticed above. Therefore it can be safely said that this section is exhaustive and not illustrative. It enacts against the transfer of a particular class of future property only. In other words, a mere chance of succession, a mere expectation to receive a legacy or a mere possibility of like nature is an exception to the rule that future property can be made the subject-matter of assignment. The doctrine of feeding the grant by estoppel, embodied in sec. 43 of the Act, is an illustration of the intention of the Legislature to recognise the validity of the transaction under consideration. If the grantor purports to convey a property, to which he has got no title at the time and if he happens to own the property subsequently, then the property passes at once to feed the grant and the grantor is estopped from going back upon the grant.

Turning to the case-law, the earliest case on the point is *Lalla Teeluckdharee Lall v. The Court of Wards and another*, [1869] 11 W. R. 149. Teeluckdharee borrowed money on the security of certain fees in deposit or to be deposited to his credit in the Collectorate. The question for determination was as to what was the character of the mortgagee. The Hon'ble E. Jackson and C. Hobhouse,

JJ., upheld the mortgage and entered judgment for the mortgagee.

The question involved in the case of *Misri Lal and others v. Mozhar Hossain and others*, I. L. R. 13 Cal. 262, was whether the mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction. "Such a transaction," observe their Lordships Mr. Justice Mitter and Mr. Justice Agnew, at p. 264, "as this, is neither governed by the Transfer of Property Act nor by the Contract Act. The transaction is in the nature of an agreement to mortgage moveable property that may come into existence in future. We see no reason that it is not valid."

The case of *Bansidhar v. Sant Lal and another*, I. L. R. 10 All. 133, is another judicial pronouncement on the validity of mortgage of future indigo crops.

The case of *Gyadin and others v. Kashi Gir*, I. L. R. 29 All. 163, deals with mortgage of immoveable property to come into existence in future. The mortgagor, in order to pre-empt a share in a village borrowed a sum of Rs. 3,000 from the mortgagee on the security of the property he was already owner of and also the share which he was seeking to pre-empt. The mortgagor succeeded in his suit for pre-emption and the present suit was brought by the mortgagee to recover his money by the sale of the pre-empted property. The point for determination was whether the mortgage *quid* the pre-empted property was valid? Stanley, C. J. and Burkitt, J., observe at p. 164, "It appears to us that when the mortgagor acquired by pre-emption, and got possession of the pre-empted property, equity, treating that as done which ought to be done, gave the mortgagee a charge by way of mortgage upon the pre-empted share, and in fact, placed the Plaintiff as regards that property in the position of mortgagees."

Lastly, the case of *Sukh Lal v. Bishambhar*, I. L. R. 39 All. 196, is an authority for the proposition that the mortgage of offerings, receivable by a Mahabrahmin in his professional capacity is valid. The cases to be found in 7 C. L. J. 387, and I. L. R. 38 Mad. 500, will provide interesting reading on the point.

Now, let us consider some of the incidents of such transactions.

Firstly, whether it prevails against a *bond fide* transferee without notice?

The answer is "no," because it is only an "equitable security" and can therefore be defeated by a transferee who purchases the hypothecated property *bonâ fide* and without notice of the encumbrance over it. By purchase, the legal title passes and vests in the vendee and inasmuch as he has no notice of the existence of the encumbrance, therefore as between the mortgagee and the vendee equities being equal, the law prevails and the vendee defeats the mortgagee. But the case is otherwise, if he purchases the property with the notice of the encumbrance over it.

Secondly, in case of two mortgages created in favour of two different persons, one after the other, can the puisne encumbrancer acquire priority by taking possession of the mortgaged property as soon as it is available?

Brett and Mitra JJ.; answer this question in the negative in the case of *Baldeo Parshad Sahu v. A. B. Miller*, I. L. R. 31 Cal. 667. At p. 678, the learned Judges observe, "We think, it is clear that, where, as in this case, there were mortgages to the creditor of property which was to come into existence in future, and when the creditor had already paid the consideration, the property, that is to say, the indigo cakes, were bound from the moment that Mr. Wilson acquired them, and from that moment he became the trustee of the property for the creditor, who as *cestui qui* trust acquired an equitable estate or interest in the property. The delivery after acquisition of the cakes to the Plaintiff's servant, if there was in fact such a delivery, could not have destroyed the equitable interest of Messrs. Moran & Co., already existing in them unless, indeed the Plaintiffs were *bonâ fide* transferees for value without notice."

As a result of the various decisions, some of which have been noticed above, the following propositions may be deduced:—

(1) A valid mortgage can be created over property, moveable or immovable, which is to come into existence in future.

(2) The phraseology of the mortgage-security should be clear enough to indicate the intention to create the mortgages.

(3) The terms of the mortgage-security should not be vague, *firstly*, in the sense of being obscure, and indefinite so as to render identification beyond the range of probability, *secondly*, in the sense of embracing such a large area as to offend against public policy.

(1) The mortgage is ineffectual against a *bonâ fide* transferee without notice.

(5) The subject-matter of the mortgage should be capable of identification at the time the mortgage is sought to be enforced.

Correspondence.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR, May I crave the hospitality of your columns for the purpose of discussing an important question of every day occurrence in the Civil Courts.

In Chittagong and probably in some other Districts as well, there exists the practice of signing the pleadings cross-wise in the right hand top corner at every page from start to finish. This practice does not however seem to be wholesome nor does it appear to be consistent with the law and High Court Circular and as such sometime leads to unnecessary hardship upon litigants. In Chittagong the practice is so very rigid that the Courts are almost prepared to reject the pleadings unless they bear signatures of the parties at every page. The law on this point is contained in Or. 6, r. 14 and Or. 29, r. 1 of the Civil Procedure Code but nowhere is it said that the pleading is to be signed at every page. A pleading is completed in the last page and if the party signs it at the end it seems sufficient. The High Court Circular is silent on the point but the practice as it obtains in the Calcutta High Court is to sign the pleadings at the bottom by the party and his pleader. The applications for certificate under Guardians and Wards Act VIII of 1890 and Succession Certificate Act VII of 1890 which must be signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint are required to be signed at the end according to set forms prescribed therefor. The head-note of Or. 29, r. 1 is "subscription and verification of pleading" and in the 1908 Edition of Woodroffe and Amir Ali's Civil Procedure Code there is a note under Or. 6, r. 14 and 15 thus, "the rule requires that the plaint as well as written statement should be subscribed by the party and his pleader if any." Now the ordinary dictionary meaning of the word "subscribe" as distinguished from "superscribe" is to sign underneath. So it does not appear that the intention of the legislature was ever to insist on the superscription or the signing of pleadings cross-wise at the right hand top corner of every page. As a practice quite inconsistent with the provisions and the spirit of law should not be allowed to continue only because it is time-honoured, it is necessary that the matter should be thoroughly ventilated with a view to its discontinuance.

Yours faithfully,
HEMENDRA NATH DUTT, B.L.,
Pleader.

Chittagong,
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Ring out the old and Ring in the new.

Easter Monday, the 13th of April next, coincides this year with the last day of Bengalee year. The first day of the new year is not celebrated as a festive day in Bengal as it is in the European countries but the last day of the year is observed as such. It is observed as a gala day by the masses and the working people. But the spirit in which it is celebrated is somewhat different from the celebration of the New Year in Europe. In the West it is observed as a day for entertainment and exchange of greetings between relations and friends. The celebration commences from the previous night when the old year is rung out and the new year is rung in. Here, however, people prepare themselves for doing penance from weeks ahead. Many, specially working men, observe *Sanyas*, dissociate themselves from their daily occupations and their worldly surroundings, assume the garb, food and life of ascetics. They dedicate themselves to the God Siva, who is the ideal of all ascetics and is also worshipped daily in every orthodox home, who represents in himself the eternal changes in the process of evolution of life, spirit and matter in this universe. To put it shortly, he may be said to represent the spirit that is behind all cosmic changes and it must be for this reason that the close of the old year and the advent of the new is celebrated by the people pre-eminently by his worship, by the observance of asceticism, by the doing of penance and subjecting this mortal flesh to austere discipline and hardship. Early in the morn of the last day of the year, these devotees take a dip in the holy river, make a meal of fruits and feel by the end of the day that they have expiated for all their shortcomings of the closing year. The

climax is marked by the *charak pooja* and by swinging on the sacred wheel raised aloft by a long pole fixed firmly to earth, which is emblematic of the eternal cycle. This day of penance is, however, observed by the multitude not unmingled with levity. They contribute to the public merriment by indulging in various kinds of masquerade and by caricaturing the striking events of the year and those connected with it. Such combination of penance and merriment is not unknown in England. Shrove Tuesday which was a day of penances is now celebrated in somewhat similar fashion. This shows that there is a kinship in ordinary human nature in the East and the West.

The 1st day of Byak, the New Year's day in Bengal is, however, regarded in a more matter of fact and businesslike manner. It is only the traders who celebrate it by decorating their shops, closing their old accounts and opening new ones, inviting their customers and entertaining them with light refreshment. In this respect their hospitality is not quite disinterested. It is the custom of the market, that customers visiting tradesmen's shops or sending their representatives to partake of their hospitality have to make a part payment of a small sum, usually a rupee, on the previous year's account. This serves to save limitation and the sweets that are then given are thus given not in vain. The last day of the Bengalee year is also the last day of the spring and the Bengalee new year is the first day of the summer. We note that in England the 19th April has been fixed by statute as the first day of summer, that is, only five days after Bengalee New Year's day. We wish all our readers a happy new year and many many prosperous returns of the same.

Omnipotence of Parliament.

Can the Parliament or a Legislature bind down its successor by any course of policy or legislation? The following extract from our

legal contemporary will be found interesting in this connection :—

On the 10th Feb., in the House of Commons, the great constitutional doctrine of the omnipotence of Parliament and of the necessary limitation of that omnipotence was maintained and vindicated. The words of Sir William Anson and of Professor Dicey, written nearly twenty years ago, are exactly applicable to the incident. "The omnipotence of Parliament is," writes Sir William Anson, "available for change, but cannot stereotype rule of practice. Its power is a present power, but cannot be projected into the future so as to bind the same Parliament on a future day or a future Parliament." "That Parliaments" writes Professor Dicey, "have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure. Of statutes intended to arrest the possible course of future legislation, the most noteworthy are the Acts which embody the treaties of Union with Ireland and Scotland." On the second reading of the Church of Scotland (Property and Endowments) Bill Mr. McLean raised a point of order which he said involved a grave constitutional issue. If the House proceeded with the consideration of this Bill, it meant, he urged, that the Treaty of Union between England and Scotland would cease to exist, and he asked the Speaker to give a ruling on the point. The Bill was an alteration in the government of the Church of Scotland and therein it violated the Act of Security and the Act of Union. The Speaker said that the House had frequently considered and adopted Bills of a similar character affecting Acts on the Statute Book, and it would be a serious thing to hold that the House was not supreme in matters of legislation. He could come to no other decision than, that the power of Parliament was supreme in the matter. In reply to a further question, the Speaker put the doctrine of Parliamentary omnipotence and its limitations concisely, thus: "What Parliament has done Parliament can undo." The provisions of the Treaty of Union with Scotland have been altered on previous occasions. The declaration of the Speaker that Parliament is supreme in legislation, emphasises the fact that the most prominent function of Parliament is legislation. The control which Parliament can exercise over affairs is at least indirect, its control over legislation is direct and absolute. Sir William Anson thus tersely describes the position: "The sovereignty of Parliament is displayed in legislation."

however no reference at all is made in the judgment in question. The Calcutta High Court has repeatedly laid down that the provisions of sec. 342 of the Code of Criminal Procedure are mandatory and must be followed and deviation therefrom renders the whole trial void. In the case in question it has been held that the filing of a written statement by the accused relieves the Magistrate from the necessity of examining the accused orally in reference to the matters elicited in the cross-examination and re-examination of the prosecution witnesses and that non-observance of the procedure laid down in sec. 342 does not vitiate the trial unless it is shown that the accused has been prejudiced.

Sec. 256, sub-sec. (2) provides that if the accused puts in any written statement the Magistrate shall file it with the record. An examination of secs. 255 and 256 of the Code of Criminal Procedure leaves no room for doubt that the time of taking a written statement filed by the accused synchronises with the recording of his plea. After that is done witnesses already examined by the prosecution are re-called if the accused so desires and they are cross-examined and re-examined and the evidence of the remaining witnesses for the prosecution is next taken and they are cross-examined and re-examined. At this stage the accused is to be called upon to enter upon his defence and produce his evidence. It is exactly at this stage that the Court is bound under sec. 342 to question the accused generally on the case for the purpose of enabling him to explain any circumstances appearing in the evidence against him. It is difficult to imagine how the filing of a written statement can relieve a Court from performing its duty which under the law it is to do at an altogether different stage of the trial, namely, after the trial has proceeded much further and the Court is in possession of the complete evidence for the prosecution.

Saiyid Mohiuddin v. The King-Emperor, 1925 Pat. 112.

The judgment of the Patna High Court in *Saiyid Mohiuddin v. The King-Emperor*, 1925 Pat. 112, is in direct opposition to a series of rulings of the Calcutta High Court to which

In this country an accused is not allowed to give evidence on his own behalf and in view of this sec. 342 is of cardinal importance. There is all the difference in the world between a written statement presumably prepared by the lawyers appearing for the defence, and a statement made by the accused himself, so that the Magistrate can observe his de-

meanour and draw his conclusions as to the value of his statement. In this country it often happens that a prisoner is tried in a language which he cannot follow and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything he may be desirous of stating. It is also important to have regard to the time at which this examination should take place. To ask an accused for his defence before he has the whole of the prosecution evidence in front of him is not a compliance with sec. 342 and it follows therefore that a written statement which is filed before the whole of the prosecution evidence is finished cannot take the place of the examination of the accused after all the witnesses for the prosecution have been examined, cross-examined and re-examined. The object of the legislature in enacting sec. 342 is quite clear and the provision of the statute must be strictly enforced and the question of prejudice ought not to come in. Sec. 537 was certainly not inserted in the Code for being invoked on any and every occasion as a shield against irregularities perpetrated by the subordinate Criminal Courts. The only way to secure the proper observance of the law by the subordinate Courts is for the High Court to interfere whenever any departure from the established procedure comes to its notice. So far as sec. 342 is concerned the matter is one of paramount importance and non-compliance with it cannot be passed over on the ground of technicality.

PECUNIARY JURISDICTION IN PARTITION SUITS.

There is a conflict of rulings as to what should be considered the value of the suit for the purpose of jurisdiction . . . whether it should be the value of the entire property sought to be partitioned or the value of the share of the Plaintiff in the said property. The Bombay, Madras and the Allahabad High Courts have invariably held that in a suit for partition, for the purpose of jurisdiction, the value of the suit is not that of the entire property but only of the share of the Plaintiff in the said property. The view of the Calcutta

High Court to the contrary is to be found in the recent ruling of his Lordship (Dwarkanath Chakravarti, J.) in *Rajani v. Rajabala*, I. L. R. 52 Cal. 128 : s.c. 29 C. W. N. 76, in which the earlier rulings are cited.

The view of the Patna High Court appears to be still unsettled. The point appears to have been debated as early as in 1920, in *Dukhi v. Hanhar*, 5 P. L. J. 540, also reported in 1 P. L. T. 595, and hence it is to be seen if it departs from the settled practice of the Calcutta High Court.

Lord Halsbury is reported to have once said that law was not a logical science. In *Quinn v. Leatham*, 1901 A. C. 495 at p. 506, his Lordship said that "a case is only an authority of what it actually decides and not for every proposition that may seem to follow logically from it." In *Barindra Kumar Ghosh v. Emperor*, known as the *Alipur Bomb case*, I. L. R. 37 Cal. 487, their Lordships observed :— "That which was an exposition of law necessary for the judgment then pronounced is not *obiter dictum*. It is the part of the law which is guiding the judgment and part of the law he is bound to expound in the judgment he is pronouncing."

In 5 P. L. J. 540 : s. c. 1 P. L. T. 595, the facts are that there had been a previous compromise decree for partition during the minority of the Plaintiff who challenged the validity thereof and brought the suit for an adjudication that the compromise decree was not binding upon him and that he was in joint possession, with the Defendants, of the ancestral properties, and for a declaration of his 1/8th share in the entire properties, and of his right to effect a partition thereof. It was held therein that the suit was one for declaration and consequential reliefs. The law appears to be clear as to what court-fee should be paid on such a suit and following I. L. R. 42 Cal. 370, their Lordships ruled that the court-fee payable was *ad valorem* on the loss to the Plaintiff. Their Lordships then ruled that in a declaratory suit which affects a decree for over Rs. 5,000, though the Plaintiff's share was below Rs. 5,000, the Plaintiff need pay court-fee on the latter amount and that the valuation for the purpose of court-fee is the same as that for purpose of jurisdiction. Thus, it is clear that this ruling is no authority for the broad proposition that the value of a suit for partition for the purpose of jurisdiction is the value of the share claimed by the Plaintiff.

In *Ranajit v. M. Qasim*, I. L. R. 2 Pat. 432 : s.c. 4 P. L. T. 257, their Lordships (Das and Kulwant Sahay, JJ.) in referring to 5 P. L. J., mentioned above, which they refused to follow, made the following observations :— " Their Lordships (Jwala Prosad and Adami, JJ.) held that having regard to the nature of the suit and the reliefs asked for, the value of the suit for purpose of jurisdiction was the value of the Plaintiff's share in the properties and not the value of the entire joint family property. No doubt, in considering the question as to whether the appeal lay to the High Court or to the District Court, their Lordships considered the broad proposition as to the value of suits in partition cases, but to my mind there is a distinction between suits for partition pure and simple where the Plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suits where the Plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case it is the value of the Plaintiff's share which will determine the jurisdiction of the Court and not the value of entire property. In the present case, there is no question as regards the title of the Plaintiffs, the only question before the Court was as regards partition; therefore the value of the whole of the properties sought to be partitioned must be the value for the purpose of jurisdiction." Their Lordships then concluded the judgment as follows :—" The Calcutta High Court has uniformly adopted this view and I (i.e., Kulwant Sahay, J., Das, J., agreeing) feel inclined to follow the same."

In I. L. R. 52 Cal. 128 : s.c. 29 C. W. N. 76 cited above, Chakravarti, J., however, came to the opposite conclusion. His Lordship observes :—" It has never been doubted that a Plaintiff can, in a partition suit, if necessary, establish his title and his right to joint possession and then if his title is good, demand in the same suit possession, not joint possession, but separate possession by partition. If this is so, the jurisdiction of the Court would be determined by the value of the entire property which is sought to be partitioned." The facts on which these observations are based are that the Plaintiff filed a plaint for partition suit in which he alleged that he was entitled to a four annas share of the family properties along with some of the Defendants. The Plaintiff further alleged that he was in possession but that a cloud had been thrown upon his title on account

of a certain suit previously instituted and also on account of an erroneous record in the record-of-rights. In this ruling his Lordship pointed out a confusion of ideas, as regards *ad valorem* court-fees payable in certain cases of partition and the valuation for purposes of jurisdiction and observed as follows :—" But it seems to us that, in the present case, the Plaintiff had to establish his title and had to establish his right to joint possession which was denied, before he could seek partition of the property in suit. In that case, the position would be, as was laid down by their Lordships in the case of *Kirty Charn Mitter v. Anath Deb*, I. L. R. 8 Cal. 757, that the Plaintiff would be bound to pay *ad valorem* court-fee upon the value of the share that he claimed." Though in the particular case, *ad valorem* court-fee was paid on the Plaintiff's share, his Lordship further pointed out that that fact would not make the case triable by the Munsif, if the Plaintiff's share was within the pecuniary jurisdiction of the Munsif.

In the case of *Ranajit v. Qasim*, cited above, their Lordships expressly pointed out that there was no dispute as regards Plaintiff's title to partition, and if that be so, it is doubtful if that ruling may be any authority for a case like I. L. R. 52 Cal. 128 : s.c. 29 C. W. N. 76 in which such a question directly arose.

In one of the rulings of the Calcutta High Court, it was pointed out that if the value of the whole property to be partitioned was not taken to be the valuation for the purpose of jurisdiction, very large properties would be affected by the decisions of less experienced Courts. The opinion of other High Courts is to be found in I. L. R. 22 Bom. 351, 20 Mad. 289 and 24 All. 381 and need not be repeated. Like all opinions, something has to be said on both sides, and they differ. I think that an authoritative pronouncement of their Lordships of the Privy Council or a legislative enactment should set at rest these conflicting opinions and bring about an uniformity of practice throughout India.

KHETRA NATH SINGHA,

THE Calcutta Weekly Notes.

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Preston v. Grant [1 K. B. (1925) 177]. Sale of adulterated food—Notice.

It is a matter of common experience that dealers in food-stuffs exhibit notices in their places of business to the effect that adulterated articles are sold by them. The object of these notices is to evade the statute which makes it penal for a dealer to supply a purchaser with an article other than what is demanded by him. In this city in stalls where milk is sold a notice is invariably to be found to the effect that milk adulterated with water is sold there. Is the seller protected by such a notice? This question arose in a recent case in England [Preston v. Grant, 1 K. B. (1925) p. 177]. An Inspector under the Sale of Food and Drugs Act called at the Defendant's hotel and asked for half a pint of whisky with which he was supplied. The public analyst analysed the whisky and certified that it was under proof. The Defendant was prosecuted. It appeared that at the time of the sale a notice was exhibited at the bar and over the fire place and the notice was also exhibited in a room at the back of the bar which read as follows:—"All spirits sold in this establishment are diluted and no alcoholic strength is guaranteed." It was found that the Inspector did not observe the notice and his attention was not drawn to it, nor was he told that the spirits sold to him were sold as diluted spirits at or before the time he made the purchase. On behalf of the Defendant it was contended that he was protected by the notice, the terms of which were plain and unambiguous and which was sufficiently brought to the attention of the customer by being exhibited in the bar. Reliance was placed on *Pearks, Gunston and Tee Limited v. Houghton*, 1 K. B. (1902) 889. In that case the Appellants, a firm of provision

merchants, displayed on the wall of their shop in a conspicuous position so as to be visible to any one entering the shop a large notice to the effect that their butter as sold at that establishment was choicest butter, blended with pure English full cream milk by new and improved machinery whereby it retained about 20 to 24 per cent. of moisture. A purchaser who did not see the notice and whose attention was not called to it bought half a pound of shilling butter which when handed to him was wrapped in two pieces of paper; on the inside wrapper was printed a notice similar to that hung up in the shop. When analysed the butter was found to contain a percentage of water which was in excess of the natural amount. Mr. Asquith who argued the case for the Appellants contended that when the seller brought to the purchaser's knowledge the fact that the article sold was not of the nature, substance or quality of the article demanded there was no offence and it was immaterial that the purchaser did not in fact see the notice. The conviction was quashed and Lord Alverston pointed out that inasmuch as the Appellants sold only one kind of butter, namely, blended butter, they were protected by the notice; but the case was different from that of a man selling various kinds of butter and putting up a notice like the one in question with a view to his protection. In the present case Lord Hewart, C. J., observed as follows:—"Here the purchaser did not observe the notice and his attention was not drawn to it. He got something different from what he demanded, whereas in *Pearks, Gunston and Tee v. Houghton*, the purchaser got the article which he demanded, namely, blended butter. The whole question is whether the Respondent was protected by the notices. In my opinion he was not so protected. There is no such thing as constructive notice in a case of this kind. Each purchase is an isolated transaction and if the seller chooses to have recourse to a general warning he runs the risk of being unprotected owing to the notice not reaching the particular purchaser. Where a sale has taken place of an article of food which is not of the nature, substance and quality demanded the presumption that the purchaser has been

prejudiced is not rebutted by proof of the existence of a notice which he did not see and to which his attention was not called."

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Contributed.)

I

Everyone interested in the moral and the economic progress of the country, will feel grateful to the Civil Justice Committee for the infinite pains they have taken, the innumerable measures of reform suggested and for the deep sympathy for the litigant public and the witnesses they have shown. Thoroughness can never be claimed in a work of this nature, nor are the measures formulated in a final shape. But they are exceedingly valuable as showing us the lines in which changes ought to take place. The detailed workings must be left to the different High Courts, the executive governments of the different provinces and the different legislatures.

In these articles, I must confine myself to an examination of the more important points which have special application in Bengal. A detailed examination will be undesirable and uninteresting. I propose to start from the bottom of the judicial organisation.

The Committee have recommended amalgamation of all Munsifs' offices located at one station, and their being placed in charge of a Munsif, to be styled the Sub-Divisional Munsif, who will receive all plaints and applications and will distribute the contested work among his colleagues. Members of the service may not unlikely resent this assertion of authority by those who erstwhile had held the same position as they. But the present system is not only uneconomical, but has been mainly responsible for that laxity in control over the subordinate staff and that weakness in dealing with abuses of the legal procedure, which have become a reproach to the subordinate judiciary. Among a people who are by habit and by tradition unpunctual and lax in their thoughts and habits, none but lax officers can command popularity. If there are three or four judicial officers at a station, a loose practice introduced in one Court is invariably found to re-act on the practice and procedure in the other Courts and the officer who is inclined to be strict finds the practices of the other Courts a serious handicap to his work.

The present system has been responsible for

unequal distribution of work and for serious waste of a judicial officer's time. The local Sub-Divisional Munsif will be in a better position to judge of the quantity and the relative complexity of the work of his colleagues than the District Judge who lives far off.

The initiation of this reform may be effected merely by administrative action of the Local Government. Under the powers vested in it under the Bengal Civil Courts Act, 1887, all Munsifs' Courts at each station, with the exception of one in each may be abolished, the senior Munsif at each station may be placed in charge of that Court, and all the other officers may be appointed additional Munsifs. The immediate effect will be amalgamation of all work in a single Court, which can distribute work amongst others. In the Central Provinces this system has worked very satisfactorily. In fact this is the practice in places where several District Judges work and in a modified form this is the practice of the Calcutta High Court.

The proposal for appointment of a judicial officer in each District as Registrar of the District Judge's Court, will relieve the District Judges of minor administrative work and will enable them to exercise proper supervision over subordinate Courts and personal attention over important administrative matters. This measure need not require any additional expense. If the Courts at each place are amalgamated and if the outlying Munsifs known as "choukis" be amalgamated with the Sub-Divisional Courts, twenty-six officers can easily be found for the twenty-six Districts out of a total cadre of about 260.

When communications were very difficult, roads were unsafe, and the pay of a Munsif was Rs. 50, that of a clerk Rs. 10, the location of Courts in outlying places was a justifiable administrative measure. It did not matter much if the judicial officer was employed half-time or one-quarter of the time. Now, that communications have almost everywhere improved, and the pay of officers has increased several times, the waste of time which takes place in most "choukis" is a matter of serious concern to the public. Moreover the administration is at its worst in these places. The prospects there are insufficient to attract the more promising lawyers. The weight of technicality, the laxity in practices and the weakness of the Judge, are at their highest in those places. The Committee

have therefore approved of the tendency in recent years to amalgamate these "choukis" with Sub-Divisional or District Courts (*vide* p. 454). This reform is very urgently needed.

"S. S."

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

LORD SHAW, LORD CARSON, SIR JOHN EDGE and MR. AMER ALI continued to hear Indian appeals as follows:—

Feb. 19th.—*Neki v. Chhajja Ram* (Lahore). This appeal came before the Privy Council in 1922 when the Board pronounced judgment dealing mainly with procedure. The appeal was then *ex parte*, the present Appellant being unrepresented. (See 26 C. W. N. 697.) Mr. Parikh for the Appellant now sought to have a decision on the merits under which he claimed to be entitled to pre-emption. Sir Geo. Lowndes and Mr. Douglas McNair raised a preliminary objection that the appeal did not lie as the order in Council in conformity with the judgment of their Lordships had "dismissed the suit." The objection was upheld and the appeal dismissed.

Feb. 19th.—*Rajendra Naram Singh v. Sunder Bibi* (Allahabad). In this appeal the sole question for decision was whether the rights of the Appellant in the property attached were protected from attachment under cl. (a) of sec. 60 of the C. P. C., as being a "right to future maintenance."

The Board were of opinion that the Appellant's interest in the attached properties was saleable but they modified the decree of the High Court.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellant.

Mr. K. V. L. Narasimham for the Respondent.

Feb. 19th and 20th.—*Gajadhar Mahton v. Ambika Prosad Tewari*. Messrs. DeGruyther, K. C. and Parikh appeared *ex parte* for the Appellants who had instituted a suit to enforce a mortgage. The decree under appeal had dismissed the suit on the ground that the money had been borrowed without legal necessity.

The Appellants now contended that they

were in any event entitled to recover on the personal covenant and alleged an acknowledgment which prevented a bar by limitation. Judgment was reserved.

Feb. 20th.—In *Yarlagadda Mallikarjuna Prasada v. Renduchintala Subbaya* (Madras), Messrs. DeGruyther, K. C. and Narasimham appeared for the Appellants *ex parte*. The Appellant sued for the recovery of lands in the possession of the Respondents.

He alleged that the Respondents were lessees whose tenancy had expired. The latter contended that the lands were ryoti lands and not the home farm lands of the Plaintiff. The Appellate Court had decided in favour of the tenants as regards portion of the lands but had given the Plaintiff a decree for banjar lands.

Feb. 23rd.—The hearing was commenced of *Forbes v. Rath Bros.*, which is concerned with the construction of a lease of property in Sultanpuri. The Appellant gave notice to terminate the tenancy. The Respondents contended that their lease is permanent and plead estoppel.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant.

Sir J. Simon, K. C., Messrs. Dunne, K. C. and Hyam for the Respondents.

Feb. 23rd.—*Adappa v. Gundappa*. Judgment was delivered by MR. AMER ALI, the appeal being dismissed with costs.

The following petitions were presented:

Gaya Din Singh v. Dhanpat Singh (Allahabad).

Mr. I. Majid applied for special leave to appeal *in forma pauperis*. Leave was refused.

Odoy Ram Kishan Lal v. Phool Chand (Lahore).

Messrs. DeGruyther, K. C. and Wallach applied for special leave to appeal. The case referred to a breach of contract for the sale of goods, delivery being given in bales in lieu of cases. They contended that there was a question of law on the construction of the correspondence which entitled them to appeal although both lower Courts had found against them. Leave was refused.

Ramdeo Baboona v. Bhejraj Babulal (Allahabad).

Mr. W. Wallach applied for special leave to appeal. Leave was granted.

Feb. 25th. — Before LORDS DUNEDIN and SHAW and SIR J. EDGE.

An application was made in *Musammatt Lajwanti v. Saja Chand* by Mr. W. Wallach for rectification of the order in Council. The question at issue was whether the Appellant had obtained a decree for herself or for her assignees as well. *Messrs. DeGruyther, K. C.* and *S. Hyam* opposed the application. Their Lordships took time to consider their decision.

Feb. 25th. — Before VISCOUNT HALDANE, LORD DUNEDIN and SIR J. EDGE.

In *Debi Charan v. King-Emperor*, Sir G. Lowndes, K. C. and Mr. Parikh for the Applicant laid the matter before their Lordships and said they could not urge any justification for asking for leave to appeal to His Majesty which would come within the principles laid down by the Board.

The application was dismissed, LORD DUNEDIN remarking that the attitude of Counsel was most proper, that the Board shared with them the responsibility in dismissing such an application, but in the circumstances it was clear that no fundamental principle had been violated so as to justify them in advising His Majesty to consider the appeal.

Feb. 25th. — In *Begu v. King-Emperor*, Mr. W. Wallach had obtained special leave to appeal in this case from a decision of the Lahore High Court. He contended that the accused had been convicted of an offence with which they had never been charged. They were committed under sec. 302 of the Indian Penal Code and were convicted under sec. 201.

A further plea had been urged that the opinion of the assessors had not been obtained and recorded in the manner prescribed by sec. 309 of the Criminal Procedure Code.

Messrs. Dunne, K. C. and *Kenworthy Brown* for the Crown were not called upon and the appeal was dismissed.

In the judgment which was delivered by LORD HALDANE it was stated that no violation of the principles of natural justice had been established so as to justify interference with the decision of the Indian Courts.

The Board has now commenced the hearing of Canadian appeals and it is probable that no Indian appeals will be heard for the next 10 days.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported
(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SUBHAWARDY AND DUVAL, JJ. S. A. No. 1499 OF 1922. *GAGENDRANARAYAN MAITY*, Appellant v. *SITANATH DAS*, Respondent. The 7th April 1925.
Tender—No deposit in Court—Interest.

The appeal was by the Plaintiff in a suit on hand-note, dated the 4th April 1916, for Rs. 350 bearing interest at 36 per cent. Defendant admitted execution of the note of hand and receipt of the money but pleaded that the amount due was tendered by money-order on 15th July 1916 which, however, was refused. The suit was instituted on 8th January 1920 and under the circumstances Defendant claimed exemption from payment of costs of the suit as also interest from the said date of tender.

The first Court decreed the suit in its entirety holding that the tender had not been kept good as the amount was not deposited in Court. On appeal it was held that the tender was good and sufficient but inasmuch as money was not deposited the Court allowed interest at the rate of 6 per cent. from July 1916 to the date of the institution of the suit.

On appeal it was urged that the Defendant not having deposited the amount alleged to have been tendered before action after the suit was instituted, the plea of tender was not available to him; and that the Court was not justified in reducing the contract rate for the period between 16th July and the date of the suit.

Held—Distinguishing and differing from 16 Bom. 141 and 38 Mad. 959 at p. 970 and approving of the observations of Mookerjee, J., in 34 Cal. 305, that the rule that the plea of tender is not available for defence if the amount tendered before action is not followed by deposit after action, is a rule of English law and the same has not been incorporated in Indian law, and the Court was justified in allowing interest at 6 per cent. for the period after tender to the date of the suit which was allowed by way of equitable compensation.

The appeal was dismissed with costs.

Messrs. Satya Charan Sinha and *Mahendra Nath Ghose* for the Appellant.

Mr. Apurba Charan Mukherji for the Respondent.

A. C. M.

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EDITORIAL NOTES—

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Under-riyats
London Notes

REPORTS (See Index.)

Is a member of Parliament representative of the whole electorate?

On the 20th of February last a very interesting discussion took place in the House of Commons, in connection with the Representation of the People Bill, as to how far a member of Parliament may, at any time, be said to be truly representative of his constituency. The fact that he is returned by a majority may in itself be said to take away from him such a representative character of the whole electorate. He is there by the choice of the majority. The control that his constituency possesses over him is that when he may have occasion to seek re-election, the majority, though not identical with the previous one, may disapprove of his work, policy or principle in Parliament and refuse to re-elect him. So the responsibility for his action in Parliament is partly personal and only partly representative. The following considerations will also show that he cannot at any time be said to be representative of the whole electorate:—

Mr. Whiteley, on the 20th Feb., in moving the second reading of the Representation of the People Bill, which seeks to extend the franchise to women at the age of twenty one on the same terms as now apply to men, referred casually, in the course of his speech, to a matter which lies near the seat of Parliamentary life and exercises an influence little, if at all, publicly acknowledged, but of incalculable power on the existence of a Parliament. Referring to the position assumed by the opponents of the Bill, that a matter so serious as that to which the Bill relates should not be taken into consideration in the early days of a Parliament but in its dying days, so that the Bill could be followed by a new election for a new Parliament, Mr. Whiteley said he was not sure that the House of Commons could be said, at any time, actually to represent the whole of the electorate. Additional voters were placed on the register every

six months, which meant that, in reality, hon. members never really represented the new thought and the new opinion which was coming on the register. An observer so acute, and with an experience so exceptional, of the working of our Parliamentary institutions as the late Sir William Anson, writing in 1907, comes very definitely to the conclusion that, far from the House of Commons representing the whole of the electorate for any definite time, few members of that House can be confidently said to represent for any definite term the constituencies by whom they were elected. Sir William Anson thus expounds and explains this position, which, he says, is a large factor in constituting the Government, through the power of dissolution, the master of the House of Commons: "The weapon," he writes, "by which the Prime Minister or the Cabinet enforces its will upon the Commons is the threat of a dissolution. The mere intimation that if the necessary support is not given to a Government, its careless and lukewarm supporters may be sent to explain their conduct to their constituents has been known to produce the desired results. But why is it so effective? Why cannot the candidate plead his own merits, explain the causes of his conduct, and satisfy his constituents of his loyalty to the principles which he has professed? Sir William Anson replies to the question in the words of Sir Sidney Low: "It follows also," writes Sir Sidney Low, "that one cannot at any given moment, except in the few months immediately succeeding a general election, say that the House of Commons represents the opinion of even the majority of the electorate. It may have done so, roughly speaking, when it was chosen; but it may have lost the character long before it has seemed fit to the Premier to recommend a dissolution." *Low Times*

True character of the claim in a suit for assessment of fair rent—Compensation for use and occupation.

In *Partap Mahtoh v. Musst. Wajirunnissa*, reported in [1925 Pat.] at p. 125 a Division Bench of the Patna High Court has expressed the opinion, following a similar opinion expressed by a Judge of the same Court in *Gobind Lal v. Ram Saran*, 2 P. J. T. 642, that "a suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by the tenant, and

When a landlord claims fair rent in respect of past years for which rent has already accrued due, a suit for determination of fair and equitable rent does not lie." The implication apparently is that the tenant in occupation of land with the landlord's permission, when a contract to pay an agreed rent is not established, does not become liable to pay for his use and occupation of the land unless and until the Court has been invited to and has by its decree determined what that compensation should be. This implication or assumption, we respectfully submit, is not sound in law. A suit for assessment of rent in the occupation of a tenant, their Lordships have rightly observed in their judgment, is not an act authorised by the Bengal Tenancy Act within the meaning of sec. 188 of that Act. It lies under the general law and is only another name for the common law action for compensation for use and occupation. A contract to pay a fair compensation for use and occupation is implied by law from the fact that land or premises belonging to the Plaintiff has been occupied by the Defendant by the Plaintiff's permission, the amount of compensation depending on the value of the premises and on the duration of the occupation. As soon as the occupation ceases, the implied contract ceases (*Gibson v. Kerk*, 1 Q. B. 850; *Churchward v. Ford*, 2 H. & N. 446; *Sloper v. Saunders*, 26 L. J. Ex. 276). The action is based on occupation, and it is the occupation which gives rise to the cause of action and not the evaluation of the compensation on a subsequent date by the Court. As the landlords can only claim to recover for the period of occupation, it would seem to follow (assuming that the view expressed by their Lordships of the Patna High Court is correct) that if the tenant left before the Court has made its decree in a suit for assessment of rent, the decree would be infructuous and a *brutum fulmen* for all purposes. This, it is respectfully submitted, cannot be and is not the law. Provided the claim is not barred by limitation, a suit for compensation for use and occupation for the period of occupation may be brought and will be decreed even after the tenant has left. *A fortiori*, if the tenant is still in possession, a decree will be passed in the landlord's favour for such period before the date of the institution of the suit as falls within the period of limitation. Art. 116 of the First Schedule to the Limitation

Act would appear to govern such a suit, though the residuary article (Art. 120) has been applied by the Calcutta High Court in an old case (18 W. R. 132; but see 7 M. L. T. 419). The observation under consideration is in the nature of an *obiter dictum*, the suit having been dismissed by their Lordships on another perfectly valid ground. But the matter is of such general importance that we have left the necessity of subjecting the proposition to a more searching examination that might at first sight appear to be necessary.

Measure of damages in torts due to negligence—"Natural and probable consequences."

In a recent issue of the Minnesota Law Review—the receipt of which we acknowledge with pleasure—there is an interesting note on "proximate cause" in relation to the question of tortious negligence—specially when there intervenes another agency between the act or omission of the Defendant and the ultimate injury for which damage is claimed. It is said that liability for a negligent act extends to consequences which might have been reasonably foreseen or anticipated from the commission of the act. In regard to torts not founded on negligence, on the other hand, the proposition usually met with is that the Defendant is responsible for the *natural* and *reasonable* consequences of his act. To say that a person is responsible for the *natural* and *probable* consequences of his act, which is the test usually propounded in cases of negligence, is not the same thing as to say that he is responsible for the *natural* and *reasonable* consequences of his act. It is a question whether the statement that in cases of negligence, the Defendant is liable for the probable consequences (that is to say, the consequences which might reasonably be anticipated) is not due to a confusion arising from importing the test which is applied in determining the existence of the negligence to the ascertainment of the measure of damages, for negligence itself consists in a failure to anticipate the reasonable consequences of one's act. We think the test of "probable consequences" is available only to determine whether the case is one of tortious negligence or a mere accident. Once negligence is proved by the application of this test, the criterion for determining the measure of damages is the same in cases of negligence

and intentional torts. In other words, we agree with those decisions which hold that once negligence is established, the Defendant is liable for all the natural and reasonable consequences of his act, whether these could reasonably have been foreseen or not. •

UNDER-RAIYATS

By MATURANATH HALDER, B.L.,
BAGERHAT.

Under cl. (a) of sec. 18 of the Bengal Tenancy Act, wide powers of transfer are given to a raiyat holding at a rent or rate of rent fixed in perpetuity. He can transfer his holding in the same way as a permanent tenure-holder can do. This raises the question whether he can transfer his holding permanently or for a period of more than nine years in the face of the provision laid down in cl. (2) of sec. 85. Or whether the word "transfer" in cl. (a) of sec. 18 includes a "lease." It has been held in 25 C. W. N. 9, following 19 C. W. N. 1127, that the word "transfer" in sec. 18 includes a "lease" and sec. 85 incorporated under the miscellaneous provisions of Chap. IX cannot curtail the powers of the raiyat under sec. 18.

Now, suppose a raiyat holding at a rent or rate of rent fixed in perpetuity grants a permanent lease to a tenant. What are the incidents of such a tenancy? His lease, being of a permanent character, cannot be avoided by his landlord by any procedure under sec. 49, although his status is no better than that of an under-raiyat. But all the same, though he is a permanent lessee, he may be ejected for arrears of rent under sec. 66. All the provisions of an under-raiyati tenancy will be applicable to him save that he is not liable to be ejected under sec. 49 by his landlord. Moreover, the principle laid down in 25 C. W. N. 5 (F. B.) will invoke the doctrine of estoppel against him. This leads us to the further inquiry, what is the distinction between a permanent tenant under a raiyat holding at a rent or rate of rent fixed in perpetuity and a tenant under an occupancy raiyat who has got a registered lease purported to be of a permanent character granted by his landlord who professes on the face of the document to have a higher status than that of a raiyat. The distinction between the two classes of leases is practically none. Both the classes of tenants can, according to the principle laid down in the Full Bench ruling just cited, invoke the doctrine of estoppel against their

landlords in a suit for ejectment under sec. 49.

Thus wise landlords who are occupancy raiyats can enjoy similar powers of transfer like a raiyat holding at a rent or rate of rent fixed in perpetuity by having recourse to a little manipulation. Hence we see that both the raiyat holding at a rent or rate of rent fixed in perpetuity and an occupancy raiyat can practically defeat the provisions of cl. (a) of sec. 49 by granting permanent leases to their tenants.

Now the question is whether under-raiyats including the above two classes of lessees can acquire the right of occupancy in their tenancies. Secs. 183 and 113 indicate that they can acquire the right of occupancy. Sec. 113, as it stood before the passing of the Bengal Act, III of 1898, did not enact any restriction of time-limit as regards enhancement of rent of under-raiyati tenancies after rent had been settled under Chap. X. Landlords of under-raiyats enjoyed unfettered powers of enhancement of rent possible under the Act. But now under the present Code when the rent of a tenancy is settled under Chap. X, under-raiyats having a right of occupancy are immune from enhancement of rent for five years under sec. 113, save in the case of exceptions mentioned therein. It is consequently clear that where by custom, usage or customary right, an under-raiyat has acquired a right of occupancy in his tenancy, he cannot be ejected under sec. 49. And so it was held by Fletcher, J., in 22 C. W. N. 519, in spite of the strenuous argument to the contrary by the commentator of the Bengal Tenancy Act. But such a tenant by the fact of his having acquired a right of occupancy is not converted into an occupancy raiyat and does not acquire the status of an occupancy raiyat. This view was endorsed by Das and Adami, JJ., in 75 I. C. 427.

Settlement operations under Chap. X are going on in the District of Khulna. Large number of under-raiyats, from their long occupation and other incidents, are being recorded as under-raiyats having occupancy rights. They are not liable to be ejected under sec. 49 by their landlords. They will remain in occupation of their tenancies so long as they duly pay rent to their landlords. But as they are no better than under-raiyats, all the other incidents of under-raiyati tenancies will apply to their tenancies. They are liable to be ejected for arrears of rent under sec. 66 of the

Bengal Tenancy Act. Decrees for arrears of rent against them are money-decrees and their tenancies may be sold in execution of such decrees by following the procedure under the Civil Procedure Code. But the use of the word "holding" in the expression "the holding of an under-raiyat having occupancy rights" in sec. 113, may lead to the view that an under-raiyat may acquire the higher status of a raiyat as the tenancy of a raiyat is called a "holding." But that is not so. This is evident from the use of the word "holding" in the same section in the expression "the holding of an under-raiyat not having occupancy rights." It is apparent that by this indiscriminate use of the word "holding," the legislature intended to mean nothing more than a "tenancy."

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Mar. 5th.—No Indian appeals were heard for a week but the Canadian list having been disposed of, Indian appeals are once again occupying the attention of the Board.

Mar. 5th and 6th.—*Udaychand Pannalal v. P. E. Guzdar & Co.*, an application for special leave to appeal from Bengal was heard by VISCOUNT HALDANE, LORD DUNEDIN and LORD DARLING.

Messrs. DeGruyther, K. C. and Parikh represented the Applicants.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* were for the Respondents.

The disputes arose under contracts for the sale of jute. Abortive arbitrations followed, and a suit was brought by the applicants, that suit was stayed and fresh arbitration proceedings were commenced which resulted in 2 *ex parte* awards, one in favour of the applicant for 80,000 and the other in favour of the Opposite Party for 4,000. The former award was set aside by the Courts and the Plaintiffs sued unsuccessfully to set aside the latter award. Having failed in the High Court they sought leave to appeal to the Judicial Committee on the ground that although directly they seek to set aside a decree for only 4,000 indirectly their cross-claim for the 80,000 awarded to them is effected. Leave was refused by SIR L. SANDERSON, C. J. and WALMSLEY, J., who held that there was no claim or question respecting "property" within the

meaning of the second clause of sec. 110 of the C. P. Code.

Their Lordships are considering their judgment.

The application is one of considerable importance and will be fully reported later.

Mar. 6th.—*Upennaga Kamaraju v. Y. Lakshminikantam* (Madras), *Mr. W. Wallach* applied for special leave to appeal to His Majesty in Council.

Mr. Narasimham opposed.

Leave was refused.

Mar. 6th.—*Bhugwan Singh v. Khedu Singh* (Central Provinces).

Mr. E. B. Raikes applied for special leave to appeal.

The suit was brought in the Court of the Subordinate Judge of Bilaspur for possession of a village and of a house as an appanage to that village. For the purpose of court-fee the Plaintiff valued his claim at 5 times the revenue payable for the village and house, *viz.*, Rs. 4,550. The trial Court decreed the claim for the village but dismissed the claim for the house. On appeal the District Court decreed the claim in full. On second appeal the Court of the Judicial Commissioner, Nagpur, varied that decree, and refused leave to appeal to the Privy Council on the ground that the suit had been valued at under 10,000 and had been instituted in a Court with limited jurisdiction.

For the applicant it was urged that under-valuation for court-fees did not preclude an appeal to the Privy Council if the Appellant could show that the real value was over Rs. 10,000. Reference was made to *Babu Lakraj Roy v. Kanhya Singh*, L. R. 1st Ind. App. 317 and *Lachappa Subrao Jadhav v. Shidappa V. Jadhav*, L. R. 26 I. A. 24. Leave was granted.

Mar. 6th.—*Sura Lakshmiah Chetty v. Kothandarama Pillai* (Madras).

This was an application for rehearing of an appeal on the ground that the "next friend of the applicant who was a minor, had absconded and the appeal had been heard *ex parte*."

Mr. Narasimham for the Applicant.

Mr. Raikes for the Opposite Party.

Leave to enter appearance was granted on condition that the applicant paid all costs of the abortive hearing and of the application.

G. D. M.

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Journal of Comparative Legislation and International Law.

The Journal of Comparative Legislation and International Law for February, which we received just before the Easter Vacation, contains some very interesting articles and notes. It opens with an article on the "Privy Council and the Colonies." It deals with the executive functions that the Privy Council used to exercise in the past in respect of the Colonies before the self-governing ones attained the Dominion status. In the name of superintendence, the policy of the Privy Council was one of interference and domination over the Colonies. It is well-known that the Dominion Governments within the British Empire now regard themselves as perfectly autonomous states and even resent being committed to any course of foreign policy without their express consent. For instance, Canada has not ratified the Lausanne Treaty or accepted the trade relations established by the British Government with Russia as binding on her. She entered protest for not being consulted in the latter case and the British Government expressed their regret and assured her that there would be no repetition of it. The Dominion Prime Ministers now demand that they should have direct dealings with the Prime Minister of England and not through the Colonial Secretary as before. The Prime Minister of England is, however, too busy with the affairs of domestic and foreign policy of various kinds and is not likely to find time to have direct dealings with the Dominions as well. So the writer vaguely suggests, if the

President of the Privy Council may not be appointed a Minister for such purposes, but he doubts if that will satisfy the Dominions. We are afraid it would not and before long the Commonwealths within the British Empire will acquire international status of their own and their relationship with the mother country will be more or less in the nature of an alliance on terms of mutuality and common interest. Amongst the other articles of interest the one on the "Constitution of Iraq" is very interesting in view of the consideration that the question is likely to receive the attention of the League of Nations in the near future. Amongst the notes, that on the "Sidelights on the Crisis in India" by Mr. H. Harcourt (Longmans Green & Co.) will be found of interest by readers in this country in so far as attempts have been made there to controvert the home truth that "between Europeans and Indians it is futile to expect justice in Criminal Courts."

Statements of witnesses recorded by the police.

Sec. 162 of the Code of Criminal Procedure, as it now stands, differs materially from the corresponding section of the Code before the amendment of 1923. The law as it stood before enjoined that no statement made by any person to a police officer in the course of an investigation if taken down in writing was to be signed by the person making it and such writing was not to be used as evidence. It is now laid down that such statement shall not be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, the only exception to this rule being the case contemplated by the proviso and it is here that the substantial alteration has been made by Act XVIII of 1923. The proviso to the old section was to the effect that "when any witness is called for the prosecution whose state-

ment has been taken down in writing (by a police officer) the Court shall on the request of the accused refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof: and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872."

Thus it was entirely left to the discretion of the Court whether or not to allow the accused to have a copy of the statement recorded by the police officer and the use of the statement for contradicting the witness under sec. 145 of the Evidence Act was permissible. Under the law as it now stands the Court is bound on the request of the accused to refer to the writing and to furnish the accused with a copy thereof in order that any part of such statement, if duly proved, may be used to contradict the witness under sec. 145 of the Evidence Act. It is likely to be, as it was in a recent case which came up to the Lahore High Court (*Labb Singh v. Crown*, 6 Lahore 24), overlooked that the record of the previous statement made by the witness to the police must be duly proved before any use could be made of it for the purpose of contradicting him. What generally happens is that the investigating police officer is called with his diary, he is asked if he examined a particular witness in the course of the investigation and whether he took down any statement made by him. The answer, if it is in the affirmative, gives the accused the right to ask for a copy of the statement and when the particular witness is cross-examined the necessary portion of the statement is put to him for the purpose of contradicting him.

In the procedure described there is a gap which renders the evidence of the police officer inadmissible and in the case referred to above it is pointed out that the police officer must say that the statements, the record of which has been placed on the record, are those which he recorded. This is the necessary consequence of the introduction of the words "if duly proved" in the section as it now stands. The learned Judges observe that there is no presumption as to the genuineness of the statements of witnesses entered in the police diaries

and unless they are duly proved the evidence given in Court cannot be contradicted by them.

Turkish legislation for controlling marriage expenses.

The *Industrial and Trade Review of India* published by some Indians resident in Berlin notices the social legislation that has been recommended by the Executive Government in Turkey for checking the extravagance which is so common in Oriental Countries in connection with marriages. The orthodox communities in India may take a leaf out of this proposed social legislation in Turkey. The custom in India that every girl is to be married has in these mercenary days afforded an opportunity to the bridegroom or his guardians to fleece the father of the bride to such an extent as to bring ruin on his family. It would seem that such exactions cannot be put an end to except by legislation. The Government here would not interfere in social and religious matters but we are not so sure that when the local and central legislature are more representative of the people, they would not, if we do not put our houses in order before that. Our contemporary says:—

In view of the prodigious waste of money on marriage ceremonies both among the Hindus and the Mohammedans of India, and of the debts and other scandals connected therewith, attention should be drawn to the fight which our progressive Turkish friends are putting up against similar evils in their own country. The Turkish Minister of the Interior has ordered the Governors of the Province of Constantinople to take the severest measures against extravagance, in order to put down the luxury which is gaining the upper hand in the old capital. A Commission of Enquiry appointed for this purpose has drawn up a bill which defines the exact limits of the expenditure of the richer citizens on occasions of marriage and other family festivities. For example, a bridegroom is not permitted to present to his future wife a ring of a higher value than 20 Turkish Pounds. No other present besides the ring is permitted. The trousseau of the young bride is not allowed to exceed two dresses. She is not permitted to take to the house of her husband more furniture than is necessary for furnishing one room. All the other usual pomp and ceremony connected with marriages is once and for all strictly forbidden.

GLIMPSES INTO THE CONSTITUTION
OF IRAQ.

The status of Iraq (Mesopotamia) at the present moment seems to be somewhat curious. It originally formed a part of the Turkish Empire. The Covenant of the League of Nations placed Palestine and Iraq, where Arab population preponderates, under 'A' mandate, as states whose independence may be provisionally recognised, subject to the rendering of advice by a mandatory, which in both cases is Great Britain. The authority and control to be exercised by the mandatory in Iraq is to be defined by the League of Nations. Formerly it was contemplated that Iraq would remain for an indefinite period under the mandate of Great Britain. A draft constitution was prepared in 1921 but the Council of the League did not confirm it. The League only gave permission to carry on the administration provisionally under the draft. The League at the same time directed the mandatory to frame within the shortest possible time, not exceeding three years, an Organic Law for Mesopotamia (Iraq) for the approval of the League with a view to facilitate the progressive development of Mesopotamia as an independent state. After Amir Faisal was elected by the Arabs as King of Iraq, the present relationship between Iraq and Great Britain is regulated by a provisional treaty and an agreement under which the latter undertakes to render such assistance and support as may be required by the former and Iraq undertakes to accept such advice from the British High Commissioner as would enable Great Britain to fulfil her obligations to the League. A constituent assembly elected by universal suffrage, the members of which, with the exception of a few who had served as Turkish Deputies under the old régime, were all devoid of any legal or political training, sat in Bagdad in July 1924, ratified the above treaty and agreement and passed a constitution, clause by clause, which though framed on the lines of constitutional freedom of Western nations, contains some anomalies of the type to be met within the Montague-Chelmsford Constitution for India. It opens with a declaration of the "rights of man," which is borrowed from the provision in this behalf in the Egyptian constitution. The following summary given in the *Journal of the Society of Comparative Legislation* would give a fair idea of it:—

The clauses defining "the rights of man" which are usual in foreign constitutions are reproduced in the regular form of a sweeping principle qualified by legal restriction. Thus, nobody may be arrested or put in prison, except in accordance with the prescriptions of the law. The domicile is inviolable, except that a search may be carried out in the cases prescribed by law. Correspondence is secret, except in cases prescribed by law. The Press is free within the limits traced by the law, and the preventive censorship is forbidden. The right of teaching is free, provided that the teaching is not contrary to public order. The right of association is granted, subject to the control of the law.

After the above it is rather curious to notice that Art. 26 (c) has a family likeness to provisions in the Government of India Act of 1919, regarding the power of the Executive Government to override by certification and ordinances the decision of the legislature with regard to the budget and legislation which may run counter to treaty obligations or be prejudicial to peace and order. The following observations in the *Journal* regarding the necessity of such safeguards against the action of an untramed and unmanageable chamber will be read with interest in India:—

Art. 26 (c) gives to the King power, when Parliament is not sitting, to make, with the concurrence of the Cabinet, ordinances which shall have the force of law. This may be done when urgent measures are necessary for the maintenance of public order and security, for repelling a public danger, for expenditure not sanctioned by the budget or by special law, and for securing the fulfilment of treaty obligation. All such measures, with the important exception of the last mentioned, must be submitted to Parliament at the beginning of its session, and, if not accepted, the ordinance becomes invalid from the date of a government notification to that effect. The result is that, given the King's power to prorogue and dissolve Parliament, the King and his Ministers could, in the teeth of an unmanageable Chamber, provide for necessary supplies or decree the legislation necessary to implement treaty obligation.

While the Iraq Assembly passed the above clause unanimously, it is, indeed, very interesting to learn that the members, mostly composed of unruly Arabs and Kurds, put up a tough fight against any foreigners being employed in Government service except a few under treaty obligations. The learned contributor of the article in the *Journal* makes the following observation in this connection:—

Art. 18 secures to Iraq exclusively all government appointments "except in exceptional circumstances, which shall be prescribed in a special law, and except in the case of foreigners, who may or shall be employed under Treaties or

Agreements." This clause evoked acrimonious discussion in the Constituent Assembly, the exclusive right to patronage and to the emoluments of government employment being regarded by Oriental patriots as the supreme prize of natural independence. The exception at the end was grudgingly inserted, only because of the obligation contained in the agreement to employ a limited number of British officials, which is annexed to the Treaty.

The policy of the League in respect of Iraq, Arabia, Palestine and Syria would be to set them up as independent Arab States, with some treaty obligations with the allies for the preservation of peace in the near and far East. The Arabs do not care to remain under the over-lordship of Turkey or of any European power and this attempt at setting up of the independent Arab States will be a very interesting study in the maintenance of the balance of power in Europe and Asia.

Correspondence.

THE MEANING OF "COUNSEL."

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

On Wednesday last, an advocate enrolled under the new Rules in filing terms of compromise of a case before Mr. Justice Gregory, signed the terms as "Counsel." On this an objection was taken by the Barrister on the other side to the advocate describing himself as "Counsel" and Mr. Justice Gregory gave effect to the contention so far as to ask the learned advocate to change the subscription.

There is no authority whatsoever for the proposition that *Counsel* means only a Barrister. Even in England where Barristers alone are ordinarily entitled to act as Counsel, where attorneys are given the right to appear before a Court as advocates they are properly described as Counsel (see 28 & 29 Vict., c. 18, sec. 9). The word only means a person who has the right to plead before a Court on behalf of a client.

Whatever doubts may exist as regards the English practice, there can be no manner of doubt that in India Barristers cannot claim the exclusive right to be described as Counsel. A glance at the Rules of the High Court (Original Side) would have been enough to convince the learned lawyers who were responsible for the incident of Wednesday last that under those Rules Counsel includes an advo-

cate who is not a Barrister. At various places those Rules refer to Counsel, notably in the chapter on Taxation. Is it contended that all those Rules apply exclusively to Barristers? The supposition is too ridiculous. If the Barristers want to distinguish themselves from other advocates of the High Court, they can fall back upon their designation as Barristers. Having regard to the frame of the High Court Rules as they stand, it would be impossible to make out their exclusive title to the term, "Counsel." No doubt the Rules can be changed, but until they are so changed, "Counsel" must be read as synonymous with advocates.

The distinction claimed is puerile and but for blind prejudice the learned Counsel could not have put forward an argument which was as undignified as it was ill-informed.

I hope we shall hear no more of such objections in future.

I am, etc.,
N. C. SEN-GUPTA.

Review.

LAW OF CONFESSIONS. By S. Roy, published by the Eastern Law House, Calcutta. Price Rs. 6.

New editions of Mr. Roy's books are always welcome, for in every subsequent edition the usefulness of the books is considerably enhanced. We have before us the fifth edition of Mr. Roy's well-known book on confessions which has been very much enlarged and carefully brought up to date. The whole law on the subject has been exhaustively dealt with and all circular orders and notifications of the High Court and the Government dealing with the recording of confessions, which after all is a matter in connection with which the greatest caution should always be observed, have been collected and inserted in appropriate places. The notes in some places might have been condensed a little more but having regard to the importance of the subject dealt with an elaborate treatment is perhaps desirable.

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The Reminiscences of Sir Surendranath Banerjea.

Sir Surendranath Banerjea's Reminiscences, which at the request of the publishers have been styled, "A Nation in Making", are replete with sketches from life more fascinating than romance. The rhythm and flow of language and the elegance of style are all his own. He has been a prolific writer and a much more of a speaker than even a writer all his life. His life is crowded with events the like of which is seldom to be met with in the career of an ordinary man. Yet the brevity with which he has dealt with them, the light touches with which he has passed over incidents over which he might have devoted pages, the little that he has said about them and the lot that he has left unsaid, make his writings a real work of art. It seems that Providence had thrown obstacles in his way from early life as if to test how he would surmount them with the talent, energy, zeal and robust self-confidence with which nature had endowed him. After having passed the Indian Civil Service Examination, his name was officially published amongst the successful candidates. But, soon after, his name was mysteriously removed from the list in consequence of some anonymous communication. How many when just out of one's teens in a foreign country living amongst strangers would have made up their mind to fight it out with the Civil Service Commissioners, presided over by Sir Edward Ryan, a retired Chief Justice of the Calcutta High Court? Surendranath was born to fight injustice and it is strange that he has so often been himself a victim of injustice from early life that he made it a mission of his life to

fight for justice for his country, his people and many a poor and friendless victim of oppression whom he never turned away from his door. When the Civil Service Commissioners had condemned him unheard and refused him a hearing, he consulted some lawyer friends, briefed Mr. Mellish (afterwards Lord Justice) and applied for a mandamus before Cockburn, L. C. J., Hannen and Mellor, J.J., and obtained a rule against the Civil Service Commissioners, who thought discretion to be the better part of valour and wrote to Surendranath that his name had been restored amongst the successful candidates and did not appear in Court to show cause. Mr. B. L. Gupta of Bengal and Mr. Sripad Babaji Thakur of Bombay, both brilliant scholars, who were in the same boat with Surendranath and whose names had also been omitted from the list for identical reasons, with the resignation of fatalists, which is bred in the Indian blood, took the decree of the Civil Service Commissioners lying down, leaving it to Surendranath to fight out their cause by this test case. The pluck of Surendranath won for him the sympathy of Charles Dickens who warmly espoused his cause and the admiration of Surendranath's tutor, Prof. Henry Morley, who told him "Banerjea, they will raise a statue for you for the fight you are putting up." The learned English professor thus early appreciated the metal of which his young pupil was made.

Sir Surendranath's Commitment for contempt.

The following account of Surendranath's commitment for Contempt of Court from his Reminiscences will surely be found interesting and also instructive to those who can read between the lines:—

But from the streets adjoining the High Court let me turn to the Court-room where the Judges were to assemble. It was densely crowded. Not an inch of space was left out on the floor or in the galleries. I had to elbow my way along with the Counsel. It was past eleven o'clock; but the Judges had not yet come. They were

closeted in the Chief Justice's room in close conference. We came to know afterwards what the conference was about. There was an eager discussion about the sentence to be passed. The majority of the Judges, and they were Europeans, were for sentencing me to imprisonment. Mr. Justice Romesh Chander Mitter insisted upon a fine only. The day before, so the report went, the Chief Justice had seen him at his private residence and had talked to him and argued with him with a view to persuading him to agree with the majority, but all in vain. At the conference the arguments were repeated with the added weight of the personal authority of the other Judges. But Mr. Justice Mitter remained unconvinced, relying on the precedent created in the Taylor case, where the Chief Justice, Sir Barnes Peacock, had deemed the infliction of a fine sufficient.

At last when it was past half past eleven, the five Judges appeared and took their seats on the Bench. The Chief Justice read out the judgment on behalf of the majority of his colleagues, putting in a slip, which was evidently a later production, that he and his colleagues disagreed with Mr. Justice Mitter. Mr. Justice Mitter then read out his dissenting judgment, after which the Judges left the Court. * * * The prison van was at the Court-gate ready for me; but in view of the attitude of the crowd, I was conveyed in a private carriage, leaving the Court by the Judges' entrance, and was taken by a round-about way to the Presidency jail. Mr. Larymore, the Superintendent of the jail was present, expecting my arrival. Mr. Larymore was a warm-hearted Irishman. He and I were friends, for we had sat round the same table as Municipal Commissioner of Calcutta. He treated me with all the courtesy that his official position permitted.

We have shown recently that Russel, J. C. J., and the English Judges have imposed only a fine in similar cases.

Choosing of jurors from persons present in Court.

A member of the legal profession in the Mofussil has drawn our attention to the unsatisfactory manner in which in some districts jurors are chosen from persons present in Court when there is a deficiency in the number of persons summoned to serve as jurors. The second proviso of sec. 276 of the Code of Criminal Procedure was enacted to meet cases of emergency where for some unavoidable reason a sufficient number of persons summoned is not forthcoming and in the absence of a provision like the one in question the result is likely to be a deadlock. We do not, however, endorse the view put forward by our correspondent that the person present in Court

who may be called to make up the deficiency must be a person whose name is on the jury list. It is a special provision made to meet the emergencies of special circumstances and a free hand must be given to the Court. A careful examination of the relevant sections shows that there is no inconsistency in giving a free hand to the Court in this matter. Under sec. 321 a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector is prepared and a number of persons whose names appear on such list, is summoned to attend the Sessions Court on every occasion. Supposing a sufficient number of persons entered on the list and summoned to attend the Court is not available for being empanelled. Sec. 276, proviso (2) enacts that with the leave of the Court, i.e., the Sessions Judge, any other persons present in Court may be called to make up the required number. Every Court must exercise its discretion in enforcing a statutory provision and the second proviso of sec. 276 clearly casts a duty on the Sessions Judge to satisfy himself that the person present in Court must be a fit and proper person to serve as a juror. Surely it is wholly improper and absolutely unpardonable if the work is done in a perfunctory manner which as pointed out by our correspondent seems to be the usual practice in some districts. The Sessions Judge must exercise his discretion and for this purpose is entitled to make such enquiry as may be necessary which in most cases need not go any further than questioning the person himself with a view to ascertain his position and status. If this is done there is nothing to complain of. There is no special charm in the fact of a particular name being on the jury list. The point is that the person called to serve as a juror must not be anybody and everybody but must be a man of some position and status. The two officers who are generally entrusted with the work of preparing the jury list are the Sessions Judge and the Collector and if in case of an emergency the Sessions Judge after making due enquiries puts a person who happens to be present in Court into the jury box to make up a deficiency it seems to be all right and not in any way inconsistent with the policy of the Code of Criminal Procedure. So far as the provision in the Code is concerned there is no good and sufficient reason for taking exception to it. The only difficulty arises in conse-

quence of the manner and spirit in which officers charged with the administration of justice do their work. No Code in the world is or can be complete and much must be left to the discretion of the Court and officers presiding over Courts of Justice must bring some amount of reason to bear upon the work before them and they must always remember that they are to enforce the law of procedure in a manner which must not be inconsistent with the policy of the Code.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Continued from p. cxxiii.)

II

To give relief to the District Judges who on account of the heavy burden of their manifold duties do not find sufficient time to exercise proper supervision over the work of subordinate Courts, the Committee have recommended devolution of judicial powers on an extensive scale upon the Subordinate Judges. The marked improvement during the last 30 or 40 years in the calibre of the subordinate judiciary is considered a sufficient warrant for this scheme of devolution. But the Committee have omitted to consider the feasibility of applying the same policy with respect to administrative work arising in subordinate Courts. It must be evident that so long as the present system of centralisation of all powers in the District Judge continues, supervision over subordinate Courts can at best be superficial and merely occasional. He can never find time to guide and advise his subordinate officers or to appreciate their difficulties. Moreover, lack of confidence even in petty matters tends to take away from the latter a sense of their own responsibility. If the subordinate judiciary are believed to have improved so much as to justify wide devolution of judicial powers upon them, there cannot be any just ground for apprehending that in minor administrative work they will be found wanting. Unless the proper training in this branch of work be given to them, they may prove administrative failures when promoted to the posts of District Judges. The Committee foresee that in the near future there will be a separation of judicial and executive functions and that the administrative burden upon the District Judges will then be heavier still. The public naturally expect from them

a high quality of judicial work as much as successful running of the administrative wheel. If they are reduced primarily to the position of executive officers and secondarily to that of Judges, they will not be able to command the proper amount of popular respect, nor will they be able to pick up that knowledge of law and of procedure which will eventually qualify them for High Court Judgeship. So, in the interest of the public it is extremely desirable that they should be relieved of as much administrative work of subordinate Courts as is possible.

The Subordinate Judges are proposed to be vested with power to try cases under the Religious Endowments Act, 1863, the Indian Succession Act, 1865, the Probate and Administration Act, 1881, the Succession Certificate Act, 1889, the Guardians and Wards Act, 1890, the Provincial Insolvency Act, 1920, and the Land Acquisition Act, 1894. They are also to be vested with powers of Assistant Sessions Judges. The maximum limit of their jurisdiction under the Small Cause Courts Act, 1887, is proposed to be raised from Rs. 500 to Rs. 1,000 and the provisions of the Act are proposed to be extended to several classes of cases now exempted from its operations.

To give relief to the Subordinate Judges who even now suffer from unmanageable congestion in their files, it is proposed that selected Munsifs should be vested with power to try suits up to the value of Rs. 5,000 instead of Rs. 2,000 as at present, and that the limit should vary from Rs. 1,000 to Rs. 5,000, according to local requirements and the relative fitness and experience of the officers. Within such limits, they are to try cases under the several enactments mentioned above. The jurisdiction under the Small Cause Courts Act is proposed to be raised from Rs. 250 to 500. In District head-quarters, where there are many competent lawyers, this scheme of devolution will not lead to any inconvenience. But in sub-divisional towns and *chaukis*, great hardship will follow if litigants have to bring pleaders in most cases of higher value, from District Courts. Moreover, in those places there is a strong tendency to grossly under-value suits for the purpose of jurisdiction, and an almost equally strong tendency not to raise questions of jurisdiction. The Court Fees Act, 1870, provides a cumbrous procedure and an inadequate remedy for checking this

evil. A wider devolution will lead to an extension of the evil. It may be mentioned here that in the Central Provinces and in the Punjab the limit of pecuniary jurisdiction of the Munsif was raised some years ago and their designation was changed to Subordinate Judges, 2nd class, in the former province and Subordinate Judges, 2nd, 3rd and 4th classes in the latter, according to the limits of their pecuniary jurisdiction.

The Committee have realised that a devolution of power upon Munsifs, "if not accompanied by an increase of staff, would remove the congestion from one place and put it in another," but as they were restricted in their enquiry by the proviso that they "will not enquire into the strength of the judicial administration maintained in each province," they have been compelled to recommend the establishment of village Courts under the Bengal Village Self-Government Act, 1919, and considerable devolution of judicial powers upon them. Had not the Central Government made this restriction, any proposal for considerable increase in expense of a reserved department would meet with such a stubborn opposition in the provincial Councils that the entire scheme of reform would have been jettisoned.

It is a matter for sincere regret that in the sphere of educating the villagers in civic responsibilities, Bengal has been the most backward province in India. In most other provinces, trial by village headmen known as village Munsifs, or by Honorary Munsifs, or by Panchayets, has been in existence for a long time. Though Honorary Munsifs and Village Munsifs have not proved successful, the Panchayet Courts have been exceedingly popular wherever introduced. Their success in Madras and in Burma has indeed been phenomenal, so much so that in Madras the system of village Munsif is now "a dying institution." It cannot seriously be urged that in the most advanced province of Bengal the villagers are the most backward in India. The premier position of Bengal has mainly been due to the eminent position which she had held in literature, laws, medicine and philosophy before she came in contact with the superior civilization of the west, and also to her power of assimilation of that civilization without losing her nationalism. It was the village organisations that transmitted such ancient culture for several centuries through despotism, invasion,

anarchy and internecine warfare. If the village organisations have now become disintegrated and demoralised, the reasons are probably repugnance of the intelligentia and the well-to-do people to village life and the waning sympathy between those and the villagers. To maintain that villages are incapable of being successfully re-organised, and that it will be through the townspeople alone that the nation is to become fit for administrative responsibilities, is not only a demoralising confession but is stultifying to a degree. The Committee deserve much gratitude for having recommended this important measure. Had the public leaders been a little enthusiastic in the matter and had the scheme of the Bengal Village Self-Government Act been sufficiently broad, village Courts would have been a popular institution by this time. If sufficient confidence is not placed on persons who are going to be entrusted with administration of justice, the best men will not be available for the work. What in the opinion of the writer is now wanted, is the repeal of the whole enactment and the framing of a new Act on liberal lines. These village Panchayets must be trusted and respected, if they are to prove a success. It may be made the duty of Munsifs, as has been done in Madras, to help and advise these Panchayets when necessary, and to revise their decisions in certain abnormal events. These villagers will have this special advantage over paid tribunals, that they will know the character of the parties and the litigants appearing before them. Forgery and perjury would not have been rampant in Mofussil Courts, if the Judges were so familiar with the character of the parties and their witnesses, as to smell fraud and to detect it, wherever perpetrated. These practices exist because they do pay.

"S. S."

(To be continued.)

CHOOSING OF JURORS FROM PERSONS PRESENT IN COURT.

(1) In some districts in the Mufussil there is a practice of inviting persons happening to be present either in the Court premises or in the Court compound, to serve as jurors in Sessions trials in cases of deficiency of persons summoned as contemplated by sec. 276, proviso (2) of the Code of Criminal Procedure. The practice prevailing is to call any person available and put him into the jury-box with-

but caring to ascertain whether the names of those persons appear on the jury list as prepared under sec. 321, of the Criminal Procedure Code. Is such a course permissible under proviso (2), sec. 276, Cr. P. C., or, does the proviso require that persons present in Court, asked to make up a deficiency of jurors, should also be persons on the jury list but who may not have been summoned to serve as jurors on that occasion. The latter view seems to be reasonable and the reasons are the following:—

(a) Sec. 276, Cr. P. C., enacts, in the first instance, that the "jurors shall be chosen by lot from the persons summoned to act as such, etc." Then come the provisos, of which the second runs as follows:—"In case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present."

Now it is a recognised rule of interpretation that a word is to be considered as used throughout a statute in the same sense, more specially should it be so when the same word is being used in an almost similar collocation in a single section of a statute. Granting this, the word "persons" in the first part of sec. 276, necessarily means "persons" already on the jury list summoned under sec. 321 of the Code of Criminal Procedure. The expression "such other persons," therefore, should mean persons already on the jury list but not summoned for the trial, the word "other," meaning "other than summoned," and the entire expression "such other persons" meaning "such persons as aforesaid," that is, persons on the list, the word "such" being referable to the context as appearing in the first part of the section and the word "other" differentiating them by the single criterion of not being summoned.

If this were not so, the words "such other" as qualifying "persons" would become meaningless surplusage, as there is no other conceivable context to which those words are referable; because if the legislature intended that non-jurymen present in Court could make up the deficiency then obviously the language would have been different, for instance, "such persons as may be present and otherwise fit to serve as jurors."

Sec. 321, Cr. P. C., cls. (1) and (2) seem to me to fortify my contention. These clauses

clearly imply that there is such a thing as a due qualification for a juror, however small that qualification may be. Sec. 325 of the Code unmistakably indicates that whereas members of a special jury should possess superior qualification in respect of property, character or education, those of the common jury are to possess a measure of qualification, however small, in respect of these things; and the only guarantee that the Code recognises of these qualifications being possessed by jurymen is the joint enquiry by the Sessions Judge and the Collector, as required by sec. 321 of the Code. The proper interpretation of sec. 276, proviso (2) of the Code should therefore be this: that when a person already on the jury list happens to be present in Court, the legal presumption of his fitness is already there and will be acted upon by the Court until that presumption is displaced by a successful challenge to the polls as contemplated by sec. 278 of the Code.

In the making up, therefore, of a deficiency by persons present, the proviso only dispenses with the initial summoning by a preliminary lot (*vide* sec. 326, Cr. P. C.) and does not dispense with any other legal requirement.

The principles of natural justice appear also to be in favour of this interpretation. Secs. 312 to 327 provide for elaborate precautions against the jury turning out to be a body of men not in every respect fit for the work with which the law entrusts them. In these circumstances the legislature could not possibly have permitted the springing as a surprise upon an accused person of every loafer in the Court premises as an eligible jurymen knowing as we do the kind of persons who ordinarily loiter about in Courts. A jurymen thus picked out is more often than not an undesirable person and yet the practice of some of the Courts is to ask the Judge's Nazir, whenever there is a deficiency, to go out into the Court compound and make a roving search for stray loiterer in the clothes of a *bhadralog* to come and serve as juror, and the accused are solemnly asked to deliver their challenges, if any, as if the accused have a mental note of everything that can be said about every man in the street.

I have not been able to find out any case-law directly bearing upon the scope and exact meaning of proviso (2) to sec. 276, Cr. P. C., but a reference to the corresponding English law makes at least two things clear:

Firstly—Talesmen or, as they are more properly called, *tales de circumstantibus* who are the English equivalents of the supplementary jurors as under sec. 276, proviso (2), cannot be had at a trial at bar. [vide Halsbury, Vol. XVIII, p. 253, footnote (a)] not on the trial of an indictment under the commission of Gaol delivery and Oyer and terminer (vide Burn's Justices of the Peace, Vol. III, p. 970, 29th Ed.).

By the 6 Geo. IV, Ch. 50, sec. 37 (Jury's Act, 1825) Talesmen can of course be had before a Court of Assize and the words "shall appoint so many of such other *able men* of the county then present as shall make up a full jury" as appearing in the statute have of course been interpreted as seeming to point to persons whose names are or might be in the jurors' book. [Vide Halsbury, Vol. 18, p. 253, footnote (a)]. But the learned commentator does not appear to be sure of this interpretation and at the same time observes that "a custom to try by *tales de circumstantibus* in an inferior Court is bad because such would admit of trial by persons both *profligate* and *unfit*," Halsbury, Vol. 18, p. 253. The net result of the above seems to be that although the words "*able men of the county present*" might be held to include persons other than those on the jury list this is a meaning which is not yet an absolutely decided meaning. The words of the Indian statute [276, proviso (2)] are, however, different as I have already pointed out and it can be very well argued that the Indian legislature although providing for *tales* did not intend to reproduce the English statute in its entirety, but with the reservation that "*Tales*" must be from persons who are on the jury list.

The question now arises—

(a) Under sec. 276, proviso (2) of the Code of Criminal Procedure, is it permissible, in order to make up the deficiency of jurymen, to requisition the services of persons present in Court whose names are not on the jury list and what should be the proper method of bringing before the Court the supplementary jury as contemplated by sec. 276, proviso (2)?

The method followed is for the Court to take the initiative in the sense that without the application of either the prosecutor or the accused the Sessions Judge asks the Nazir to go into the Court compound and find out some persons to serve as jurors and these persons are brought

up in about five minutes. Is that a legal or a regular procedure for calling up these jurors?

The corresponding English statute, 6 Geo. IV, sec. 37, lays down that "every such Court upon request made for the King by anyone thereto authorised or assigned by the Court or on request made by the parties, Plaintiff or demandant, Defendant or tenant in any action or suit, whether popular or private, shall command the Sheriff or other Minister to whom the making of the return shall belong to name and appoint, etc., and the Sheriff or other Minister aforesaid shall at such command of the Court return such men *duly qualified* as shall be present or can be found to serve on the jury and shall add and annex their names to the former panel, etc."

Thus in England Talesmen are brought up through the same channel through which the original panel are returned, namely, through the Sheriff or other Minister appointed on that behalf. The reason for this rule can be gathered from the succeeding words of the statute which make it obligatory upon the Sheriff to return men *duly qualified* which implies an obligation upon him to make some sort of an enquiry into the fitness of the men whom he returns as Talesmen.

Is there any reason why the same rule should not apply here, namely, jurors under sec. 276, proviso (2) be required to be returned by the District Magistrate on the analogy of sec. 226, Cr. P. C., by which persons drawn by lot in open Court are required to be summoned by the District Magistrate?

In view of the recognised fact that "*Talesmen*" are always more or less deceptive their return through the District Magistrate is only a necessary guarantee of their fitness.

BIDHURANJAN LAHIRI,
Vakil,
Rangpur.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Mar. 6th.—*Hareli Shah v. Charan Dass* (Baluchistan).

This was an application for special leave to appeal to the Privy Council, there being no power in the Courts of Baluchistan to grant leave. There was a very large sum of money in dispute and although there were concurrent findings of the lower Courts those findings were come to on entirely divergent reasons.

Sir G. Lowndes and *Mr. A. Majid* for the Applicant. Leave was granted.

Mar. 6th, 8th and 9th.—*Mir Subhan Ali v. Imami Begum* (Berar).

The arguments in this appeal were heard by LORDS SHAW and BLANESBURGH, SIR JOHN EDGE and MR. AMEER ALI.

The suit was in regard to a claim to certain *inam* lands granted to an ancestor of the litigants and continued by Government to the holder and his male descendants. The Plaintiffs had in former suits established their title to a share in the estate but had failed to get the income from it. They now sued for partition and were opposed on the ground that being females they were not entitled to share, and that if they contended that that question was *res judicata* they were precluded from asking for partition now as they had failed to ask for such relief in their former suit.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

The appeal in *Forbes v. Ralli Bros.* is now being heard. The question for decision is whether the Appellant's lease to the Respondents was a permanent one and whether the Appellant is not in any event estopped from denying that it was permanent.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant.

Sir John Simon, K. C., Messrs. A. M. Dunne, K. C. and Hyam for the Respondents.

Mar. 12th.—Judgment was delivered in *Mian Ghulam Rasul Khan v. Secretary of State*, reversing the decree of the Lahore High Court and declaring that the Appellant was a Rajput and therefore a member of an agricul-

tural tribe and entitled to purchase and hold the property in suit.

Mar. 10th, 12th and 13th.—*Forbes v. Ralli Bros.* The arguments were concluded in the above appeal and judgment was reserved.

Mar. 13th.—Judgment was delivered in *Gajadhar Mahton v. Ambika Prasad Tewari*, an appeal from Allahabad. The appeal was dismissed.

Mar. 13th and 16th.—*Harigir Kisangir Gosari v. Anand Bharti Vishun Bharti Gosari* (Central Provinces).

Before LORDS PHILLIMORE, CARSON, BLANESBURGH, SIR JOHN EDGE and MR. AMEER ALI, this appeal was argued by *Messrs. Dunne, K. C. and Hyam* for the Appellants and *Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes* for the Respondents. The suit was instituted by the Respondent who was a Garbhari Ghosain, a caste, the members of which are ascetics except in the matter of marriage. Hindu law generally is applicable as varied by custom. The Respondent claimed title through his father's adoption. The Appellants deny the adoption and allege that the suit is barred by Art. 119 of the 2nd Sch. of the Limitation Act. Judgment was reserved.

Mar. 17th and 19th.—The same Board are now hearing an appeal from Patna, *Agnilar v. Kumat Gangananda Singh*. This was a suit for possession of alluvial lands, which had been flooded by the Ganges and emerged again after about 3 years. The Subordinate Judge passed a decree in favour of the present Respondent for 606 bighas. The High Court also found in favour of the Respondent but directed a Commissioner to make over possession of such lands as he found to lie north of the Cadastral Survey boundary of 1887, 1888. The Respondent contends *inter alia* that no appeal lies to the Privy Council on the ground that the question is purely one of fact on which there are concurrent findings of the Indian Courts.

Messrs. DeGruyther, K. C. and Hyam for the Appellant.

Mr. Kenworthy Brown for the Respondent.

Mar. 19th and 23rd.—The hearing was concluded of *Agnilar v. Gangananda Singh* (Patna). Judgment was reserved.

Mar. 23rd and 24th.—The following members of the Judicial Committee heard an appeal from Bombay, *Shevak Jeranchhod Bhogital v. The Dakore Temple Committee*:—LORD ATKINSON, LORD CARSON, SIR JOHN EDGE and MR. AMERR ALI.

In a suit instituted in 1880 it had been held that the Dakore Temple was a public charity and a scheme was framed for its administration under that scheme. Rules were to be drawn up by the Temple Committee and after sanction by the District Court were to have the same force as if they had been part of the scheme. Rules were framed and sanctioned by the District Court but on objection the High Court altered the rules by striking out all the provisions for payment for passes admitting to the Nij Mandir. From this order the Appellants, who are the hereditary custodians of the shrine, are appealing. The Respondents are (1) the Temple Committee, and (2) the Govs, or Brahmin priests who act as guides and instructors to the pilgrims. The latter contend that no fees are payable by them or by pilgrims accompanying them to the Shevaks, and also that no appeal lies from the order appealed against. Judgment was reserved.

Messrs. DeGruyther, K. C. and Parikh for the Appellants.

Messrs. Dunne, K. C. and Wallach for the Temple Committee.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the Govs.

Mar. 24th.—Judgment was delivered by LORD PHILLIMORE in *Hope Prudhomme & Co. v. Hamel & Horley*, an appeal from Bombay. The appeal was allowed.

Mar. 24th and 26th.—*Kirkwood v. Maung Sin*, an appeal from the Chief Court of Lower Burma, is concerned with the rights to the property of two Burman Buddhists who are deceased. The disputes between the parties were submitted to arbitration, the names of the Appellants who were minors being included in the reference. An application to file the resulting award was dismissed on the ground that it was invalid as against the minors, whose proper representation at the arbitration was impeached. The judgment appealed from held that the claim of the 1st Appellant was barred by limitation as she had failed to sue within 3 years of attaining her majority.

Messrs. DeGruyther, K. C. and Hon. Geoffrey Lawrence, K. C. for the Appellants. Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Respondents.

In *Hareli Shah v. Khan Sahib Sheikh Panida Khan* (Baluchistan), Sir G. Lowndes, K. C. and Mr. A. Majid applied for a stay of proceedings pending an admitted appeal to the Judicial Committee on preliminary questions of limitation and jurisdiction.

The Hon. Henn Collins opposed, but suggested that certain commissions for the taking of evidence should continue but the actual trial should be stayed. An order was made accordingly.

G. D. M.

Correspondence.

"MEANING OF COUNSEL."

To THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,

Mr. N. C. Sen Gupta's letter in your issue this week reminds me of two incidents which may be interesting to your readers.

(1) In March 1909, I was appearing before the Additional District Magistrate of Midnapore for the defence in an offshoot of the notorious Bomb Conspiracy case—*Emperor v. Bakhal Chandra Laha*. Incidentally, in the course of the proceedings, there was some discussion as to the proper mode of designating me (a mere Vakeel) in the order-sheet. The Officiating Advocate-General who was appearing for the prosecution was referred to by the learned Magistrate and he unhesitatingly gave his opinion that no matter whether a Barrister or a Vakeel was appearing, he was properly designated "Counsel for the accused." The Officiating Advocate-General was Mr. Walter Gregory.

(2) In a case before Sir Lawrence Jenkins, C. J., and another learned Judge, a Barrister objected to Sir Rashbehary Ghose's describing a Vakeel as "Counsel." That objection was met with the retort, "It is only the uneducated and the half-educated who think that the term 'Counsel' is restricted to Barristers." *Verb Sap*

Yours, etc.,
NARENDR K. BASU.

6th May 1925.

THE Calcutta. Weekly Notes.

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REPORTS (See Index)

Recording of confessions in Calcutta.

The judgment of Mr. Justice Mukerji in *Emperor v. Panchkari Dutt*, 29 C. W. N. 300, discloses a curious defect in the drafting of the Act passed in 1923 for amending the Code of Criminal Procedure. There can be no doubt that the legislature intended that the recording of all confessions whether in Calcutta or in the Mofussil should be governed by the provisions of sec. 164 of the Code and the safe-guards laid down in the section should be followed in all cases without exception. With this view the legislature has amended sec. 164 and enacted it in the present form specifically mentioning a Presidency Magistrate as one of the officers empowered to record a confession under the section. But what is the effect of this amendment? It leaves matters exactly where they were and, although it may appear curious, a Presidency Magistrate has even now no power to record a confession under sec. 164, in other words, the safe-guards laid down for the recording of a confession, omission on the part of a Mofussil Magistrate to follow which renders a confession inadmissible in evidence, may quietly be ignored when a confession is recorded in the towns of Calcutta and Bombay.

Chap. XIV of the Code of Criminal Procedure deals with information to the police and their powers to investigate and the only portions of this chapter which are applicable to the police in the towns of Calcutta and Bombay are sub-sec. (2) of sec. 155 and sub-sec. (3) of sec. 156 which deal with investigation into a non-cognizable case directed by a Presidency Magistrate and investigation into a cognizable case directed by such Magistrate res-

pectively. Under sub-sec. (2) of sec. 1, in the absence of a specific provision to the contrary, the Code of Criminal Procedure does not apply to the police in the towns of Calcutta and Bombay and that being so investigations into cognizable cases undertaken by the police without the order of a Magistrate are exempted from the operation of Chap. XIV of the Code and necessarily sec. 164 cannot apply to these cases for its application is limited only to an investigation held under the chapter. Instances in which investigations are held into cognizable cases under orders of a Magistrate are so very rare that for all practical purposes they may be left out of consideration and the net result of the amendment is that in Calcutta as before there is no law regulating the recording of confessions—a state of things which the legislature surely intended to put a stop to, but it is very unfortunate that it has failed to express its intention in the terms used in the Code. The whole difficulty would have been avoided if the legislature had said that the provisions of Chap. XIV shall apply to the police in the towns of Calcutta and Bombay and it is difficult to imagine what stood in the way of its doing so. There was a time when there was very great difference between the Presidency Towns and the Mofussil and this justified the making of special laws for the former areas, but times are changed and those days are long gone by. It is high time that the distinctions between the Calcutta and the provincial police were wiped out and both governed by the same law.

Another curious fact brought out by the same judgment will show conclusively how very necessary it is to obliterate the distinction referred to. Sec. 61 of the Code of Criminal Procedure lays down the wholesome rule that no police officer shall detain in custody a person arrested without warrant for more than twenty-four hours unless he gets a special order from a Magistrate. This section not

being applicable to the police in Calcutta, the Deputy Commissioners have somehow or other clothed themselves with the power of detention for an unlimited period. There does not seem to be any statutory basis for this extraordinary power which the officers in question exercise quite arbitrarily but they have done this so long unchallenged that it is generally understood that there is such a power. We hope, however, that after the authoritative pronouncement of Mr. Justice Mukerji there will be an end of this unlawful interference with the liberty of subjects. In the view taken by Mr. Justice Mukerji he has the support of Mr. Justice Walmisley who also held a detention under similar circumstances as improper, presumably on the ground that no such unlimited power exists.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Continued from p. cxxvii.)

III

The Committee recommend that *ex parte* cases should be decreed without evidence, in certain classes of cases, after service of a "default" summons upon the Defendant. The object of issuing such summons will be to give the Defendant notice that unless he contests the claim, the Court will presume that he has no contest to make. They recommend that supervision over the process-serving staff should be more rigorous and thorough than at present, so that the presumption from non-appearance may arise. They think that the evidence adduced at present in undefended cases is merely formal. If a person brings a false claim, he has no difficulty in bringing false witnesses to support his claim. Neither the demeanour of the witnesses nor the improbability of the case enables a Court to feel justified in dismissing the claim, as improbable things do sometimes happen and truthful witnesses very often show suspicious demeanour. Moreover, the Courts have not the materials before them which will enable them to elicit the truth. They recommend that even if the present system continues, *ex parte* cases should be tried in places where there is a group of Courts, by a Registrar for all those Courts. The Registrar will be the Chief Ministerial Officer. They think that it is waste of time for the presiding officers to do this work which is merely mechanical.

Nowhere in the whole report are the members so eloquent as in the Chapters (XX to XXIV) dealing with the right of appeal. This "right" is considered to be a "liability" for persons with a true claim to be harassed out of all proportion to the nature of the claim, and to be delayed unduly in the realisation of their just dues. They have therefore recommended several measures for final disposal in the first Appellate Court and for greater scrutiny in the admission of appeals, and the abolition of Letters Patent Appeals from decisions of single Judges except where certificates are granted by such Judges. Though they have made out a very strong case for those proposals, it is exceedingly doubtful if the public will approve of those measures. The people of India have more love for justice in the abstract than for general considerations of public convenience. Western people generally level the criticism against Indians that the latter are not a practical people, and are lacking in common sense. As Sir Herbert Risley has put it very facetiously, Indians have got two valves in their heart, one of which functions as the source of all discussions, social, legal, political and religious, while the other controls his social life, and that the one has no connection with the other. What the Indians lack in is not "the common sense," but the robust practical view of things commonly known as the "horse-sense." Their fondness for metaphysical and abstract discussions is the more marked, as they are less desirous than other people to follow the conclusions arrived at after such discussions. That explains also their religious tolerance, the large sums of money spent on ceremonial occasions in hearing learned discussions by Indian pandits and their fondness for legal discussions. Newspapers in India devote more space to legal matters than any daily paper of a western country. The people probably regret that the learned Judges of the High Court do not decide questions of law unless they arise in a case before them. The Committee think that it would be a desideratum if litigations could be finally disposed of by the trial Court to the satisfaction of the parties. But one cannot be sure that the public would be dissatisfied if Honourable Judges were permitted in appeals to decide legal conundrums, and pronounce on constitutional and social questions, unconnected with any case, but having a remote connection with legal principles. Such is also

the atmosphere of the law Courts. The Committee have found that though in several enactments the right of appeal to the High Court was definitely refused, yet the power of interference and of supervision inherent in a supreme tribunal like the High Court and consequently reserved for it, has in practice come to be regarded as an ordinary power of appeal. The line of demarcation between the two classes of cases, varies according to difference in the temperament of the Judges, and to the environments they have been brought up in. They recommend a "stiffening" in admission of appeals, but so long as the mentality of the Indians does not undergo a radical change, the recommendation will remain as a pious wish. The inability to right a supposed wrong is considered by many Judges as an unjust restriction on their utility as superior judicial officers. It is about 70 years since Sir Henry Sumner Maine said in a convocation address of the Calcutta University that he expected the dissemination of mathematical and scientific training through the colleges, an improvement in the practical outlook of the Indians, but the improvement, if any, is hardly noticeable. Whether there has been any, will be evident from the nature of support accorded to the proposals of the Committee.

So far as the appellate work from decisions of Munsifs is concerned, the Committee recommend constitution of District Appellate Benches consisting of two selected Subordinate Judges. A concurrent decision of theirs is proposed to be made final on all questions of law and of fact. If they differ, a second appeal will lie to the High Court, both on questions of fact and of law, so that the Honourable Judges of the High Court will be able to do complete justice in the case. A well-known Judge once regretted that he had to "do injustice knowingly." In second appeals the chief merits of the proposed system are that decisions will be final within a short space of time and that the Subordinate Judges will find more time for deciding appeals than at present when they have to write appeal-proof judgments for use in the High Court. It cannot be gainsaid that one of the defects of the present system is that the principal qualification of a Judge has come to be conceived to be the capacity to write judgments that would read well and would withstand a battery in the Appellate Court, more than the ability to decide cases quickly and satisfac-

torily. It has been proposed that the Judges of the District Appellate Bench will not try any original suit, but will merely hear appeals and that they will hold their sittings in circuit over several districts, if the work of a single district be insufficient and if it be inconvenient to decide cases of several districts in one place. Neither the circuit system, nor the inconvenient system of hearing appeals of several districts at one station need be adopted, if those Judges are allowed to try original suits and to constitute periodically Appellate Bench for the district they work in. This modification may be adopted in the heavier districts where there are two or more Subordinate Judges. If the Committee's suggestion be accepted, the legislature will probably enact an additional schedule to the present Code of Civil Procedure, and will possibly permit local Governments to introduce this system in certain districts or throughout the province, subject to the approval of the Central Government. It may be worth while to consider whether it is not desirable to authorise Local Governments to permit trial by jury in commercial cases and in some other classes of cases requiring knowledge of local custom or of usages of certain sections of people. In some place the Munsif and Subordinate Judges are not kept employed for the whole time on account of insufficiency of work. If the District Judge be authorised to direct trial of selected cases or specified classes of cases by a Bench of two Munsifs and if their concurrent decision be made final on all questions of law and of fact, then the advantage to the public will be greater still.

With respect to the Calcutta Small Causes Court, the Committee think that the present system of hearing appeals by a Bench consisting of the trial Judge and of the Chief Judge, is unsatisfactory. They recommend a different constitution of the Appellate Bench and the creation of the post of a Commercial Judge. They suggest that some officers of the provincial service be trained in the usages of commerce, so that in case of a sudden influx of commercial cases, those officers may remove the congestion.

The Committee recommend that the District Judges should be given some training in civil law and in practice and procedure before appointment as such, and that recruits for the posts of Munsif should be given a thorough training in office and in legal work during their

probationary period. They think that pleaders should be required to learn their work from some District Court pleaders on payment of some fee. If the High Court selects only those who enjoy a good reputation for devotion to details of work and are zealous in training others, and if the scale of fee for each be prescribed by the High Court, the improvement will be a far-reaching one. Not only will the pleaders improve, but the judicial officers who are recruited from the pleaders will also be better equipped than now. As at present, the newly appointed Munsif is as much dependent upon the advice and guidance of his subordinate clerks as the junior pleader is upon his clerk. The Committee have wisely refrained from considering any step for checking the undesirable over-crowding of the Bar, as any attempt in that direction might have launched them into the highly electrified grounds of social customs, political and economic conditions. They have left the matter for consideration by the Provincial Bar Councils.

"S. S."

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Mar. 27th.—Judgment was delivered by LORD DUNEDIN in *Udoy Chand Pannalal v. P. E. Guzdar* (Bengal) in which an application had been made for special leave to appeal.

The question raised is an important one dealing with the meaning and scope of secs. 109 and 110 of the Civil Procedure Code and will be the subject-matter of a full report later.

A dispute arose in a contract for the sale of goods. There were abortive arbitrations and a suit was brought. The suit was stayed because of the arbitrations. New arbitration proceedings were held and two *ex parte* awards were made, one in favour of the present Petitioner for 81,000, the other in favour of the Respondents for 3,000.

The High Court on the application of the Respondent set aside the award in favour of the Petitioner. The latter thereupon sued to set aside the award in favour of the Respondents. His suit was dismissed by the High Court on appeal and on refusal of leave to appeal further, the present petition for special leave was filed. The Petitioner contended that

although the immediate effect of his application was a decision whether or not he should pay only 3,000, yet the ultimate effect, if he could get rid of that decree for 3,000 against him, was whether or not he could obtain a sum of over 10,000.

Their Lordships refused leave on the ground that there was no property indirectly involved of the value of Rs. 10,000 within the meaning of sec. 110 of the Civil Procedure Code and said:—

"It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-sec. (c) of sec. 109."

Mar. 27th.—Judgment was delivered by LORD SHAW in *Probhudas v. Ganidada* (Bengal), where in sugar contracts the buyer claimed to deduct from the purchase price the equivalent of a decrease of duty. He contended that the duty was fixed on the basis of a tariff valuation and that as the tariff valuation was reduced hence the duty must be taken to have been reduced. This view was negatived and the decisions of the Courts in India were affirmed.

Mar. 27.—Leave was granted to withdraw the appeal in view of a compromise having been effected in *Jagaveera R. Venkateswara v. E. N. Ayyan Avergal* (Madras).

Mr. Narasimham for the Applicant.

Mar. 30th.—In *Indrajit Pratap Sahi v. Amar Singh* (Patna), Messrs. Dunne, K. C. and Wallach applied to amend the order in Council passed in the appeal reported in 28 C. W. N. 277. Messrs. DeGruyther, K. C. and Parikh opposed. Amendment was refused.

Mar. 30th.—Judgment was delivered in *Shevak Jevanchand Bhogilal v. Dekone Temple Committee*. The judgment of the High Court was set aside and the appeal allowed.

Mar. 27th, 30th and 31st.—The hearing was continued and concluded in *Kirkwood v. Mg Sin* (Lower Burma). Judgment was reserved.

G. D. M.

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Transfer application supported by affidavit of accused.

In the Calcutta High Court it is an established practice not to receive affidavits of accused persons in support of applications for transfer but it appears to be not unusual in some of the other High Courts to receive such affidavits. It is a cardinal principle of law that the accused should never be subjected to the risk of a prosecution in respect of a statement made by him in his defence. Where an accused moves a higher court for the transfer of a case pending against him on the ground that he reasonably apprehends that he will not have a fair and impartial trial in the Court below, he is undoubtedly acting in his defence and the policy of the law is that no obstacle of any sort should be thrown in his way. The matter becomes one of great importance in cases in which an attempt is made to prosecute the accused for filing a false affidavit in support of his application for transfer.

The practice of receiving affidavits of accused persons is wholly illegal. Turning to sec. 5 of the Indian Oaths Act, we find that after enumerating the persons who are to make oaths or affirmations in Courts of law it clearly lays down that it shall not be lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person. All applications to the High Court under sec. 526 of the Code of Criminal Procedure or to the District Magistrate under sec. 528 are surely criminal proceedings and the accused so long as the case in question is pending against him is an accused. How then can an oath be administered to the accused in connection with an application for transfer? How many illegal practices are in vogue in courts of law is more than one can say. In the Calcutta

High Court the practice is quite in conformity with law and common sense.

In 1906 the Allahabad High Court was called upon to pronounce its judgment on the question, *Emperor v. Bindeshri Sing*, 1. L. R. 28 All. 331 and Mr. Justice Richards held that where an accused person applies for the transfer of the case pending against him to some other Court supporting his application by an affidavit he cannot or at least ought not to be prosecuted under sec. 193, I. P. C., in respect of statements made therein. In a recent Lahore case, *Crown v. Pirquadir Butsh Shah*, 6 Lahore 34, Shadi Lal, C. J., has held that there is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an affidavit tendered by him in support of his application for transfer and such statement can be the subject-matter of a charge for perjury. The learned Judge takes it that the only provision of the law which confers immunity upon an accused person from criminal liability for making a false statement is that contained in sub-sec. (2) of sec. 342 of the Code of Criminal Procedure. His Lordship seems to have overlooked sec. 5 of the Oaths Act referred to above which places the matter beyond all reasonable doubt.

In the case in question it has been said that if the immunity were allowed to accused persons they will be at liberty to make reckless allegations against Judges and Magistrates and anxiety to avoid this undesirable consequence has led the Court to strain the law unduly against the accused. It is not a question of expediency but the question is whether it is at all legal and if it is not sanctioned by law it cannot be done whatever the consequences may be. The matter, however, does not seem to us to present any great difficulty. If the Courts uniformly refuse to take these affidavits of accused persons, transfer applications will have to be supported by statements on oath of some other person conversant with the facts of the case who is liable to be prose-

cuted under sec. 193, I. P. C., if his affidavit is false.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Continued from p. cxliv.)

IV

The excessive costs which have to be incurred in a litigation in the High Court have given rise to an insistent demand by the public for a City Civil Court in Calcutta, similar to that in Madras. The Committee have carefully considered the proposal and have definitely rejected the idea. They think that a Court of the "mofussil type" will give less satisfaction to the public and that appeals to the High Court will be greater from such a Court than at present. "To get a cheap judge is by no means always an economy" is their opinion on the project. It cannot be gainsaid that a trial after it has once been commenced, is finished more quickly in the High Court than in a Subordinate Judge's Court. In the former case there are not so many unnecessary witnesses, nor is cross-examination so wearily lengthy and useless. The lawyers of the High Court are not only more competent as a body than the Mofussil lawyers, but have more respect for the Judge, and a suggestion from the latter that a cross-examination is being carried too minutely, or is directed on an unimportant line is always treated with proper respect. In Courts of the interior such suggestions are generally resented by the Bar and the Subordinate Judiciary are extremely anxious to avoid complaints about arbitrary methods. Their subordinate position is responsible for the inveterate tendency to follow the line of least resistance. They do not feel sure that if they depart from the traditional supineness and show greater firmness in rejecting remotely relevant questions, their action will not be condemned. Some typical cases have been cited (pp. 71-86) to illustrate the extravagant length of time which trials in subordinate Courts take up, and that when leading Counsel appear before such Courts the Judges surrender themselves to these gentlemen and allow the trials to drift as they list. Such being the case, the Judge of the City Civil Court will not be able to try cases as expeditiously as a High Court Judge. Moreover, it is considered that the enrolment of Vakeels as Advocates will have the effect of cheapening litigation in the High Court. But

so long as the public have to pay fees both to the Attorneys and to the Counsel, the expenses are bound to be prohibitive. The time has now come when the idea that the legal profession should consist of two branches, the upper one of which will have to conduct themselves more cleanly and more honourably than the lower, deserves to be considerably modified. So long as Counsel and Advocates are refused direct contact with clients, and so long as the attorneys are not allowed to prepare plaints, move petitions in Court, conduct trials of *ex parte* cases and their out-put is unduly restricted by a defective system of examination, the cost of litigation in the High Court will continue to be as excessive as at present. A commission to examine a witness for about 3 hours, which costs in a lower Court about Rs. 30 including pleader's fees, is likely to require in the High Court Rs. 400 to Rs. 500 at the lowest. The prohibitive nature of the costs is the real reason why suits for partition of houses are more rare in the High Court than in the Courts at Alipore.

The Committee strongly recommend that some system of training for legal practitioners in Mofussil Courts should be introduced, so that they may get the proper practical training before commencing practice. If only those District Court pleaders are selected as instructors, who besides being efficient are likely to display some zeal in their work, if their proposed remuneration be commensurate with the labour involved and if the intending practitioners are allowed to select their own instructors from those in the approved list, the effect will be noticeable. One of the reasons why the system of "articled clerks" has not been successful in the case of vakeels but has been a complete success in the case of attorneys, is that the latter pay some remuneration and render valuable assistance to their masters, while the masters of the former get no benefit from the arrangement. Any improvement in the legal profession will also effect a corresponding improvement in the junior ranks of the subordinate judiciary, as the latter are exclusively recruited from the Bar. If a junior pleader is too much dependent on his clerk for the little work that comes in his way, then on being appointed as a Munsif, he will be still more dependent on his ministerial officers for the great variety and complexity of his office work.

In the University of Madras, vakeels have

to attend before enrolment a course of lectures on professional conduct and etiquette. If such a course of study were introduced in the curriculum of the B. L. Examination of the Calcutta University, much good may come from the innovation. At present, many Mofussil practitioners have conflicting ideas about the dignity attaching to the profession. While they do not always show a proper standard of dignity in dealings with clients and in conduct of cases, their exaggerated ideas of dignity are responsible for a great reluctance to go to a Court's office to examine a record, to sign a decree or a register of payments. Naturally enough, the clerks will expect some personal benefit for sending a record or a register to a pleader in disregard of departmental rules. The Judicial Officers also very often betray a poor idea of dignity on some lines of conduct and an exaggerated idea in others. As the Vice-Chancellor of the University is a Judge of the Calcutta High Court and the faculty of law is composed mainly of practising lawyers, there may not be a great difficulty in the way of introducing some change in the University curriculum. To achieve the end it is also necessary that the conduct of legal business should be more dignified, witnesses should be better treated, the traditional symbols of dress and other matters of form should be religiously observed, there should be more of mutual respect between the Bench and the Bar and that there should be slackening of the tendency to protect by every possible means a member of the profession who shows gross delinquency in any matter. The Committee expect much service to the public from the Provincial Bar Council when it will be formed. If that Council show as much moral courage as the Civil Justice Committee, who have not spared even High Court Judges and Judicial Commissioners, it can do immense good to the public.

In a country where the people are habitually dilatory, it is not possible for the pleaders to enforce punctuality, even if they were so minded. The change in habit must really be brought about by the judges. "Presiding officers must be stricter," and "be ready to give up a reputation for easy-going good nature in the interests of efficiency." Stricter methods may, in the transitional period, occasion injustice in a few cases, but in the long run the public will be benefited. The Committee say that unless the Courts make it understood that "an order must be obeyed,"

there will not be great improvement in any direction. On the point of strictness there seems to be much popular misconception among the public and the legal practitioners. The chief attributes associated with a strict officer are want of consideration for convenience of the public and lack of courtesy. An officer who follows strictness from a higher sense of duty or from a love of method, need not entertain any apathy towards public convenience or a disregard for sentiments of others. The misconception may have been due to the cause that some officers in the past in their excessive anxiety to do their duty or to follow a cherished method of procedure, may have shown impatience or irritation whenever they thought they were being intentionally obstructed, and in such a frame of mind may have overlooked the very consideration which lent justification for stricter methods. All branches of the public service have much improved of late years and people will soon have occasion to modify their former conception. A "nation in making" cannot but produce, in increasing members, officers of the proper type.

"S. S."

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Mar. 31st.—*Thakur Ashutosh Deo v. Bansidhar Sharaff*. In this application, *Messrs. Dunne, K. C. and A. M. Talbot* applied on behalf of Government for leave to join in the appeal to the Privy Council.

The Appellant was a *ghattwal* and proceedings had been taken for the sale of his tenure in satisfaction of a judgment-debt. It was a question whether the tenure was saleable without the consent of Government. Leave was granted.

Mar. 31st.—In *Secretary of State v. Raja Jyoti Prasad Singh Deo* (Patna), the application by the Petitioner to be heard was reserved. The appeal was heard by the Board in December last in the absence of the Respondent and judgment was reserved. The Respondent applied earlier in the term for leave on the ground that although funds had been transmitted to their agent in England he had failed to brief counsel.

It was now stated in affidavit that a change of solicitors had been made and it was submitted that the failure to appear at the hear-

ing was in no way due to the negligence of the Respondent. The original solicitor had failed to obey an order of the Chancery Judge to hand over the funds and papers in his hands and a writ of attachment had issued and had been executed. The Respondent's present solicitors would, however, obtain further funds and instructions.

Messrs. DeGruyther, K. C. and Párikh for the Applicant-Respondent.

Messrs. Dunne, K. C. and A. M. Talbot for the Secretary of State.

Sir G. Lowndes, K. C. and Messrs. E. B. Raikes and Douglas McNair for the other Appellants.

Leave was granted for the Respondent to be heard, the hearing to be fixed for the beginning of the June sittings.

G. D. M.

Review.

HAND-BOOK OF ENGLISH CONSTITUTIONAL LAW FOR INDIAN STUDENTS. By *Jyoti Prasad Sarbadhikari, M.A., B.L.* Das Gupta & Co., Publishers, 54/3, College Street, Calcutta, 1925. Price Rs. 4-8.

It is no mere accident that constitutional questions have been engaging an increasing amount of attention on the part of the educational authorities all over India. Until the inauguration of the Montague-Chelmsford Reforms, the constitutional position of India was closely assimilated to that of the Crown Colonies, the Government of the country being a thinly disguised despotism, on the whole benevolent in character, but fitting so ill with the constitutional system of the Government of the British Isles that hardly any practical object could be served by requiring Indian Students to study English constitutional law. The promise of responsible Government, however inadequately fulfilled on account of the innumerable limitations by which it has been hedged round, contained in the Government of India Act of 1919-20, has done at least one important service—it has lifted the consideration of questions of constitution and constitutional law above the plane of mere academical discussions, within as well as outside the precincts of educational institutions. The very close and careful analysis of the English constitution and English constitutional law from the point of view and for the benefit of Indian Students, presented by Mr. Sarbadhi-

kari in this attractively got-up hand-book of about 250 pages, is both a sign of the times and an intelligent anticipation of the needs of a whole generation of students of Indian politics to come.

It is a fact that the Indian constitution and Indian constitutional law, whatever that is, cannot be studied at this moment without a preliminary study of the English constitution of which it is an offshoot. At what points of contact and through what channels Indian constitutional law draws its vital forces from that fountain-head and what forces retard the circulation of the life-blood of English constitutional law into the administrative system of British India—that is the matter that must engage the attention of students of Indian politics at the present moment and for years to come. In this little book not only has the English constitutional law been analysed and exhibited from the point of view of an Indian scholar, the points of contact referred to above with the Indian constitution have been definitely indicated with the object, it is to be hoped, of carrying the study and discussion into the details of the Indian constitutional system, in a treatise by itself.

Of the manner in which the work has been executed, *multum in parvo* appears to be the key-note. And yet it is not a digest only or a cram-book either. It is the work of a scholar who has studied the whole subject rationally and has attempted to present, with evident success, the various aspects of the subject in a rational way. It ought not therefore to be difficult for any student of the book to discriminate the principles from the illustrative details, without which a mere enunciation of the principles would not have been adequately illuminating or convincing. The subject has been dealt with in seven chapters, an introductory chapter followed by chapters on (i) The Subject, (ii) The Crown, (iii) The Executive, (iv) The Legislature, (v) The Judiciary and (vi) The Colonies and India. The sub-heading Treason and Sedition would, we think, have come naturally within the chapter dealing with the Crown, but this misplacement, if it is one, is hardly of any consequence. Not a single leading case of importance appears to have been left out. It is a work of great intrinsic merit, an admirable hand-book for students, and a convenient introductory to the study of constitution and constitutional law for all students of Indian politics.

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Control of domestic relations by injunction.

An interesting case on the above subject recently arose in America. The Plaintiff's petition alleged that the Defendant was seeking the affections and support of the Plaintiff's husband. It was further alleged that the Defendant was insolvent and that if she continued her present course of conduct the Plaintiff would be deprived of the love, support and consortium of her husband. The Plaintiff prayed for equitable relief. The Defendant entered a general denial. The Court found the issues in favour of the Plaintiff and granted an injunction restraining the Defendant from associating with the Plaintiff's husband, going near him, communicating with him or doing any act to prevent him from giving the Plaintiff his love, companionship or support. The matter was taken up to the highest Court where it was held that equity will not attempt to control domestic relations by means of an injunction [*Snedaker v. King*, 145 N. E. 15 (Ohio)].

The learned commentator in Harvard Law Review observes as follows:—"Although the proposition that equity has jurisdiction only to protect property interests was long regarded as axiomatic, there is a growing body of authority to the effect that interests in personality will be protected. Some Courts tread lightly in this unaccustomed field and lean upon shadowy property rights which they find co-existent with the personal interests protected. In the case in question the husband was under a statutory duty to support his wife. A Court which sought a peg upon which to hang its

decision might treat the wife's right to support as a property interest entitled to equitable protection. A few of the Courts which take the more desirable view that the absence of a proprietary interest does not deprive equity of jurisdiction have given relief in cases involving domestic relations. The practical difficulty of enforcing decrees like that awarded by the lower Court supports the result of the case under notice."

Abuse of judicial privilege.

In a recent case (*Benarasi Das v. Crown*, 5 Lahore 166), the Lahore High Court has acted very properly in expunging from the record certain portions of the judgment of the Magistrate in which strong reflections were made against the Petitioner who was not before the Court in any capacity, neither as a party nor as a witness. In a case in which a clerk of the local Cantonment office was prosecuted for having engaged in trade and thereby committed an offence under sec. 168, I. P. C., the Magistrate after finding the accused not guilty of the offence alleged against him proceeded in the concluding portion of his judgment to express strong opinions as to the motives which he considered had inspired the prosecution. He declared that the accused was the victim of a conspiracy on the part of the managing committee of the All-India Cantonment Association. He stated that this body of which the Petitioner was the Vice-President was anxious to have the accused dismissed from his post simply because its members had failed to have their own way with the Cantonment authorities. He further added that the columns of a newspaper known as the "Cantonment Advocate" had been freely used by the Petitioner and those associated with him to injure the accused. He concluded his judgment by stating that the complaint was based purely on malicious prose-

cution of the accused. These portions of the judgment the Petitioner asked to have excluded.

Forde, J., allowed the application and observed as follows:—"It is an elementary duty of a Judge in a criminal case to exclude evidence which is not legally admissible. The trial Magistrate in the case before me has conspicuously failed in this duty. I am further of opinion that the observations of the Magistrate concerning the Petitioner made in a proceeding in which the Petitioner had no opportunity of being heard based upon material which is not admissible in evidence in those proceedings and which, even if admissible, would not justify the observations in question amount to an abuse of judicial privilege. It would be a denial of justice to allow the reflections upon the character of the Petitioner to stand."

Law of treason in Britain and in Ireland.

The following extract from the *Law Times* will go to show that in the Irish Free State, the law of treason is being made more stringent than it is in Great Britain, which before the separation was also the law in Ireland:—

The Treasonable and Seditious Offences Bill, which was read the second time in the Dail Eireann of the Irish Free State on the 19th inst., declares, in its first clause, that anyone who commits, in the Irish Free State, certain acts, therein specified, shall be guilty of treason and shall be liable on conviction thereof to suffer death. The third sub-clause of the first clause of the Bill is as follows:—"Every person charged under this section with treason shall and may be indicted, arraigned, and tried in the same manner and according to the same course and order of trial in every respect and upon the like evidence as if such person stood charged with murder, and if such person is found guilty of treason he shall be convicted and sentenced in the same manner as if he had been found guilty of murder." It will be observed that the provision that the trial for treason shall be conducted in the same manner and "upon the like evidence" as if the trial were one for murder deprives the person accused of privileges secured to him by the statute of 7 & 8 Will. 3, which were extended to Ireland by various subsequent statutes, piecemeal. Thus a section of the statute of William III. [re-enacting and strengthening an enactment of Edward VI. (1 Edw. 6, c. 12, s. 22)], making necessary a technical minimum of proof by providing that a prisoner should not be convicted unless he voluntarily confessed in open Court or

his guilt were established by two witnesses deposing either to the same overt acts or, at least, to separate overt acts of the same kind of treason, is omitted from the Bill. So, too, a provision of the Act of William III., which enacts that treason only can be prosecuted within three years from its commission unless it were committed abroad, or consisted of an actual plot to assassinate the sovereign is omitted from the Bill. These omissions are, of course, calculated to afford greater facilities of obtaining convictions under the Bill. The provision that a person found guilty of treason shall be convicted and sentenced in the same manner as if he had been found guilty of murder, savours of the superfluous. In 1870, by the Forfeitures Acts, all the exceptional features of execution for treason were abolished except in cases where quartering or beheading may be ordered by Royal warrant. By an Act of 1814 (54 Geo. 3, c. 146, s. 2), the Crown has still power to order by warrant under the sign manual that any male who has been sentenced to be hanged for treason shall be beheaded. The judge, however, cannot appoint any mode of death but hanging. When a treason had been committed, but where the Crown could only obtain a single witness, the only mode of punishing the offender was either to prosecute him for sedition, as in the case of Hampden (9 St. Tr. p. 1853), who took part in the Rye House Plot, or to attain him by an *ex post facto* Act of Parliament (such Acts cannot be passed under the Irish Constitution), as in the case of Sir John Fenwick, who plotted the assassination of William III. The provision requiring two witnesses in cases of treason to procure a conviction did not become law in Ireland till 1821 (1 & 2 Geo. 4, c. 24). On the 29th April 1795, nearly a century after Sir John Fenwick's attainder, Mr. Curran, from his place in the Irish House of Commons, unsuccessfully moved for leave to bring in a Bill for amending the Irish laws in cases of high treason, in a speech in the course of which he alluded to the difference which was said to exist between the laws relative to high treason in Ireland and Great Britain, in the latter of which two witnesses were necessary in order to convict the accused, while in Ireland a single witness was deemed sufficient.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Continued from p. cxlvii.)

V

The Committee recommend that officers of the Indian Civil Service should be better grounded in legal principles, and that those appointed as District Judges should be required to undergo some short training as Subordinate Judicial Officers. They have quoted from a communication which passed in the year 1907 from the Government of India to

the Secretary of State (*vide* p. 191) which recognised that the absence of proper legal training in officers whose function was to hear appeals from trained judicial officers constituted a "blot" on the administration. The chief reason why such officers have been popular is that on account of their superior general culture and of being brought up under better environments in an advanced country they have not only been generally able to pick up the necessary knowledge but have shown high administrative ability and a broader sympathy for the people than most natives of the soil, whose ennui and apathy have struck some foreign travellers as something inexplicable. Some indeed like Justices Field and Rampini have earned a high reputation for being sound lawyers. But in many cases want of confidence in their own legal knowledge has been responsible for weakness in administration and consequent enervating effect upon the subordinate judiciary.

The Committee have recommended an elaborate system of training for probationary Munsifs, so that they too may not have to learn their work at the expense of public justice. Another object is to give them a proper training in office methods. One often hears judicial officers complain that they cannot effect any improvement in office as their powers of control are very limited. They forget that if they fail in utilising even those small powers in effecting a reform in the office, there can be no justification for investing them with wider powers. But, the Committee's recommendation that officers should not be promoted from one grade to another as a matter of routine, but that incompetent officers should be passed over, would be a dangerous principle under present conditions. What is wanted now is to develop in them a proper sense of responsibility and dignity. If the recommendation is accepted they will be still more timid than at present. Extreme subordination and full sense of responsibility ill go together. The remedy lies in proper selection during recruitment and in selecting officers for superior posts not by seniority but by test of merit.

The Courts' offices are proposed to be improved by better organisation, more effective supervision and by increasing the pay and prospects of the ministerial officers. Process-serving establishment is also proposed to be improved by similar methods. For greater supervision of their work in the interior the

creation of posts of Inspectors of process-servers is recommended.

Improvements in administration inevitably mean increase in costs. If a clerk or a process-server is poorly paid, it is the litigant public who supplement their income, and once the system has begun it does not stop just when the living wage has been reached, but the earning continues until it is many times over the remuneration which would be fit for the post and the abuses reach such gigantic proportions that the system comes to be known as an "open secret." The less there are of such "open secrets" the better is the administration. If the public feel sure that besides the prescribed fees they will not be required to pay anything, they may not grudge an increase in fees to cover increase in pay. But what is most important of all is that the public leaders should not show in their anxiety to secure money for the "nation building" departments, so much jealousy for expenses on the "reserved" side. Heavy and gigantic structures are best built when the soil has been made firm, and the money spent on strengthening the foundation is never wasted.

The question of proper service of processes, which forms the foundation of the civil judicial system, has received the due consideration of the Committee. But even in spite of their anxiety to remove all legitimate grounds of complaints they have not been able to overcome some of the difficulties of the problem. The present system would not have worked so badly in practice, did Defendants and judgment-debtors act up to what is expected of them, *viz.*, by acknowledging service of summonses and notices by affixing signatures or finger-prints on the original processes, and if the neighbours came forward to prove due service. The Courts find it difficult to discriminate between cases of true service from false ones. The rule requiring an identifier for service of a process has given rise to loud complaints. That the rule is highly inconvenient and that it is responsible for many of the abuses, cannot be questioned. But if the parties are exonerated from all liability to have their processes duly served by the process-servers on their identification, there will be many false accusations of suppression of processes and the Court's officers will find it very difficult to prove due service. At present, the responsibility of proving due service lies with the party at whose instance the process was served.

They take the proper measures to preserve evidence of service. The witnesses whom the Court's peon may find present during service, may be on friendly terms with the person served, and it may happen that on an enquiry into a complaint of suppression of a process, those persons will deny all knowledge. The Committee have refrained from pronouncing any opinion as to whether the rule requiring an identifier should be abrogated or not, they have recommended however, that identifiers and process-servers should not be required to prove service by affidavit—which is in many cases a "solemn farce" and which puts the identifier to needless trouble. It is well-known that cases have to be adjourned several times on account of the failure of the identifier on account of illness or some private reason to turn up to swear the affidavit in time. The reasons why processes of Criminal Courts are properly served without identifiers are that the village *chaukidars* and *dafadars* help the peons, that the parties who generally reside in the same locality also help them, and that the accused has nothing to gain but much to lose from a false plea of non-receipt of a summons. The proposal for general use of the post office for service of processes was considered and the Committee are of opinion that it would "practically mean flying from the ill we have to others that we know not of." The reasons that postal peons are recruited from the same ranks of society as Civil Court peons and that they are not subject to the discipline of the Court are sufficient for not showing any preference to them. The Committee think that in Bengal and some other provinces, "personal service is made a fetish," which it was not in the contemplation of the legislature, and that service upon an adult male member of the family ought to be sufficient when Defendant is not found at home. They also suggest that irregularity in the service of a summons should not be a ground for the setting aside of an *ex parte* decree unless the Court is satisfied that the Defendant had no notice of the date of hearing. They recommend also that the sum of about 18 lacs of rupees which the Local Government make in each year a profit of, should be utilised in improving the process-serving agency, so that the litigants, get "full value for the money paid for a specific purpose." The Committee think that summonses upon witnesses can very conveniently be served through the parties themselves.

The beat-system of service analogous to that under which postal letters are delivered, has been found by the members to have worked very satisfactorily in some provinces in Upper India and they consider it desirable that it should be introduced everywhere. Under that system processes are served more quickly, the process-servers are kept more fully employed, the nezarat finds fewer scope for nepotism and the dishonest litigants find fewer opportunities for securing the services of a willing accomplice. To ensure that the peons actually visit the villages, a form of patrol-book in use in the Bombay Presidency is proposed to be extended to other Provinces. The peons will be required to note in the book the villages visited in a round, and will take the signatures of some villagers in each to show that he had been actually to those villages.

"S. S."

(To be continued.)

Review.

THE INDIAN PENAL CODE. By DAWES SWINHoe, Third Edition. Published by Messrs. Ray and Ray Chowdhury, College Street Market, Calcutta. Price Rs. 7 as. 8.

We have before us a new edition of Mr. Swinhoe's Penal Code. The book has been brought up to December 1924. Under each section the head-notes of cases bearing on the law and its interpretation are set forth succinctly while the typographical plan which prints the headings and the references in bold type have advantages which are obvious to every one who has to consult works of reference. The book will prove useful to the members of the profession.

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The Full Bench Decision in Narendra Chandra Rudra Pal v. Sabarali Bhuiya.

It was indeed a puzzling point that was referred to the Full Bench which recently sat to decide whether the procedure laid down in sec. 360 of the Code of Criminal Procedure is applicable to cases under sec. 145 of the Code, in other words, whether the evidence of witnesses in such cases is to be read over to them in the manner provided for in sec. 360. This section enacts that the evidence of each witness taken under sec. 356 as soon as completed shall be read over to him in the presence of the accused if in attendance or of his pleader if he appears by pleader and shall, if necessary, be corrected. Turning to sec. 356 it appears that that section is made applicable in so many words to enquiries under Chap. XII of the Code, i.e., to proceedings under sec. 145 of the Code. Reading the two sections together the law as stated in the Code is this—As the evidence of each witness taken in a case under sec. 145 of the Code is completed it shall be read over to him in the presence of the accused, if in attendance or of his pleader, if he appears by pleader and shall, if necessary, be corrected. It is noteworthy that the language of sec. 360 is “it shall be read over to him in the presence of the accused, if he is in attendance or of his pleader, if he appears by pleader” and not “in the presence of the accused, if any.” Had it been the latter the puzzle would not have arisen to the great relief of all concerned, but as it is the words used by the legislature surely include within the purview of sec. 360 all cases under sec. 145 of the Code to which that section is made applicable in its entirety and whether or not the legislature has succeeded in ex-

pressing its intention with sufficient clearness is an altogether different matter. It is a well-recognised rule of construction of statute that a section is to be given the meaning which the words employed therein reasonably bear and nothing is to be read into it, regard being had to what the legislature intended to enact. Sec. 360 does not make a distinction between a case when there is an accused person and when there is none. If it is established that a distinction has been made between the two classes of cases on the basis that an accused is a person accused of an offence only then sec. 360 cannot apply to enquiries under Chap. XII of the Code, but it is by reference to sec. 356 specifically made applicable to them; if no such distinction has at all been made in the Code then sec. 360 applies to enquiries under Chap. XII in its entirety. The words “in the presence of the accused, if in attendance or of his pleader, if he appears by pleader” do not justify the view that the section contemplates two classes of cases, viz., (1) where there is an accused in the sense of a person accused of an offence, and (2) where an enquiry is being held against a person who is not accused of an offence, and the depositions of witnesses are to be read over to them in the presence of the accused only in the former class of cases.

This is however the decision of the majority of the Full Bench who have held that sec. 360 is applicable to cases under sec. 145 of the Code so far as to make it obligatory for the deposition to be read over to the witness, but it need not be read over to him in the presence of the parties to the proceeding for they are not “accused.” Their Lordships forming the majority of the Full Bench have taken a practical view of the matter and laid down a procedure which is expedient and free from as much difficulty in its actual application as possible and this is undoubtedly the view one is tempted to take as being consistent with common sense. All these considerations however

are of no avail in construing the words of the statute. To give effect to them against the plain meaning of the statute would be to arrogate the function of the legislature. The procedure which the minority of the Judges of the Full Bench have taken to be what has been laid down by the section may be beset with various difficulties in its practical application, but the proper remedy is the amendment of the Code which is purely the business of the legislature. The difficulty which apparently stood in the way of the majority of the Full Bench in making the sec. 360 applicable *in toto* to enquiries under Chap. XII of the Code is that in the opinion of their Lordships "accused" can only mean a person accused of an offence. In the opinion of those who take the opposite view "accused" practically means a person against whom the Criminal Court is exercising jurisdiction. This view was taken by the Calcutta High Court (Ghosh and Rampini, JJ.) as far back as 1896 in *Jhohn Singh v. Queen-Empress*, I. L. R. 23 Cal. 493, following the decision of the Bombay High Court in *Queen-Empress v. Mona Puna*, I. L. R. 16 Bom. 661. Sec. 145 of the Code of Criminal Procedure may very properly be called "the curious section of the Code". The number of judicial decisions in which the section has been interpreted is legion. Full Bench after Full Bench has sat to elucidate knotty points of law arising under the section but the knottiest are perhaps still awaiting decision.

It is abundantly clear from the wording of sec. 356 that the legislature has excluded enquiries under Chaps. VIII and X of the Code from the operation of that section and necessarily of sec. 360 but has in so many words made the sections applicable to enquiries under Chap. XII and it is difficult to conceive that the legislature has used the word "accused" in sec. 360 in a limited sense so as not to include a party to a proceeding under sec. 145. Leaving aside for our present purpose other enquiries contemplated by the Code a party to a proceeding under sec. 145 is one against whom an allegation has been made before a Magistrate either in a police report or some other information that he is concerned in a dispute likely to cause a breach of the peace, or in other words, he is likely to commit an offence involving a breach of the peace if immediate steps are not taken by the Magis-

trate and it does not require a wide stretch of imagination to include such a person within the category of an accused, specially bearing in mind that the word has nowhere been defined in the Code.

The effect of the Full Bench decision as to the meaning of the word accused is that a person against whom an order has been made under Chap. VIII of the Code for keeping the peace or for good behaviour is not also an "accused" in the same way as a party to a proceeding under sec. 145 of the Code is not. Sec. 439 of the Code lays down that in exercising its Revisional Jurisdiction no order shall be made by the High Court to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence, but a person "bound over for keeping the peace or being of good behaviour being not an accused is not entitled to the benefit of the wholesome provision contained in sub-sec. (2) of sec. 439 referred to above. The peculiar nature of bad livelihood cases has made it necessary for the High Court to introduce the practice of entering into evidence in revising orders in these cases; and to hold that in such cases an order can be made to the prejudice of the person aggrieved without giving him an opportunity of being heard is to lay down a proposition which does not at all stand to reason and is wholly inconsistent with the policy of the Code of Criminal Procedure and the cardinal principles of our system of jurisprudence. Under the Code, as it now stands after the amendment in 1923, proceedings under sec. 145 have been made amenable to the Ordinary Revisional Jurisdiction of the High Court. This is as it ought to be and the legislature has acted very properly in going back to what the law was before the Code of 1898 was enacted; but a party to a proceeding under sec. 145 not being an accused an order may be made by the High Court in revision to the prejudice of all the parties to the proceeding without hearing any one of them—a position almost verging on absurdity, specially bearing in mind that sec. 145 does not merely prevent a breach of the peace, which is a matter properly within the scope of a Criminal Court and for which there are other provisions in the Code, but practically decides the ownership of immoveable property.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Continued from p. clii.)

•VI

The defective nature of the pleadings has come in for a share of criticism. Important matters are very often omitted, while unimportant and irrelevant matters are inserted in pleadings. The remedy for this state of things is proposed to be left to the Courts. But no suggestion from the Bench is more resented by members of the Bar than those aimed at improvement in the form of the pleadings. While the pleadings in the High Court are full of sententious repetitions and grandiose expressions, those in Mofussil Courts are replete with slipshod expressions and betray extreme carelessness. In most written statements filed in Mofussil Courts, each line of allegation in the plaint is categorically denied, but in the concluding paragraph the defence version is given, in which most of the allegations previously denied are admitted. Fatal defects in a plaint are very often overlooked. So long as the Subordinate judicial officers fail to command proper respect, the real improvement in this matter as well as in several others must be looked for from improvements in the legal profession.

The practice of allowing the pleaders to frame issues has been severely condemned. The procedure is stated to be not only "illegal" but "intensely unsatisfactory." The plea of want of time put forward by judicial officers is not only considered "unsustainable," but it has been held that "if the law directs presiding officers to perform a particular duty, that duty must be performed and time must be found for its performance." In the cases of the High Courts and of the Judicial Commissioners' Courts, the system of framing issues long before trial has been condemned, the practice in the Calcutta High Court of framing issues during trial has been recommended for extension and the "Issue Court" in the Madras High Court is recommended for immediate abolition, as the time of a High Court Judge is considered too valuable to be wasted in framing issues which will be tried by another Bench of Judges. The reasons for suggesting such a wide divergence in procedure are given as the greater need in Mofussil Courts to help pleaders and parties to confine the contest really to the subject-matter of the

suit, the need for greater appreciation of the real nature of contest in each case and the firmer grip which the judicial officers will get over their files, which may really turn out not to be so unmanageable as is generally thought. The soundness of this view must be acknowledged, but there are some countervailing circumstances which need not be altogether overlooked. In complicated cases the most important part of the work for the Judge is to understand the respective case of each party and the evidence proposed to be adduced by each, and this work must be done in an initial stage of the suit if issues are to be framed then by the Judge. The case is expected to be ready for trial about a year later and by that time the Judge may have been transferred or the case may have been settled in or out of Court. A large proportion of contested cases in the Mofussil Courts is compromised. The labour devoted to and the time spent in the framing of issues are wasted. Even if the Judge who has framed issues eventually tries the case, he may have forgotten the facts as narrated to him about a year ago and the whole work may have to be done over again. It is only when people fail to appreciate the utility of a rule of law, that they begin to lose respect for that rule. The matter may be solved satisfactorily if framing of issues by subordinate Courts at an initial stage is made compulsory in every suit tried under ordinary procedure, except those relating to title to immovable property. In such cases the issues seldom give a correct idea as to the length of time that would be required during trial. The issue of completion of title in the Defendant by twelve years' adverse possession is common to most cases. In some the issue is decided in three or four hours, while in others it takes up several days. One matter connected with the subject of issues does not seem to have been brought to the notice of the Committee. Or. XX, r. 5, C. P. C., enacts that in every judgment where issues have been framed, a separate decision must be given on each issue. The manifest object of the rule was to prevent jumbling up of decisions of several issues together, which makes the work highly unsatisfactory. But the general nature of the rule has led to divergence of views as to whether the rule applies to those cases which are finally tried *ex parte* even though issues had been framed. The practice of the Courts is not uniform, though more often than not

those issues are not considered which were raised at the instance of the Defendant who subsequently fails to appear. It would be hard on the Plaintiff to ask him to prove that the contentions raised by the Defendant, since absent, are untenable. The Defendant may himself have thought it futile to contest. Moreover, the liability of the Plaintiff to have the case re-tried on sufficient ground for non-appearance being shown by the Defendant will remain the same, however completely he may have proved the genuineness of his claim and the falsity of the defence. The rule of procedure should be made clear for such cases.

"S. S."

(To be continued.)

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

I beg to draw the attention of the Hon'ble Legal Remembrancer and also of the Secretary to the Government of Bengal through the medium of your journal for an interpretation of the Circular No. 5996J, dated 25th September 1923, of the Government of Bengal read with High Court Circular Orders Nos. 11 and 12 of Chap. IV. I shall be highly obliged if any of your readers kindly enlighten me whether a similar practice as stated below is in vogue at other places too.

On 9th May last an application was made by me for converting an uncertified copy taken on 28th March 1919 into a certified copy for which in addition to court-fees payable under Art. 9 of Sch. I of the Court Fees Act for certification, one anna per folio was realised from me in view of the Circular No. 5996J, dated the 25th September 1923 by which the price of each folio was increased from three annas to four annas. The said Circular runs thus :—"In supersession of all previous orders the Governor in Council is pleased to direct that the rate of copying fees in Civil and Criminal Courts of Bengal other than the High Court shall be increased from three annas to four annas per folio with effect from 26th October 1923." Now the question is whether the additional one anna per folio can be levied for converting an uncertified copy taken long before 26th October 1923, into a certified copy after that date. The High Court Cir-

cular Order No. 11 of Chap. IV says that in case of certified copies the court-fee chargeable under the Court Fees Act (i.e., under Art. 9 of Sch. I) should be levied by affixing the necessary stamp to the first folio of the copy. R. 12 of the same chapter says that uncertified copies may be converted into certified copies after comparison with originals upon the application of the person to whom they have been granted and upon his filing with such application the necessary court-fee stamps required by law. From the reading of the above two rules it appears that uncertified copies should be converted into certified copies when court-fees payable under Art. 9 of Sch. I of the Court Fees Act are paid. There is no provision either in the High Court Circular Order or in the Government Circular mentioned above by which such additional one anna may be levied for each folio of copies taken before 26th October 1923. R. 9 of Chap. IV of High Court Circular Order provides for the charging of three annas per folio for manuscript copies which was increased to four annas by the Bengal Government Circular quoted above. Rr. 11 and 12 do not refer to r. 9 but they clearly indicate the payment of court-fees chargeable under the Court Fees Act for certification. The Bengal Government Circular also speaks of the increment of copying fees. Besides, unless otherwise provided, all enactments and rules and circulars are prospective and not retrospective. Under the circumstances I do not understand how this one anna for each folio can be levied at the time of certifying an uncertified copy taken before 26th October 1923.

I remain,

Sir,

Yours faithfully,

HEMANTA KUMAR CHAUDHURI,

Pleader, Pabna.

Dated 28th May 1925.

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Right of accused to be defended by lawyer.

"The work of this Court would be appreciably lightened if the Subordinate Magistrates in dealing with the law relating to the rights of accused persons would construe it in a less technical spirit than they are accustomed to do. In the inferior Courts the right principle is occasionally reversed and a person is presumed to be guilty the moment he is accused and every attempt on his part to prove his innocence is regarded as vexatious." These were the observations of Amcer Ali and Pratt, JJ., in *Sheo Prokash v. Rawlins*, I. L. R. 28 Cal. 594. In our system of jurisprudence an accused person is to be presumed to be innocent unless his guilt is proved and it is entirely the business of the prosecution to bring home to the accused the charge which has been laid against him. Consistently with this policy our Code of Criminal Procedure provides that any person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any such Court may of right be defended by a pleader. A lay man can hardly be expected to tackle the intricacies of law which very often baffle the skill of an experienced lawyer and to withhold from an accused person facilities for securing the services of a professional man is beyond doubt a denial of justice. The legislature being fully alive to the necessity of the services of lawyers in proceedings before Courts of justice has amended sec. 340 in a liberal spirit and altered the law so as to ensure the benefit of the section to all persons against whom any proceeding is taken

in a Criminal Court irrespective of the fact whether he is accused of an offence or not.

It is interesting to note in this connection the analogous liberal provision in the law of America where when a Defendant is brought upon arrest the Magistrate must immediately inform him of the charge against him and of his right to the aid of Counsel in every stage of the proceeding and before any further proceedings are had. The Magistrate must also allow the Defendant a reasonable time to send for Counsel and adjourn the examination for that purpose and must upon the request of the Defendant require an officer to take a message to such Counsel in the town or city as the Defendant may name. The officer must without delay and without fee perform that duty.

The remarks of the Calcutta High Court quoted above very appropriately apply to the facts of a recent Allahabad case (*Emperor v. Pita and others*, I. L. R. 47 All. 147). In this case on the date on which the accused were produced in Court the Magistrate ordered that the case would be heard the next day in the jail. The first step in the proceedings in the jail was the presentation of an application by some friend of the accused asking for an opportunity to engage a pleader and that the evidence might be taken in that pleader's presence. This application was however bluntly refused on the allegation that the accused had had plenty of time to consult pleaders since the previous day and that the Magistrate would have to send the prosecution witnesses away again. The next step was that the Magistrate examined six of the prosecution witnesses and took down the accused's statements, framed a charge and said that he would take the remaining prosecution witnesses the next day. At the end after the statements of the accused he asked them whether they wished to cross-examine. Having had their application for time to appoint a pleader rejected the accused persons who were ignorant villagers very naturally said that

they did not wish to cross-examine the witnesses. On the next day further prosecution witnesses were examined and the accused were further examined and they stated that they would produce defence witnesses. By this time they had succeeded in engaging the services of a pleader who put in an application asking for another date to be fixed for cross-examination as there was nobody who could properly instruct him on behalf of the accused. The Magistrate refused this application on the ground that the pleader could get his instructions from the accused themselves. When the application for postponement was rejected the pleader verbally applied for being allowed to cross-examine the witnesses in the circumstances of the case without further instruction. This was disallowed on the ground that the pleader had no right left. On the next day the Magistrate was asked to resubmit the prosecution witnesses which he refused to do but on the subsequent date of hearing he summoned a few of the prosecution witnesses under sec. 540 as Court witnesses and when the defence pleader wanted to cross-examine them he was not allowed to do so. In his explanation to the High Court the Magistrate stated that as the defence had left no legal right of cross-examination at that stage questions of the nature of cross-examination suggested by the defence Counsel were put to the witnesses by him. The proceedings were quashed by the High Court and a retrial directed by another Magistrate.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

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VII

The Committee have condemned in severe terms the universal practice of fixing by each Court more work for a day than can by any stretch of imagination be done on that day and of adjourning most of those cases to a date a month later, when they will again be adjourned, and that of not taking up a case which has not undergone several adjournments. This system is really responsible, as they say, for (a) ineffectual control over the day's work, (b) allowing bench-clerks to fix the adjourned dates with consequent chance of petty corruption, (c) granting of adjournments on frivolous grounds, and very often for the mere asking, (d) great hardship and much expense to litigants, (e) inconvenience, beyond

degree, of witnesses and (f) want of proper respect for processes of Civil Courts. They confess their failure to understand how such a practice came to be introduced and how it became so universal. Strange to say, that in those High Courts and Judicial Commissioner's Courts, where the system of fixing a certain number of cases for a definite day obtains, the same defect as in Mofussil Courts is noticed. They say that parties are likely to come to Court with witnesses if they feel sure that their case would be taken up and that adjournment would not be granted to either party except on very good grounds. In connection with that practice in the Madras High Court and the argument in its support that a long list obviates all chance of there being insufficiency of work, the Committee have said very rightly that "experience shows that cases which are very low down in the list are seldom ready if the list collapses," and that "applications for adjournments on all kinds of suspicious pretexts are inevitable when long lists of cases are posted." The Committee have not only characterised the system as a "vicious" one, but say that they are "forced to the conclusion that the practice has grown up owing to apathy." I think that "conservatism" would have better described the real reason. It requires much courage to depart from the traditional practice and to adjourn a case a year ahead, instead of a month, on the ground that there is no chance of the case being taken up in a year. Some Subordinate Judicial Officers have made some move in the right direction by adjourning cases 2 or 3 months ahead, but their subordinate position may have stood in the way of bringing about a revolutionary change in procedure. Though higher authorities have never approved of the system of fixing too large a number of cases for a day, it is doubtful if they would have tolerated an adjournment for a year. The system would never have grown up if the higher authorities had given proper instructions to subordinate Courts and had made them feel that attempts to move in the right direction would be supported. Had they taken any serious notice of the bad practice, just as they had taken in cases of piece-meal trials, the practice would never have grown up. So far as the Mofussil judiciary is concerned, it must be said in extenuation of their offence that persons in subordinate position are least likely

to introduce a bold change in practice and that the tendency to follow the "beaten track," the track which had led many to posts of superior position and dignity, would be too strong for them. It is hoped that after the publication of the report of the Committee, the subordinate judiciary will feel themselves fortified in following the proposed reform. A detailed instruction of the High Court on the point may also go far.

The need for instructions as to how the day's work is to be conducted is very great indeed. The Committee have recognised it. To mention a matter in point, it may be stated that the impression is almost universal that unless there be a "part-heard" case, work cannot be commenced at 11 A.M., and that time must be allowed for petitions and "haziras" to be filed and placed in their respective records. The Committee have thought it a waste of time to wait till the sorting is completed. In a place where there is a single Court, it may be possible to begin work at 11 A.M. But in a place where there are several Courts of the same degree, it will be inconvenient to the pleaders, if cases are put up before the Judges in all those Courts at the same time.

"S. S."

(To be continued.)

Correspondence

NEW PRACTICE FOR POSTING CIVIL APPEALS FOR HEARING AT FARIDPORE.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

From the month of May last the Courts here have adopted a new procedure for the hearing of appeals. The Courts publish a list of appeals (giving the numbers of the appeals only) without fixing any dates with the intimation that they will be taken up in order in course of a particular month—the District Judge's list containing a further note that the appeals on the list of the Subordinate Judge's Court may be taken up by him. Copies of these lists are hung on the Notice Board but copies are not available as in the High Court. Apart from the question of the legality of this procedure, which will be discussed later on, this is causing great inconvenience and hardship to the litigants and their pleaders.

In adopting this new practice the Courts profess to follow the High Court procedure. But a moment's consideration will show the great difference. The High Court Benches which take up appeals have no original cases to try—they only hear appeals. In the High Court the following lists are published:—First a General List, then a Weekly List and then a Daily List. These lists contain full details—the Nos. of the appeals and the names of parties and their Vakils. So the parties and their Vakils can have an idea of the time when their appeals may be taken up. But in the Mofussil the Courts try Original Suits and Sessions cases, hear Criminal appeals and motions (Criminal cases getting precedence) and other miscellaneous matters and they take up appeals only when they are not engaged in those cases. So the effect of the present arrangement will be that they will take up appeals at their pleasure and convenience and the parties and their pleaders must be ready for their appeals at any time on any day during the month and the following months. This might help in speedy disposal of appeals but will certainly be detrimental to the interest of the litigants. It would debar the parties from attending to their appeals because they cannot certainly be expected to wait at the District town indefinitely for the whole month or more. The pleaders also will find themselves in a great fix. They cannot be ready to argue any number of appeals on any day and at any time before any and every Court. In the High Court all appeals below Rs. 5,000 involve only questions of law, so the parties need not be present and in appeals above Rs. 5,000 the parties are generally rich and can afford to wait for a week or so. The pleaders will be greatly inconvenienced in attending to their private business and in arranging their business in the different Courts and elsewhere, for with the prospect of the appeals being taken up any day and before any Court, they cannot leave the station or accept engagements on any particular date. If the High Court where in most appeals the questions involve points of law, it is not difficult for one pleader to argue for another, but in cases involving in the main intricate questions of fact as well as law, it is not easy for one pleader to argue for another without previous preparation and most of the cases being of small value and the parties generally poor, it cannot be ex-

pected that the parties will engage a number of pleaders. The cost of litigation is already very high.

Turning to the legal aspect of the procedure it seems to be not warranted by law. The High Court has no doubt made Rules for the hearing of appeals before it by publishing Cause Lists from time to time without fixing any particular dates for individual appeals. But in the absence of Rules made by the High Court, the provisions of the Civil Procedure Code would govern the procedure of the Mofussil Appellate Courts. Rules in Or. 41, C. P. C., clearly show that the Court has to fix particular dates for hearing of appeals and it has been held by the High Court in several cases that dismissal for default or hearing of appeals *ex parte* on a date not fixed for the hearing of the appeals is illegal and liable to be set aside.

Under sec. 107 (2), C. P. C., the Appellate Court has the same powers and duties as an Original Court and Or. 17 (2) speaks of fixing of particular dates and r. 48 of Chap. I of the High Court Rules says that "no judicial proceeding of whatever nature shall be postponed *sine die*." Mr. L. Palit, while District Judge of Faridpur, with a view to speedy disposal and to take up appeals whenever he was not engaged in criminal work, kept a number of appeals pending *sine die* and Mr. Justice Rampini (afterwards Sir Robert Fulton) when he came on inspection, disapproved of the procedure and asked the District Judge to fix proper dates for hearing of the appeals. The present procedure virtually keeps appeals pending *sine die*.

HEM CHANDRA MUKHERJI,
Pleader, Faridpur.

5-6-25.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHAKRAVARTI, J. APPEAL FROM APPELLATE DECREE No. 2368 of 1922. SREEMATI BINAPANI DAS, Plaintiff-Appellant v. SREEMATI DAKSHABALA GHOSANI, Defendant-Respondent. The 26th May 1925.

Trespass on Plaintiff's wall by putting up

structure—Plaintiff's right to have structure removed—Relief, if may be refused on the ground of dispute being a petty one.

The Plaintiff brought the suit in the Court of the first Munsif of Berhampur against the Defendant for declaration of Plaintiff's title to the boundary wall between the Plaintiff's house and the Defendant's house, and for removal of a privy and a hut, the roofs of which rested on this wall and for a permanent injunction against the Defendant so that she might not construct any such privy or hut upon Plaintiff's wall in future. The defence was that the wall belonged to the Defendant. The Munsif decreed the Plaintiff's suit in full with costs. On appeal by the Defendants the District Judge of Berhampur while agreeing with the first Court in declaring Plaintiff's title to the wall refused to grant consequential relief holding that the order passed by the learned Munsif went beyond the requirements of the case, that it was unseemly that neighbours should quarrel over such petty matters and that justice would be done if the present privy and hut were allowed to stand and if the Defendant was forbidden to make use of the wall in any future erection either on the same site or elsewhere. So he modified the decree passed by the Munsif and ordered that the parties should bear their own costs throughout.

Held—That the lower Appellate Court having agreed with the finding of the Munsif that the wall belonged to the Plaintiff, it was wrong in modifying the decree passed by the Munsif and in refusing to grant consequential relief to the Plaintiff. The decree passed by the District Judge on appeal was set aside and the decree passed by the Munsif was restored with costs in all Courts.

Babu Urukram Das Chakravarti for the Appellant.

No one appeared for the Respondent.

Appeal allowed with costs of all Courts.

THE Calcutta Weekly Notes.

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REPORTS (See Index.)

THE LATE MR. C. R. DAS.

It is with deep sorrow that we record the sudden and untimely death of Mr. C. R. Das. It is about four years ago that he finally retired from the Calcutta Bar of which he was one of the leading members. He has had a meteoric career both at the Bar and in public life. He joined the Calcutta Bar in 1894. The Bar was before a preserve of British barristers, now it is the reverse. Mr. Monomohan Ghose, Mr. W. C. Bonnerjee and Mr. T. Palit had however already made their way to the forefront amongst their British competitors through sheer merit, industry and force of character. At the time Mr. C. R. Das joined the Bar, a new band of promising Indian juniors were only just making headway in the profession. These were Mr. B. Chakravarty, Sir A. Chaudhuri and Lord Sinha. The services of Mr. Monomohan Ghose and Mr. Palit were then much in requisition in the Mofussil Criminal Courts. In the High Court, barring Mr. W. C. Bonnerjee, the leaders of the Calcutta Bar were then singularly able members of the English Bar, such as, Sir Charles Paul, Sir Griffith Evans, Mr. J. T. Woodroffe, Mr. Jackson, Mr. Arthur Phillips, Mr. C. P. Hill, Mr. T. P. Pugh, Mr. T. A. Apcar. Next to them came Mr. R. Mitter who had an established practice on the Original Side. Mr. William Garth and Mr. Dunn though juniors to them all were both very brilliant men. The business on the Original Side as also the most important cases on the Appellate Side of the High Court were then monopolised by the leaders of the English Bar. It was just then that the three Indian juniors

already named were elbowing their way into the Original Side. The only Court that was then open to a new-comer from the English Bar was the Court of Criminal Appeal and Revision and the Criminal Courts in the Mofussil. Mr. C. R. Das joined the Calcutta Bar when the prospects at the Bar for Indian juniors were not very promising. He had after graduation at the Calcutta University gone to England and did not seriously intend to take to the Bar for a career. He went to England with the object of entering the Indian Civil Service. He was not a keen student and the many attractions of life in England appealed to his youthful and emotional nature more than the daily drudgery of being trained like a race horse. His failure to secure a place in the Civil Service was taken by him with equanimity and then he decided to take to the Bar for a career in life. After joining the Calcutta Bar, like most juniors of those days, he found it much easier to get a criminal practice on the Criminal Side of the High Court and in the Mofussil Criminal Courts than to establish a civil practice on the Original Side. But his cousin, the present Advocate-General of Bengal, who is almost of the same standing, preferred patiently to stick to the Original Side. Mr. C. R. Das, however, soon made a name as an able criminal lawyer. The secret of his success was that when he was engaged in a criminal case, good, bad or indifferent, he made up his mind to win it by making the case his own. It may be said that it is this staunch determination to win that contributed to his achievements in his political career as well. He first made his mark in the profession as the defence Counsel on behalf of Arabinda Ghose in the Murari-Pukur Bomb case. It may not be generally known that it was Babu Krishna Kumar Mitter who was a near relative of Arabinda who persuaded him to take up Arabinda's case. The late Mr. Dhannulal Agarwala was Krishna Babu's pupil and held him in high regard. Dhannulal Agarwala at his request acted as solicitor in the case. This association

between the Counsel and the solicitor in this sensational state trial contributed largely to the popularity and success of both in their respective professions. Although some fees were paid to them by the father-in-law of Arabinda Ghose, yet having regard to the length of the trial, the services rendered by both to Arabinda were a labour of love. Mr. Das was opposed by Mr. Norton on behalf of the Crown. Mr. Das displayed great ability in handling the witnesses in the case and much more in marshalling the facts in his final address. Arabinda was acquitted but the honours of it are to be equally divided between the counsel and the eminently fair charge that Judge Beachcroft delivered with regard to Arabinda, whose culture and scholarship had made a profound impression on the learned Judge as a fellow student of Arabinda at Cambridge. Mr. Beachcroft could not persuade himself to believe on the meagre evidence before him that Arabinda was in any way mixed up with the bomb conspiracy. Arabinda was then the idol of the people and his acquittal was followed by demonstrations all over the land. Mr. Das's fame also spread far and wide. Mr. C. R. Das's success in this case strengthened the hands of his friend Mr. Agarwala in entrusting the sole charge of the Dumraon case to him. Mr. Das made up his mind to win that case and by industry, perseverance and tact, in which he had few rivals at the Bar, his determination was crowned with success. This brought him a fortune and immensely enhanced his forensic reputation. We should not omit to mention also the Dacca conspiracy case, in which he was opposed by the late Sir William Garth, amongst the celebrated cases which he defended with conspicuous ability both in the Sessions Court and in the Court of appeal. Sir Lawrence Jenkins before whom he argued the appeal recognised his great ability as an advocate and from that time he got a large and established practice on the Original Side of the High Court. But all the same it must be said that he was at his best in dealing with witness cases especially in the Criminal and Sessions Courts. His reputation in such cases had reached such high water-mark that the Government of India retained him as the Crown Counsel in the Munition case, offering him higher fees than to Mr. Gibbons, the Advocate-General of Bengal.

This may be said to mark the turning point in his professional and political career. In his younger days Mr. C. R. Das was more artistic

and literary than political in his temperament. One hardly knew what was his political opinion in those days or if he had any political opinion at all. He was, however, a great admirer of the poet Rabindranath. The poet regarded humdrum politics as vulgar. He was an idealist and an apostle of self-help. In this his close friend and near relative Sir Asutosh Chaudhuri shared his views, though from a more practical point of view than the poet. It was thus in or about 1904 that Mr. A. Chaudhuri, as he then was, decided to popularize the doctrine of self-help amongst the politically minded young men in Bengal and in this connection Mr. Bepin Chandra Pal, Mr. C. R. Das joined him as enthusiastic colleagues. Mr. A. Chaudhuri's speech at the famous Burdwan Conference was an exposition of the views of this little group who gave a new turn to Bengal politics. A weekly newspaper was started by them for preaching the doctrine of self-help and self-reliance for our national regeneration. Mr. Pal used to do most of the writing and Sir Ashutosh Chaudhuri and Mr. C. R. Das most of the financing and the management was taken charge of by Babu Kumar Krishna Dutt, the well-known solicitor. In 1905 came on Lord Curzon's Partition of Bengal. After all representations and reasons against the partition had failed, the *Swadeshi* movement which followed heralded the birth of modern nationalism in Bengal. In this all-engrossing national movement all other individual ideals of nationalism were absorbed and the whole of Bengal felt, thought and acted as one man. Sir Asutosh Chaudhuri consistently with his doctrine of self-help and self-reliance threw himself heart and soul in the organisation of the National Council of Education and actively co-operated in the promotion of indigenous industries. At this time Mr. C. R. Das's sympathies with the movement were pronounced but he took not much prominent part in it. His activities were then more confined to the legal profession in the course of which he appeared on the popular side in many State trials, in some professionally and in others for the ends of justice. As a political idealist his sympathies, however, drifted towards the school of politics founded by Arabinda. But his position in the new party was more that of a passive supporter than as an active promoter of it.

It was, however, the non-co-operation movement of Mahatma Gandhi that drew Mr. C. R. Das prominently out in the field of politics. He

accepted the doctrine of non-co-operation in so far as it lent support to his long cherished ideals of self-help and self-reliance, but he was by no means an out and out supporter of the triple boycott. Mr. Das had seldom attended or taken any active part in the Indian National Congress before Mahatma Gandhi gave a new turn to its activities. In one matter Mr. Das, however, went farther than even Mr. Gandhi and that was when at Amritsar he moved for the total rejection of the Reforms of 1919, though Mr. Gandhi was then in favour of working it. It might be through Mr. Das's influence that Mr. Gandhi included the Council boycott in his non-co-operation programme. Although Mr. Das regarded the Reforms of 1919 as inadequate, unsatisfactory and disappointing yet we doubt whether he ever seriously believed that the triple boycott would be an effective means of winning *Swaraj*. He expressly declared in a speech at the College Square before he left for Nagpur that the boycotting of Colleges and Schools and the law Courts did not commend themselves to him. But at the Nagpur Congress the influence of Mahatma Gandhi was so supreme that he had no alternative left but to get committed to the triple boycott, if he at all wished to continue in the Congress. He returned to Calcutta committed to the policy of an out and out non-co-operator and, like the man of honour that he was, gave up his practice at the Bar definitely and called upon the students to non-co-operate and give up their studies at the Government Schools and Colleges. We deplored then and still deplore what he did in this connection but we cannot at the same time help admiring him for carrying out the vow of renunciation that he had adopted at Nagpur through stress of circumstances and perhaps, against his own personal free will, to the very letter and spirit of it. The giving up of his profession reduced him from affluence to poverty and this colossal sacrifice alone was sufficient to raise him in the high estimation of his people. Although he inflicted on his own self this self-denying ordinance yet he did not surrender his will to the masterful will of even Mahatma Gandhi. Nevertheless he faithfully carried out the command of his leader in boycotting the visit of the Heir to the Throne, and for calling out volunteers to aid him in Congress work, was arrested and sent to prison. Had he, on this occasion, cared to

defend himself by giving the go-by to the then prevalent doctrine of non-co-operation, he would, we have reasons to believe, never have been committed to prison. He was to have presided at the Ahmedabad Congress during the ensuing Christmas Vacation, but owing to his imprisonment and the refusal of Mahatma Gandhi to negotiate with the Government in spite of Mr. Das's willingness to do so, the Ahmedabad Congress ended in a fiasco and the chances of further constitutional progress of India that would have surely followed were wrecked.

Mr. Das might have been an idealist but he was not a visionary. Mr. Das appears to have adopted the policy of Council boycott at Nagpur as a provisional measure in deference to the opinion of the majority but his subsequent conduct shows that he was opposed to this item of the non-co-operation programme. Presiding over the Gaya Congress he declared himself in favour of Council entry, although it be for the ostensible purpose of wrecking the Council. We shall not enter into the merit of his idea or ideals but it must be said that he displayed great courage and self-confidence in sticking to his guns and getting a large following at the next Delhi Congress to accept his views in this respect. He lost no time in making his position secure and unassailable by carving the *Swaraj* party out of the Congress. He showed both genius and great generalship in thus consolidating his position against his opponents. He was naturally accepted as the leader of the new party and ultimately he succeeded in making the Congress a mere annexe to his party organisation. The man who had thus succeeded in making himself the leader of the most powerful political organisation in India was unquestionably a man of great ability and resourcefulness. It may be that his methods did not always commend themselves to some of the best minds of India but all the same one cannot help admiring his energy, courage, singleness of purpose and power of organisation and his dogged determination to win in fight with his opponents, be it in the Congress or Council Chamber. He threw himself into the vortex of the non-co-operation movement to wrest the lead out of the hands of one of the greatest of idealists and leaders of men of modern times. Undaunted by defeat, with supreme confidence in himself and with indomitable will,

he gained the day and Mahatma Gandhi yielded to him with a magnanimity, all his own, and left Mr. Das to carry out his political programme unhampered.

Mr. C. R. Das was no doubt a man of great personal ambition but his love of his motherland and desire to see his country and its people take an honourable place amongst the free nations of the world was genuine and unbounded. It is from this point of view and not from his achievements in the region of practical politics that he has to be judged. It may be that the policy of obstruction and destruction that he followed have yielded no great practical results and, in some cases, might have produced the contrary effect to what he desired; his policy in the Council might not have brought him any nearer to *Swaraj*; but no one can deny that never before has any political leader fought autocracy with so much courage and resourcefulness. He gave up the ease, comfort and luxury to which he was lifelong accustomed and spared himself no trouble, pain, risks even to life through break-down of health or otherwise, in carrying out the self-denying mission that he had made the very breath of his life. Failures did not discourage him but only urged him on to further action. With his keen intelligence he scanned its cause, changed his tactics and adopted a new plan of operation.

On the eve of his last victory at the Budget meeting of the Bengal Council, when we met him in the lobby during an interval of recess and enquired about his health, he wofully replied that what he had recouped by his prolonged rest at Patna had been taken out of him by the physical and mental strain of the past few days and that he was afraid that he would not be able to stand it for any length of time. This was in the middle of March last and he must have felt then, and afterwards that with the heterogeneous elements he had to work with he could not carry on his policy of obstruction to any more fruitful issue. It must have been from this feeling that he made a pronouncement of a change in his policy from one of obstruction to honourable co-operation at the Faridpur Conference. We do not regard his last pronouncement in the light of a climb down or a sign of weakness but as a mark of the strength and courage which made him such an outstanding personality amongst the political leaders of India. He knew that this declaration of a new

policy would meet with violent opposition and opprobrium amongst a large section of his own followers. Knowing all this, that he fearlessly gave expression to the mature views at which he had arrived, after five years of bitter experience which he had acquired at the sacrifice of all that was dear to him in life, has raised him more than ever in our high esteem as a leader of men. It is a thousand pities that he did not live to carry out his new policy. He would not surely have found it a bed of roses and one does not know that his work might not have collapsed any moment in the thankless task that he had just chalked out for himself. We have said that he was a votary of art and literature in his youth and his exit from all honours and glory at the climax of his career has been quite appropriately dramatic and full of the pathos of a great tragedy. He died the death of a hero and his mortal remains have received a fitting ovation from those for whom he lived, worked, suffered and died. It is therefore with great sorrow and profound admiration for his exemplary sacrifice and the other manly qualities of his character that we pay this our humble homage to his memory.

CENTENARY BY THE CALCUTTA BAR LIBRARY CLUB.

On Monday the 15th June last the centenary of the Calcutta Bar Library Club was celebrated at a dinner given by the members of the Club at the Dalhousie Institute at which most of the members of the Club were present and the Hon'ble Chief Justice and his brother Judges, the Registrars on the Original and Appellate Sides of the Court and the Sheriff of Calcutta attended as guests of the Bar. Felicitous references regarding the origin of the Bar Library Club and the noble traditions of the Bench and Bar at Calcutta were made by the Advocate-General, Mr. S. R. Das, in a very appropriate speech in proposing the toast of the guests. We give below a full text of his speech. An extempore reply was given by His Lordship the Chief Justice in which he expressed his warm appreciation of the past and present services of the Calcutta Bar in the cause of administration of justice and its sturdy independence and noble traditions. His Lordship also enlivened the assembled company with many humorous references to his experiences at the English Bar. As according to the traditions of the Bar no press reporters are ad-

mitted at any of its functions, we regret very much that we are unable to reproduce the speech of His Lordship, the Chief Justice in full and have to satisfy ourselves by giving only a very brief resume of it. We offer our hearty congratulations to the members of the Bar Library Club and wish them and their Club a prosperous and a glorious future during which we hope they will enhance their fame far and wide and keep up the noble traditions of independence and devotion to duty which have built up for it its present position, in the course of the last century, as the premier Bar in India.

The Advocate-General, Mr. S. R. Das, in proposing the toast of the guests said :—

It is now my pleasant duty to propose the toast of our guests. This is an unique occasion in the history of the Bar Library Club, not likely to recur in the lifetime of any of us present here. It is only fitting that after a century of association between the members of the Club and the Bench, we should have among our guests to-night the Chief Justice and the Judges of the High Court, the present repositories and guardians of those great traditions which our association together have gradually built up and which have made the Calcutta High Court the premier High Court and the Calcutta Bar the premier Bar in India. The unique position which the Calcutta High Court occupies is mainly due to the fact that both the Bench and the members of the Club have always recognised that for the proper administration of justice an independent Bar is as necessary as an independent judiciary.

A century ago to-day the Bar Library Club was formed with ten practising barristers and six high officers of the Court, four of whom were also members of the Bar. I do not propose to take you through the history of the Club, many somewhat inaccurate versions of which have appeared in the newspapers and a correct version of which you will find on the book which has been placed before you to-night. But we would be wanting in gratitude if we let this occasion pass without paying a tribute to the pious memory of Longueville Clarke, the real founder of our Club. It is due entirely to his foresight and public spirit that the Club came into existence and but for his unselfish devotion to its interests, the Club would have ceased to exist long ago and we would not be celebrating to-day its centenary. He was a junior of about 2 years' standing when he founded the Club and for the first 37 years of its existence he was its life and soul. By 1862 when he left India he had placed the Club on a firm foundation and we are now reaping the benefit of his labours. His name will continue to be connected with the Bar Library and the High Court so long as they exist, for the present High

Court building stands partly on the site of the house long occupied by Longueville Clarke.

When the Supreme Court was established in 1774, it started with only one barrister in its rolls, Thomas Ferrer, who later defended Nand-cooman. There was no Advocate-General. Sir John Day who had been appointed to that post remained content with being knighted or, to use the words of King George when he knighted him, "turning day into night" and never came out. Newman, the first *de facto* Advocate-General came out later in the year. It is difficult to realise at the present day that at one time there was not a sufficient number of barristers to carry on the work of the Court and the Supreme Court was obliged to admit as advocates men who had not been called to the Bar. In 1825, when the Bar Library was founded there were only 10 practising barristers. Even in 1862, when the High Court was established there were only about 25 practising barristers. What happy days they must have been for the members of the Club. No dreary waiting for work!

But if work was plentiful in those days had its inconveniences. In these days of modern amenities it is difficult to form a picture of the conditions under which our predecessors lived. There were no electric fans. Ice was difficult to procure and as for mosquitoes they are as nothing now compared to what they were in those early days. You have all probably heard of the custom which prevailed of covering one's lower limbs with paste board to guard against the attacks of those insects, but I doubt if you have heard of the legal advice on the subject tendered to the first Lord Minto when he came out as Governor-General. To prevent mosquitoes from attacking him, he was advised by his Advocate-General to always take care to have at his side at table a freshly arrived young lady from Europe. The mosquitoes, he was told, would then leave him alone for fresh food and pastures new. Sir Evans Cotton in his Calcutta Old and New names the Advocate-General who tendered this advice as a Mr. Smith. But no Smith, so far as one can find, has even been honoured with a patent of appointment as Advocate-General, but that does not necessarily detract from the truth of the story.

As for ice, can you now, with your cheap and plentiful supply of ice, appreciate the words of Colesworthy Grant written in 1849? Writing of the then new arrangement for the supply of ice at 3 annas per seer, he says, "I will not talk of nectar or elysium, but I will say that if there be a luxury here, it is this, it is this." It was to Longueville Clarke again that Calcutta was indebted in those days for the supply of ice. He arranged to have it brought by ship all the way from Boston in America and kept in a house specially built for it in Hare Street.

Many of us here can remember the days when we had to depend on the tender mercies of the sleepy punka-puller for some alleviation from the heat, but those who have experience only

of the electric fan, can hardly realise the inconvenience and the loss of temper of which the punka-wallah was the cause.

On this centenary of the Bar Library Club our thoughts naturally go back to the great giants at the Bar, who have made the Calcutta Bar what it is now.

Sir James Colville, who came out as Advocate-General and became Chief Justice of the Supreme Court and later a member of the Judicial Committee of the Privy Council.

William Ritchie, a great lawyer who subsequently became Advocate-General whose letter defining the duties of the Advocate-General and Standing Counsel is still in existence. Thomas Hardwicke Cowie, who became Advocate-General the same year that the High Court was established and who has left a reputation behind him second to none as a great lawyer and an advocate.

John David Bell, Richard Doyne, Joseph Graham and Sir Charles Paul who occupied the position of Advocate-General for 29 years, the longest period that any member has held that post and who died at the very hour at which his resignation was to take effect. J. T. Woodroffe, Sir Griffith Evans, Monomohan Ghose, W. C. Bonnerjee, Arthur Phillips, T. A. Apcar, C. P. Hill, T. Palit, A. M. Dunne, and William Garth, Asutosh Chaudhuri were giants in their days and have left an indelible mark in the history of the Club and the Calcutta Bar. Is it a matter of surprise that the Calcutta Bar should occupy the position it does?

I have not mentioned William Jackson, familiarly known to all as Tiger Jackson. He is happily still with us and serves to remind us of the days when the Bar at Calcutta was at its height of fame. A man of strong independence of character, always jealous of the honour of the Bar, fearless in his advocacy and as a man of the most generous disposition, we are all proud of him and rejoice that he is still one of our members. It is a matter of regret to all of us that he is not present here to-night.

There is another name which requires special mention, though he is no longer a member of the Club. Lord Sinha was not only a great lawyer and Advocate and a staunch upholder of the traditions of the Bar, but no member of the Club has created so many records or attained a career like his. There have been members of the Club who have been members of the Viceroy's Council, but none, like Lord Sinha, has had the honour of a peerage conferred on him or attained the position of an Under-Secretary of State or a Governor of a Province.

The Supreme Court was composed of a Chief Justice and 3 puisne Judges though in practice there were only two, one generally managing to depart for a climate which it is hoped was cooler. At present we have our Chief Justice and fourteen Judges. The Chief Justice has

always been a barrister in considerable practice in England. Of the puisne Judges those who come from England bring with them a freshness of view and the great traditions of the English Bar; the members of the Civil Service who attain to the Bench do so by hard work, and outstanding ability and bring with them a knowledge of conditions prevailing in the Districts. It is only those who have the longest practice among the Vakils become our Judges and they add to the Bench their wide experience of law and practice. I say nothing of those members of the Bench who have been members of our Club. They are our men and of course must make the best Judges.

Of the present members of the Club I cannot obviously speak, but an irreverent Junior ambitious of being appointed our Poet Laureate, has furnished me with an estimate of our character and abilities which I will now read to you.

This is a proud day for us, a day of rejoicing. A day full of memories of our glorious past and of resolve that the future shall be even more glorious. We welcome amidst us to-night our Chief Justice and the Judges who are the inheritors and up-holders of the great traditions of the Bench to whom we look for that sympathy and encouragement which they have always extended to us. The position of the Sheriff, who has also kindly accepted our invitation, is as old as that of the Bar. We also extend our welcome to Mr. Remfry and Mr. Stork, who hold the two highest offices in Court.

THE CHIEF JUSTICE

SIR LANCELOT SANDERSON AND THE BAR.

Replying on behalf of the guests, the Chief Justice said that they had assembled on the occasion of a very interesting event. The Bar of the Calcutta High Court had been the most important element in the administration of justice in this Province. He could say with confidence that they could not have a better Bar than they had at present. The relations between the Bench and the Bar had been most cordial—he might almost say, jovial. (Laughter.)

The Calcutta High Court was the premier High Court in India and the Calcutta Bar the premier Bar. (Applause.)

In 1826, there were between 90 to 100 cases in the Court, now there were something between three and four thousand a year.

After predicting a brilliant future for the profession, Sir Lancelot dwelt on the expansion of which the Court stood in need. At present, sufficient accommodation could not be found for the eighteen judges; and the offices were over-crowded. In the circumstances, it would not be very long before the High Court would have to be enlarged.

He had made representation to the Government on the point, and the latter always said that they had no money. "But," declared Sir Lancelot amidst applause, "in my opinion, money must be found."

TRIBUTE PAID TO THE LATE MR. C. R. DAS FROM THE BENCH AND BAR OF THE CALCUTTA HIGH COURT.

Eloquent tributes to the memory of the late Mr. C. R. Das were paid by the Bench and the Bar at the Calcutta High Court on Wednesday. All the Judges assembled in the Court room of the Chief Justice which was crowded with members of the various branches of the legal profession and the general public.

On their Lordships taking their seats, Mr. Chakravarti said that on behalf of the Bar he had to announce to them the mournful news of the sudden death of Mr. C. R. Das. Mr. Das was born of a gifted family in Bikrampur, in the District of Dacca. His father was a solicitor of this Court and his uncles and also many other members of his family were members of the profession. Mr. Das was educated when a boy in a Missionary College at Bhowanipore and later he joined the Presidency College and graduated from there in 1890. He then proceeded to England and was called to the Bar in 1894. He joined this Court in April 1894 and as it often happened, notwithstanding his distinguished qualities as an advocate, he had to struggle as every one of the profession had to struggle. In 1910 he made his mark in the Dumraon case and from that time his success at the Bar was assured and he built up a lucrative practice. But in 1921 he gave up not only the emolument of his extensive practice but his comforts, his ease, and he led a strenuous life of activity in the cause of the ideal which he had before him. This was not the time, nor the occasion, nor the place to express any opinion with regard to that ideal; some people might be in favour of it, others not, but he wished to emphasise one of Mr. Das's aspect of life. That was the aspect of "sacrifice," grand sacrifice for the ideal which he had set before him. On account of the strenuous life which Mr. Das had been leading for the last five years his health was shattered. He sought rest at first at Patna and later at Darjeeling. From all accounts they thought that Mr. C. R. Das was getting better but they were surprised to receive the news of his sudden death. Mr. Das had left his widow, a son and two daughters, all married, to mourn his loss. He also left the members of the profession and his numerous countrymen to mourn for him. He was a distinguished advocate. His was a great patriotic soul. He had the good of his country according to his own way, his own lights, at heart and he made every sacrifice for it and his last sacrifice was the supreme sacrifice of having laid down his life as a soldier in the field of his activity. They would ever remember his memory with admiration.

On behalf of the Vakils' Association, Babu Mahendra Nath Roy subscribed to all that had been said about the late Mr. C. R. Das. This was perhaps, he said, not the place, nor the occasion to dwell on the powerful individuality

of the great man—the great leader and statesman who had so suddenly and so prematurely passed away. As one of the leaders of the Bar Mr. Das rose so high in the profession that he earned the respect and admiration of all by his powerful advocacy and great independence. They were lost in admiration for the noble example he set to his countrymen by giving up a highly lucrative practice for what he believed to be the good of his country. The memory of such a great man would always be cherished with reverence.

Babu Mohini Mohan Chatterji on behalf of the Incorporated Law Society and of the attorneys desired to associate himself with the expression of regret at the death of Mr. C. R. Das which had been so eloquently made before their lordships. A great life had been closed in death. Those who knew Mr. Das in the days of his dark adversity and watched the brilliant success that he achieved by character and ability not only in the profession to which he belonged, but in the larger sphere of life, could not help feeling a thrill of powerful admiration when, with heroic sincerity, he renounced wealth and luxury for a life of ascetic simplicity. In that thrill was lost all the differences of opinion either in regard to politics or other matters of human interest. With great respect he placed before their lordships a feeling of sincerest sympathy on the part of the members of his profession at the great bereavement that the family of Mr. Das had sustained.

TRIBUTE BY CHIEF JUSTICE.

The Chief Justice said: My learned brothers and I have heard with the greatest grief of the untimely death of Mr. C. R. Das. The news came to me as a great surprise, for it was only on Monday last that I received reassuring news from the Advocate General as to the state of his health. We have not seen the late Mr. C. R. Das in this Court for the last few years. He has been taking a prominent part in the political world. In this Court we have nothing to do with politics. We recognize that the late Mr. Das was a prominent, able and much respected member of the profession. I had the opportunity on several occasions of judging of his past activities. I think it is well known to most of his friends at all events, if not to the public in general, that he was a man of a very generous disposition. I have heard many stories of his kindness to poor students and members of the Bar who were struggling at the beginning of their career. Ill fortune seems to attend Bengal just at the present moment. It was only last year that she lost, through death, one of her most prominent citizens in the person of Sir Ashutosh Mukerjee from whom most of us hoped for still greater efforts than he had shown during his career on the Bench, in the interest of the country. Now death has snatched away another who must be recognized by all, whatever their views may be, as one of the most prominent men in Bengal. My learned brothers and I recognize

that the profession has lost one of its most brilliant and most respected leaders and we join with you in expressing our very great regret at his untimely death. We shall be glad, Mr. Chakrabarti, if you will convey to his widow and the members of his family our sincerest sympathy in the trouble which has befallen them.

MENTION IN THE PATNA HIGH COURT.

At the Patna High Court on reference being made to the death of Mr. C. R. Das, on the 18th instant, the Hon. Justice Sir Basanta Kumar Mullick in reply said: The news which you have given us to-day is as great a shock to us as it is to you, and in a sense it is appropriate that you should have mentioned this matter in our Court, because perhaps I am now the only judge of this Court who was privileged to work with Mr. C. R. Das when he was in regular practice in the Calcutta High Court, while on the other hand my learned brother was personally associated with him in several important cases in this province, one of which occupied our time for a considerable number of months last year. I do not think it can be denied that in the capacity to marshal facts and brilliancy of advocacy, Mr. C. R. Das had many equals. He had also the gift of idealism which though generally out of place in the forensic theatre helped him to infuse a living spirit into the dry bones of a plain issue of fact, so that the characters in the plot moved on the stage as if they were living flesh and blood. That was a great gift and no doubt very largely helped him to achieve the success in his profession which he commanded at the time of his retirement. As to his other activities it is not for us to speak but this much can be said that his large-heartedness, his charity and his honesty spread the fame of his name far beyond the limits of this province and it was common to hear from people in remote parts of India that he was a man who had given up all he had to serve the cause of his country. That is a good enough epitaph for any man. My learned brother and I ask you to convey to the members of his family the message that we join with them in mourning the loss of a distinguished member of the legal profession.

ed appeals was delivered by Sir JOHN EDGE. The appeals were dismissed, but no decision was given on the question of *res judicata*:

April 2nd, 3rd and 6th.—*Mt. Bhagwani Kunwar v. Mohan Singh*. This was an appeal from Allahabad in a suit for possession of property. The material question in issue was whether a Hindu family was joint or separate.

Judgment was reserved.

Messrs. DeGruyther, K. C. and *Patrik* for the Appellants.

Sir G. Lowndes, K. C. and *Mr. Wallach* for the Respondents.

April 3rd.—Judgment was delivered in the following appeals:—

Diwan Chand Kirpa Ram v. Weld & Co. Appeal allowed.

Forbes v. Ralli Bros. Appeal dismissed.

April 6th.—*Mohan Singh v. King-Emperor* (Allahabad).

Mr. Douglas McNair applied for special leave to appeal from a conviction and sentence to death for murder. The Board composed of LORDS ATKINSON and CARSON and SIR JOHN EDGE were of opinion that the grounds did not come within the principles set out in *Dillet's* case and leave was refused.

Mr. A. M. Talbot for the Secretary of State.
G. D. M.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

The Judicial Committee concluded the hearing of Indian appeals on Monday, April 6th and rose for the Easter Vacation.

The following business was transacted during the past week:

April 2nd.—*Vaithialinga Mudaliar v. Srivinth Arni*. Judgment in these 7 consolidated

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Combination when amounts to actionable wrong and when not.

In the recent decision of the House of Lords in *Sorrell v. Smith*, Lord Chancellor Cave, in delivering judgment, has attempted to deduce general propositions of law, as to when combination of two or more persons resulting in damages to a third person or persons, would be an actionable wrong and when not. Their Lordships held in this case, agreeing with the Court of Appeal, that where the purpose of the combination is not to injure another in his trade but to further or protect the trade of the combination, no actionable wrong is committed, even though damage may result owing to the act of such combination. The Lord Chancellor in his judgment analysed the law as laid down in the "famous trilogy" of *The Mogul Steamship v. McGregor*, *Allen v. Flood* and *Quinn v. Leatham*, in support of the propositions deduced by him.

Our contemporary of the *Law Times* sums up the following propositions of law as the net result of the decision:—

(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if results in damage to him, is actionable. (2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. His Lordship added the following commentaries as "foot-notes" to those general propositions: (i) Although the first proposition is confined to a combination of two or more, it does not necessarily follow that the existence of the combination is essential to the commission of the offence; (ii) that the word "malice" when

used in connection with those matters merely means that the act is wilfully and knowingly done, as personal enmity, spite, or evil motive is not an element of tort; (iii) that the second proposition assumes the absence of means which are in themselves unlawful, such as, violence or the threat of violence or fraud; (iv) that there is no question of the application of the Trade Dispute Act of 1906.

Non-direction to the jury by the trial Judge.

Our contemporary of the *English Law Journal* says that the recent decision of the English Court of Criminal appeal in *Rex v. Thorpe* (*Times*, April 28th), is of importance since it has a bearing on the duty cast on the trial Judge with regard to the directing of the jury in prosecutions for murder. One of the grounds of appeal in that case was that the learned Judge ought, in his summing up, to have directed the jury that it was open for them to consider whether the facts warranted a finding of man-slaughter, and it was agreed that it was immaterial that this point was not raised by the defence. The defence in point was that it was a case either of conviction for murder or acquittal. No doubt the learned Counsel for the defence was quite right in adopting this line, since the danger of running a double alternative defence in most cases is not to be lost sight of. However that may be, it is quite clear, from such authorities as *Rex v. Hopper* (1915, 2 K. B. 431), which was cited with approval by the Court in *Rex v. Thorpe*, that it is undoubtedly the duty of the trial Judge to put such questions to the jury as appear clearly to arise upon the evidence, whatever the line of defence adopted by the prisoner's Counsel. When the Judge has failed in this duty it will be open for the Court of Criminal appeal either to quash the conviction or to substitute a verdict of a lesser offence, e.g., man-slaughter. To this rule, however, there is a corollary, and that is, there must be some evidence on which the jury might arrive at such a verdict. The Court

of Criminal appeal accordingly dismissed the appeal in *Thorpe's* case on the ground that there was no evidence on which the verdict of man-slaughter could have been properly founded, it being the duty of the Judge in such a case, not to leave the question of man-slaughter to the jury. Although those observations have particular reference to murder cases, there appears to be no reason why the same principles should not be applied to every criminal prosecution." The same view has been taken by the High Courts in India in a number of cases.

Costs in sec. 145 proceedings.

Can the High Court in revising an order under sec. 145 of the Code of Criminal Procedure direct one party to pay costs to the other including the costs incurred by the successful party in the High Court? Sec. 148 of the Code runs as follows:—"When any costs have been incurred by any party to a proceeding under this chapter the Magistrate passing a decision under sec. 145, sec. 146 or sec. 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding and whether in whole or in part or proportion. Such costs may include any expenses incurred in respect of witnesses and of pleader's fees which the Court may consider reasonable." A Full Bench of the Madras High Court has held in *Veerappa Naidu v. Ayadayammal*, 48 Mad. 262, that the High Court when exercising its powers of criminal revision from an order passed by a Magistrate in proceedings under Chap. XII of the Code has no power to award to the successful party the costs incurred in the revision proceedings. Reliance has been placed on a previous decision of a Full Bench of the Madras High Court in *Sankarlinga Mudaliyar v. Narayana Mudaliyar*, 45 Mad. 913. The learned Judges seem to take the view that the decision of the previous Full Bench is conclusive on the point, but we fail to see how that can be so. The previous case referred to was one in which an application in revision was made to the High Court by a private party against an order of acquittal. This application was refused and the Court was asked to direct the Petitioner to give costs to the Opposite Party. This also was refused on the ground that the High Court has no power in a criminal case to make an order as to costs.

The *ratio decidendi* of that decision may be gathered from the observations of Coutts Trotter, J.: "The whole machinery of revision is a creature of statute and has to be found within the four walls of the Code of Criminal Procedure and so far as criminal cases are concerned I do not see how we can possess an inherent power in ourselves to supplement that purely statutory machinery by assuming to ourselves the power of supplementing it by the awarding of costs. It is for the legislature to consider whether the power of revision in cases of the kind that we have seen in these proceedings has not outlived its usefulness or at any rate whether it should not be safeguarded by the arming of Courts with the power at least in cases where revisional proceedings are taken by private prosecutors and not by the Crown of mulcting them in proper cases by the award of costs." We fully agree with the observation quoted above but we think that in consequence of the recent amendment of the Code the position has altogether been changed. In the first place orders made by Magistrates under sec. 145 of the Code are now subject to the ordinary revisional powers of the High Court conferred by sec. 439 of the Code under which the High Court may make any amendment or any consequential or incidental order that may be just and proper. There cannot be any doubt that the High Court may make the order which it is competent for the Magistrate to make but which he has omitted to make; in other words, the High Court can undoubtedly make an order as to the costs incurred in the Court of the Magistrate. The only difficulty is as to the costs incurred in connection with the revisional proceedings in the High Court. We think this relief can be granted now by the High Court as an incidental order.

By analogy reference may be made to the conflict of decisions which existed before the recent amendment as to the power of an Appellate Court to make an order under sec. 106 of the Code where no such order could be made by the Magistrate. In the majority of cases the view was taken that it was competent for an Appellate Court to make the order in question. The legislature has however removed all doubts on the subject and given effect to the majority view by amending sub-sec. (8) of sec. 106 in the manner required. No express provision is to be found in the Code on the ques-

tion we are discussing as to cases under sec. 145 of the Code but the effect of making sec. 489 applicable to orders under sec. 145 seems to clothe the High Court with the necessary powers. This view is confirmed by the fact that in the present Code a new sec. (561A) has been enacted to the effect that nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The legislature should however set all doubt at rest and expressly clothe the High Court with the necessary powers.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925. (Continued from p. clix.)

VIII

Delay in Mofussil Courts is found by the Committee to arise from inadequate application of many of the prescribed rules of procedure other than those already mentioned. As instances they mention (a) the granting of several adjournments for filing of written statements, (b) the practice of not opening the case during trial, (c) the omission to examine the parties when issues are framed, (d) the failure to utilise the rules about discovery and inspection owing to the rules being not properly understood, (e) commissions for examination of witnesses and for local investigation being unduly delayed, and (f) negligence shown by the Courts in effecting service of processes received from other Courts. It is considered that if pleaders in the Mofussil work in partnership and constitute firms like those of attorneys in Presidency Towns, commissions will be executed much more quickly and adjournments will not have to be granted on account of the engagement of a pleader in another Court or on account of his absence in the Mofussil. Senior members of the profession feel some reluctance in forming a partnership with a junior as there is the possibility of the junior partner breaking off as soon as he has secured through his connection an assured practice. When the mutual advantages of the arrangement will be understood, it may not be found difficult in practice to safeguard effectively against such a contingency.

The Committee have found that the practice is almost universal in the Mofussil Courts

of examining especially in cases of a high value, a very large number of unnecessary witnesses. Cross-examination is very often extended to about six times the proper period required and the matters elicited are generally so unimportant that a reference to them during argument would make it unimpressive and is therefore seldom made. They have not been able to offer a solution for this state of things. If instead of being allowed to ask questions merely with a view to test the veracity of each of the statements made by a witness, it was made compulsory that the cross-examination should be confined only to those material facts which, to the knowledge of that party, are false, some check might be effected. If the Courts were empowered to reject cross-examination on a particular point after satisfying themselves that the materials for doubting the veracity of a statement are grossly insufficient, there will be another check. In many cases the Courts may consider a particular line of defence to have failed after a few witnesses in support of the story have been examined and it may be feasible to exclude further oral evidence on the point, subject to incorporating in the record the pleader's note of the points to be proved by each of the witnesses. An instance mentioned by the Committee is typical. A leading Counsel who had attested a Will, genuineness whereof was being questioned, was cross-examined for two whole days with a view to show that his professional income was much less than what he stated and that his position in society was not so high as was represented. Nothing was gained however by such detailed and lengthy cross-examination. A person, pleading satisfaction of a bond on which a suit has been based, tries to prove that the Plaintiff admitted before a meeting of the villagers that the bond had been satisfied. Though the witnesses hopelessly contradict one another on several material facts and though the pleader advises the party not to adduce further evidence on the point, the party insists that everyone of the 12 or 13 persons present should be examined. An auction-purchaser who has purchased a property at a very low price offers innumerable witnesses to prove that each bigha of the land in question was worth only two annas or four annas, though each of those have been saying that the nett yearly profit of a bigha varies from five rupees to ten. Such instances, though not very general, are not

rare either. These tend to lower rather than enhance the respect of the public for the law Courts and tempt them to devise fanciful means for playing with the legal procedure.

The Committee think that the present system under which even senior judicial officers have to record each word of what the witnesses say not only throws an unjustifiable burden of strenuous and mechanical work upon the Judge, but it distracts his attention from the demeanour of the witness. They suggest that the Judge should only take notes in long hand. In England, this system has not given rise to any complaint. They think that in India even after the introduction of the practice, the tendency of the Subordinate judiciary will be towards over-elaboration rather than over-condensation. As a safeguard against insufficient notes, a verbatim record of the evidence kept by a pleader may, under proper conditions, to ensure accuracy, be permitted to be used in the Appellate Court. The framers of the Civil Procedure Code left it to the different High Courts to modify the existing practice, whenever they thought necessary. So, there is no difficulty in the way of this reform.

"S. S."

(To be continued.)

Review.

TRIAL OF KATE WEBSTER. Edited by E. O'Donnell. (Butterworth & Co.).

The case of Kate Webster, otherwise known as the Richmond Murder Case or again as the Barnes Mystery, was one of the most sensational cases of the last century, awaking wide interest because of the revolting barbarity of the crime with which the prisoner was charged as also for the amazing resourcefulness with which she strove to avoid the penalty of the law. It was tried at the Central Criminal Court, London, before Mr. Justice Denman and resulted in her conviction. The trial brought her out as a woman of primitive savagery, gifted nevertheless with a strange power of fascinating men, and altogether a grim and complex character whom students of abnormal psychology would regard as a "subject" of exceptional interest. Her crime was the murder of a wealthy lady named Mrs. Thomas, under whom she was employed as a maid-of-all-work, but the enormity of the outrage will not

be realised unless it is added that she cut the body to pieces, boiled the flesh and bones before packing them up in a wooden case, offered the fat for sale, went about paying visits to strangers in the character of Mrs. Thomas whose head she carried in a black bag and exhibited herself a great deal for sometime in developing intimacies with two men with the deliberate object of creating evidence of their complicity with her so that she might ultimately fasten the crime on them.

The volume under review gives a full and verbatim account of the trial, including the speeches of the Attorney-General and Counsel for the defence, the examination and cross-examination of witnesses, objections raised and rulings given—in fact, every little detail that might help one in visualising the proceedings. The value of such accounts is obvious. The ordinary report in the Law Journals, while it gives enough materials for a proper understanding of the points of legal interest presented, has naturally to omit particulars which would help one to reconstruct the atmosphere of the Court-room and a picture of the personalities involved. Such particulars can only be furnished by full accounts to read which would be at once to see the law in practice at the hands of some of the best among its exponents and to go through a narrative of intense human interest. The report portion of the present volume does give one this double pleasure, for it is fairly exhaustive, even hints as to the demeanour of witnesses having been supplied. The "Introduction," however, a curious medley of psychology, character study, art-criticism and loose speculation about diverse things, is out of place in a legal publication and is a hindrance rather than a help to a scientific appraisal of the leading features of the case.

In Memoriam.

Dr. Jadunath Kanjilal has paid a very appropriate tribute to the memory of the late Mr. C. R. Das in a poem, which has been published in the public press. For want of space we cannot reproduce it *in extenso* but publish only the concluding lines.

Greatness leaves behind everlasting trace
Its image Death can never spoil and mar
So shall it inspire the rising race
Inscribing in their heart the name of Das C. R.

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New Rules of the Judicial Committee of the Privy Council.

On the 2nd of May last a new set of Rules of the Privy Council was issued. These supersede the Judicial Committee Rules of 1908 and the new Rules will come into operation on the 1st of January 1926. The new Rules do not alter the practice which have prevailed in the Judicial Committee in any material respect except with regard to special leave applications. Hitherto such applications could be made *ex parte*, but the new rule, which replaces r. 4, provides that, in future, applications for special leave to His Majesty in Council must be accompanied by an affidavit of service of notice of the intended application on the Opposite Party. This is a very important change. In civil cases the successful party may not consider it worth his while to appear when such applications are made but in criminal cases, where appeals are usually preferred by applications for special leave, it remains to be seen whether the Secretary of State for India, representing the Crown, would not appear to oppose such applications. As special leave to appeal in criminal cases is seldom given, it would be a waste of public funds for the Crown to appear through Counsel to oppose such applications.

Moral standard of public life in England.

It is often said in justification of corruption in public life, which is quite a new feature in this country, that it is not uncommon even in England. Every student of English constitutional history is familiar with the history of rotten boroughs and other political scandals of the past or of more recent occurrence. But all the same one cannot be blind to the fact

that whenever such scandals have come to public notice, the British public have severely criticised them and adopted measures for their prevention. Universal suffrage was introduced in Parliamentary elections, not merely in recognition of the right of every citizen to vote but also with the object of obviating corruption at such elections. It is not possible for any party to bribe the whole nation, or for a candidate to corrupt the whole adult population of his constituency. We noticed not very long ago, that election petitions, which were a fruitful source of income to the leaders of the English Bar, have steadily declined and that after the last election at which the Labour Government was ousted by the Conservatives, hardly any election petitions were filed to the great disappointment and disgust of the legal profession.

The anxiety of the leaders of public opinion in England to maintain a high standard of public conduct in the responsible ministers is also evidenced by the strong protest in the leading organs of the newspaper press against Lord Birkenhead, our present Secretary of State, supplementing his income by his prolific and profitable contributions as a journalist. He was careful to avoid writing on Indian affairs of which he is in charge as a cabinet minister. But the *Times* and other leading newspapers, as also members of the House of Commons, objected to his journalistic activities on quite different grounds. Some of these were that he as a cabinet minister could get more handsome remuneration for his contributions than he would have got otherwise and that this placed him under some obligations to newspapers to which he contributed. Judging by ordinary moral standard, this may seem to be a rather far-fetched impropriety. Lord Birkenhead at first maintained that there was no impropriety in his supplementing his income by literary contributions and he meant to fight it out. But

such pressure was brought on the Prime Minister by public opinion in England on the question that Lord Birkenhead had to choose between the alternative of either giving up his seat in the cabinet or journalism. He discreetly yielded and decided to give up the latter. Need we furnish any better proof of the anxiety of the British public to maintain a high moral standard in their public men?

After giving this recent instance we give below a historic one of very serious character to show how the British public have always been jealous in maintaining a high moral standard in men occupying very high and responsible positions in public life. Centuries ago, public life in England was admittedly very corrupt. Still the House of Commons of those days did not hesitate to bring its Speaker to book when he failed to maintain the high standard of this office, which has latterly been held by men who have commanded universal confidence for their honesty, impartiality and freedom from party bias. We are indebted to our contemporary of the *Law Times* for the following episode regarding the treatment meted out to Sir John Trevor, who held the great position of Master of the Rolls with that of the Speaker of the House of Commons towards the close of the seventeenth century. Lord Macaulay thus describes it: "In 1695 a rumour arose and spread that the funds of the City of London and the East India Company had been largely employed for the purpose of corrupting great men, and the name of Sir John Trevor, Speaker of the House of Commons, was mentioned among others. A committee was appointed to examine the books of the two corporations. Foley was placed in the chair, and within a week reported that the Speaker had in the preceding session received from the City a thousand guineas for expediting a local Bill. As soon as the report of the committee had been read it was moved that he had been guilty of high crime and misdemeanour. He had to stand up and put the question. A man of spirit would have given up the ghost with remorse and shame. Had Trevor returned to the House on the following day he would have had to put a motion for his own expulsion. He therefore pleaded illness and shut himself up in his bedroom. A Royal message was brought down by Wharton, authorising the Commons to elect another Speaker."

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IX

The Committee strongly recommend that judgments should usually be delivered at the close of the argument and that they should neither be too long nor too laboured. They have found that occasionally the delay is almost scandalous. Trial Courts should only try to 'make the whole case comprehensible and should not attempt to "relieve the Appellate Court of any portion of his duties" by making the judgment a substitute for the record. They think that the extra cost of employing stenographers for writing judgments on dictation will be more than compensated by increased outturn of work. After such employment there will be very few judgments reserved for a long time. To argue new cases before a Judge who has allowed ten of such judgments to accumulate is "to address oneself to a mortgaged mind." Some instructions should in their opinion be issued to subordinate Courts to remove the misconception, that they are to "produce independent treatises of their own reciting all the facts as though a judgment were a 'case stated' for the opinion of a higher Court on points of law."

The Committee have recommended several changes in the Evidence Act, the Transfer of Property Act, the Provincial Small Cause Courts Act and some other enactments.

About the rules of evidence it is thought that "it is time to prevent the delay caused by requiring formal proof of duly registered documents." They would like to see the requirement being dispensed with even in cases where the law requires a document to be attested. The attesting witnesses very often extort considerable money for the purpose of proving a document and sometimes the delay in bringing them is excessive. They might have considered as well the desirability of amending the definition of "secondary evidence." The rule as it exists is anomalous and inconvenient. A certified copy of a registered deed of conveyance is nothing more than a copy of the Sub-Registrar's copy of the original document. If that can be used as evidence, there is no good ground for rejecting copies prepared from the Court's copies of sale certificates, probates, succession certificates,

etc. There is certainly no presumption of greater accuracy in the copies granted by Sub-Registrars than by a District Judge's office. Record-of-rights is printed. One copy, which is termed the original, is kept in the Collector's office while those supplied to the Sub-Divisional Officer and the Munsif are stamped as certified copies. There is not much force in the argument that copies prepared from the Collector's copy are more authentic than those prepared from the other printed copies. The Committee suggest that the definition of "public documents" should be made more comprehensive so as to include written statements, petitions and affidavits. The definition may also be made to include road-gess returns, reports of process-servers and of officers of the Court, a post-master's receipt, endorsements of refusal by addressee of a letter, money order, etc., made by a postal peon, and similar other documents. Tenants find it very difficult to prove that a rent-roll supplied by the landlord to the Cess Revaluation Officer, was really signed by the landlord or by his duly authorised agent. Where a document is supplied by a person under some statutory obligation to a public officer, he ought not to be allowed to escape from the consequences of his own false statements merely by resorting to the device of getting his signature written by another person. The rule enacted in sec. 83, to the effect that maps prepared by the Government for the purpose of any case must be proved to be accurate, leads to great inconvenience, without any corresponding advantages. The evidence of accuracy must be of a formal nature as the witness brought at an inordinate expense has merely to say that the things were done as were represented by him in the map. At any rate, such requirement can safely be dispensed with in those cases where the Court has accepted the correctness of the map. What weight should be attached to a map must depend on the circumstances of each case.

The Provincial Small Cause Courts Act, 1887, exempts forty-four classes of suits from the operations of the Act. The Committee think that the following classes of suits need not be so exempted :—(a) ejectment after expiry of a term of a written lease, (b) suits on simple mortgage in which the mortgagors are the only Defendants, (c) suits for all classes of rent, (d) contribution suits, (e) suits to set aside attachment of movable property, (f) suits for mesne profits, (g) suits to recover damage

caused by trespassers even when criminal offences accompany the action, and (h) suits to recover maintenance based on a written instrument, and some others of minor importance. The attention of the Committee was probably not drawn to a defect in the Act, which is not only anomalous but which gives rise to a serious delay. It is now well-established that under the enactment, a suit of the summary nature, even if wrongly entertained as an ordinary suit, may be tried under the summary procedure, but that a suit of the summary nature valued at Rs. 5 filed as an ordinary suit before an Officiating Munsif during the absence on leave of a Munsif vested with Small Cause Court power up to Rs. 250, cannot be tried under the summary procedure on his return to duty. This restriction ought to be removed.

" S. S. "

(To be continued.)

Reviews.

THE LAW OF MUNICIPAL CORPORATIONS IN BRITISH INDIA. By P. Duraiswami Aiyangar, B.A., B.L., Assisted by S. Rangaswami Aiyangar, B.A., B.L. and P. Chakrapani Aiyangar, B.A., B.L. Second Edition. Published by P. Chakrapani Aiyangar, B.A., B.L. Madras, 1924. Price Rs. 20.

A new edition of the only standard Indian work on the subject must be very welcome at this juncture when the re-modelling of Municipalities and other local bodies on more democratic lines ushered in by the Reforms of 1920 is bound to have important consequences on the working and administration of these bodies. We share the publisher's regret that Mr. P. Duraiswami Aiyangar, the author of the original treatise, has not lived to see the publication of this second edition of his work, of which fortunately he lived long enough to complete the manuscript—all except two new chapters on education and town planning. Although the general arrangement of the chapters has been retained, substantial modifications have been made in the text, necessitated by far-reaching legislative changes in the several provincial and urban Municipal statutes, and the chapter on election practically re-written. The great merit of the work lies in the success with which materials derived from English and American text-books and decisions have been

utilised to illuminate the various topics arising for consideration in Indian enactments from the Indian point of view. That the decisions of the Indian Courts, those of the Privy Council in Indian cases inclusive, have been duly embodied in the text goes without saying. The work is voluminous, but the arrangement is throughout logical, and the references and citations, so far as we have been able to test, exhaustive and accurate. These features will specially commend it to lawyers, but the work will serve to guide and assist rate-payers and Municipal Councillors also and others concerned in dealing with the constantly recurring problems of Municipal administration. The high standard of industry and accuracy and the insight which marked the preparation of the first edition has been maintained in the present edition.

THE LAW OF TRANSFER (INTER VIVOS) IN BRITISH INDIA. By Lal Gopal Mukerjee, B.A., LL.B., Additional Judge, High Court of Judicature, Allahabad. R. Cambay & Co., Calcutta, Madras, 1925.

This is a text-book based mainly on the provisions of the Transfer of Property Act and judicial decisions bearing thereon, but as the provisions of that Act do not completely cover all the topics which come under the description of law of transfer, *inter vivos*, the author has had frequently to travel beyond the limits of the enactment. The chapters on "settlement," "family arrangement," "compromise of doubtful rights" and "procedure" are instances in point and they serve to fill up gaps left by the legislature. The Transfer of Property Act is a very fragmentary piece of legislation—much of which again has very little bearing on the facts of Indian life. We welcome this treatise as the first attempt towards a more rational and comprehensive treatment of the subject with reference to Indian needs than is offered by the Transfer of Property Act. Its value to students of law and to lawyers is obvious. We would however specially commend it to those who interest themselves in legal reform and specially in the reform of the law as embodied in the Transfer of Property Act. It is a scholarly work, handy for use by lawyers and not too heavy for the law student.

By S. C. Sarkar, B.L., Bengal Civil Service (Judicial). Fourth Edition, Calcutta. M. C. Sarkar & Sons, 90-2A, Harrison Road, 1925.

The book is growing with each successive edition, keeping faithful however to its original ideal of providing a handy manual of practice for use in Mofussil Civil Courts. The first three parts deal successively with matters contained in the Civil Procedure Code, the Rules and Circular Orders, etc., of the High Courts and other enactments; the fourth concerns examination of witnesses and the fifth and last contains forms and precedents. Much of the work has been re-written and if it runs any risks, it will be owing not to shirking labour on the part of the compiler, but to over-elaboration.

THE LAW OF COMPULSORY LAND ACQUISITION AND COMPENSATION. By S. G. Velinker, Barrister-at-Law. Price Rs. 15.

Mr. Velinker has made his mark as an annotator by his compact little volume on the law of gaming and wagering, and having been president of the tribunal of appeal under the City of Bombay Improvement Act, he has not allowed the experience and insight he gathered from his incumbency of that responsible office to pass without fruits, and the result is the present treatise, which is a very wide-awake, able and reasoned commentary on the several enactments authorising and regulating compulsory acquisition of lands, e.g., the Land Acquisition Act, the Land Acquisition (Mines) Act and the relevant provisions of the many Municipal and Town Improvement Acts and of the Indian Railways Act. Complete mastery of the underlying principles and a capacity for felicitous presentation within the briefest compass distinguish Mr. Velinker's commentaries. The subject-index itself is an indication of the thoroughness with which the details of the subject have been rationalised for the purpose of presentation. Altogether, it is a most reliable guide to, and commentary on, the law of compulsory acquisition of land in British India.

M. C. SARKAR'S PRACTICE AND PROCEDURE IN CIVIL CASES AND EXAMINATION OF WITNESSES.

THE

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The Late Rai Surendra Chandra Sen Bahadur

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REPORTS (See Index.)

The late Rai Surendra Chandra Sen Bahadur.

It is with deep sorrow that we record the death of Rai Surendra Chandra Sen Bahadur, which took place on Friday, the 3rd of July last. He was for long very intimately connected with our journal and reports. In fact he was our chief reporter on the Appellate Side of the Court as Mr. S. R. Das, the present Advocate-General, was the chief reporter on the Original Side of the Court, at the very start of the journal. For many years Mr. Sen was a member of our staff and rendered us very valuable assistance in conducting our journal. It was only a few years ago when he became too busy to attend to the reporter's duties that he gave up the work. But he continued to take interest in the journal and we always received very valuable help from him. He made a special study of the Bengal Tenancy Act and the land-laws of Bengal and came to be recognised as an authority on the same. His annotated edition of the Bengal Tenancy Act has passed through many editions and is recognised as the standard work on the subject. He belonged to an intellectual Vaidya family of Kalia in Jessore, many members of whom have distinguished themselves in the provincial services, in the district Bar and in the educational line. Mr. Sen was very simple in his habits, amiable and a thorough gentleman in every way. He was a very popular member of the legal profession and commanded the respect of the Bench. He will be missed much by both. We endorse the tribute paid to his memory by the Hon'ble the Chief Justice and publish it in another column. We convey our sincere con-

dolence to the members of the bereaved family.

The Acting Chief Justice.

We convey our heartiest congratulations to the Hon'ble Sir Nalini Ranjan Chatterjea on his appointment as Acting Chief Justice of the Calcutta High Court during the absence on leave of Sir Lancelot Sanderson. He is the fourth Indian Judge of the Calcutta High Court to be appointed to this high office, the first being Sir Romesh Chandra Mitter and the other two, Sir Chandra Madhub Ghosh and Sir Asutosh Mookerjee.

Lord Birkenhead on the revision of the Indian Constitution.

Sifting chaff from grain the following may be said to be the sum and substance of the policy to be pursued by the Secretary of State and the present British Cabinet with regard to the revision of the constitution of India:—

The Secretary of State for India stated in the House of Lords on the 7th of July last that no decision was arrived at as the result of the conference with the Viceroy of India and the Indian Government.

Nevertheless, the British Government would welcome and very carefully consider any constitution commanding general agreement among Indian parties. The British Government are prepared to go as far as possible to accept any proposals which the Indian Government may make after discussion in the Assembly.

The constitution undoubtedly required revision, Diarchy must be decided by results.

A Royal Commission to review the constitution might be accelerated, when Indian leaders gave evidence of a genuine desire to co-operate in making the best of the existing constitution.

In the course of the debate in the House of Commons which followed Lord Birkenhead's pronouncement in the House of Lords, Earl Winterton affirming the same said:—

When proposals are submitted by the Indians themselves, which carried a reasonable measure of general agreement among the people of India, such proposals would be carefully considered, when the time came, by the Government of

India, the Cabinet and the statutory Royal Commission.

The leaders of the labour party expressed their approval of Lord Birkenhead's assurance.

Reading between the lines it is evident that whatever conclusions the Secretary of State might have arrived at after prolonged conference with the Viceroy and Governor-General of India (Lord Reading) were not considered sufficient by the Cabinet Council to justify the making of any definite recommendations for the revision of the present constitution. The pronouncement made by the Secretary of State on behalf of the Government that "the British Government would welcome and very carefully consider any constitution commanding general agreement among Indian parties" is of great constitutional significance. Those who are acquainted with the history of Dominion Constitutions, know that the Australian Commonwealth Bill was so framed at a conference of the members of the Legislature and the leaders of the people of Australia.

It was not a measure of first impression and its history is very instructive to India. The Commonwealth of Australia now consists of six federated Colonies. Its constitution was not forged in a day. From 1863 to 1883 ten conferences were held and the Federal Council of Australia Act was passed in 1885 by the Imperial Parliament. This constitution did not prove a success and negotiations for a better constitution went on. During the years 1897 and 1898, conventions of delegates from the different states (colonies) were authorised to frame a federal constitution by the legislatures of the different colonies and they met in conference successively at Adelaide, Sydney and Melbourne and formally framed a Bill to constitute a Commonwealth. The Bill was then submitted to the British Parliament for being passed into an Act. It was introduced in the House of Commons on the 14th of May 1900 and was passed with some amendments on the 9th of July following. Thus it will be seen that the constitution of Commonwealth of Australia, which is regarded as the most progressive amongst the Dominion constitutions, is only 25 years old. Mr. Harrison Moore in his work on the Constitution of the Commonwealth of Australia says, "The federal constitution was a popular act and an expression of

the freewill of the people" and as such he assigns to it a higher place than the constitution of the United States or of any other country which has a written constitution.

We regard the constitution given to us by the Reforms Act of 1919 as inadequate and unsatisfactory. Why cannot our political parties, in the central and provincial legislatures, follow in the footsteps of Australia? If we wish to proceed at all on practical lines we must not only hold an united conference of all parties but also make the fullest use of the existing legislature to our best advantage. If the political parties in India and their leaders cannot now unite, meet and frame a constitution for India and the provinces, how can they expect to attain the status of a Dominion Government? So the first and foremost duty of us all is to promote unity in the country and entrust the leading representative men amongst us with the duty of framing a constitution that may meet with general acceptance. Creating bad blood amongst ourselves or between us and the British people will by no means further the cause of *Swaraj*. Here is a definite offer and if we fail to avail ourselves of it and go on indulging in mutual recriminations and wild talk and ideas we shall remain very much where we are to-day.

Tercentenary of Grotius's great work on International Law.

Tercentenary of Grotius's great work *De Jure Belli et Pacis* was celebrated by a banquet at the Gray's Inn Hall on Monday the 8th of June last by the Grotius Society at which there were present many distinguished members of the Bench and Bar, many learned jurists and foreign ambassadors, notably of Netherlands and Sweden which played such an important part in the remarkable career of this great jurist and intellectual prodigy. Lord Blanesburgh, who presided, very appropriately filled the chair, as his humane services for the prisoners of war and distressed enemy aliens represented in his person the high moral standard that should govern the international relations between states and which was first clearly enunciated in the epoch-making work of Grotius. Grotius knew that it was impossible to abolish war in this world and so attempted to formulate rules based on moral principles so that war may not be wantonly, cruelly and brutally waged.

He says that what impelled him to produce the work was that "he saw prevailing throughout Christendom a licence in making war of which even barbarous nations would have been ashamed. Recourse was had to arms for slight reasons or no reasons, and when arms were once taken up just as if men were thenceforth authorised to commit all crimes without restraint." International law and morality have theoretically undergone great development since the days of Grotius and were embodied in the form of a code in the Hague Regulations at the close of the last century but when the beast in man is up we are little respecters of the moral laws, as the Great European war has abundantly served to illustrate. So Lord Blanesburgh woefully said in the course of his presidential address: "It is the heaven through which salvation may come to the distracted world." The bitter lessons of the last war has not subdued, even in its worst sufferers, the spirit of strife, the contagion of which has contributed to a world wide unrest. It is the moral forces, for the ascendancy of which men like Grotius appealed to the world in his immortal work, that can alone regenerate mankind. The disciples of Grotius will do well to study the moral ideals of Ancient India and popularize them amongst mankind. What a pity that they are more often honoured in their breach than in their observance even in the country of their birth. The world was never in greater need of being guided by the precepts of men of peace and apostles of love and charity like Budha, Christ and Chaitanya.

What a remarkable prodigy Grotius was will appear from the following extracts from Lord Blanesburgh's speech:—

He would recall to their recollection some of the outstanding features in the life of Grotius, and would speak of one or two of the principles which overlay his great work, *De Jure Belli et Pacis*, the tercentenary of the publication of which they were celebrating. What an amazing prodigy Hugo Grotius must have been. At the age of nine he was the author of Latin verses which were still famous. He became a University student at the age of twelve. At the age of fifteen he produced an edition of Martianus Capella, whose prophecies some of them would remember, and in that book he included all the knowledge which was then possessed by the educated world of the day. At the same age he, a youth of fifteen, was included as a member of a special embassy from Holland to the French

court, and at the age of seventeen, or a little afterwards, he became a doctor of law at the University of Leyden. As a poet he was the author of a work which was the forerunner of Milton's *Paradise Lost*. In truth, before he was twenty he was a jurist, a scholar, a theologian, and a politician, and in each of these different realms of activity he excelled. It was true to say of him, *Nihil tetigit quod non ornaret*, and that he was a master was appreciated by his contemporaries. One instance might be given. Casaubon, although he was an old man when he first met Grotius on his visit to England in 1613, said of him that he was the greatest man that he had ever met, and he wrote of him at the same time a letter, which had been the subject of constant quotation ever since, the terms of which might be recalled because they were exceptional. The letter was written by Casaubon on the 13th April 1613, during the period of the visit of Grotius to England, and it said: "I cannot say how happy I esteem myself in having seen so much of one so truly great as Grotius." Grotius at this time was thirty years old. The letter continued: "A wonderful man. This I knew him to be before I had seen him, but the rare excellence of that divine genius no one can sufficiently feel who does not see his face and hear him speak. Probity is stamped on his features, his conversation savours of true poetry and of profound learning. It is not only upon me that he has made this impression. The pious and learned men to whom he has been introduced have felt the same towards him, the King especially so." Might he, as a Scotsman, remind them that the King in question was James the Sixth of Scotland and the First of England, "the wisest fool in Christendom?"—so that they would appreciate the merits of the commendation.

How really great men, who are much in advance of their age, are seldom honoured in their own country and have to suffer for their moral virtues, and regard for truth is well-illustrated by the remarkable career of Grotius:—

But while to Holland was due the credit of having produced Grotius and while Holland might also claim credit for most, or much of, his work in those other spheres with much of which they in that society were not specially associated, the particular claims that Holland might make with reference to the work whose publication they were celebrating was of a distinctly negative character. She was entitled to say that, if it had not been for the somewhat imperfect supervision exercised by her warders in Loevestein prison, the work in question would probably never have been written. But more than that, in relation to this particular work he thought that Holland was not, perhaps, entitled to claim. What had happened in the position of Grotius at that time was that he, having enjoyed cer-

tain theological views which were not at the moment popular with the ruling authorities, had found himself in conflict with the civil powers and he had been tried and, whether rightly or not from the point of view of those who tried him, he had been sentenced to imprisonment for life. But, owing to the resources of his wife, a lady to whom apparently all historians united in paying the utmost homage, Grotius was smuggled out of prison in a book-box, and he found himself, after considerable adventure, in France, and it was in France, as an exile, that the opportunity came to him of writing his great book. He thought they might well doubt whether, if it had not been for that extraordinary untoward happening, as it must have appeared at that time, or the series of happenings, it might be doubted whether it would ever have been written. Immersed as Grotius was at the time of his imprisonment in the controversies of his own country, political and ecclesiastical, it might be doubted whether he would ever have found either leisure or the repose of soul-necessary in which to compose this great spiritual classic *To France*, which offered him shelter, and to Sweden, which, at a later date after Grotius had written his book, appointed him to be her ambassador at the French court, credit for the course of the later life of Grotius was mainly due

THE LATE RAI SURENDRA CHANDRA SEN BAHADUR

REFERENCES IN THE HIGH COURT.

At the High Court on Monday last before a Full Court composed of the Chief Justice and all the other Judges, sympathetic references were made by the Bench and the Bar to the death of the late Rai Surendra Chandra Sen, Advocate, High Court, which took place on Friday last.

Mr. Mahendra Nath Roy, President of the Vakils' Association said:—Mr. Sen commanded an extensive practice, specially in cases involving the land law of Bengal, of which subject he was recognized as an authority. Mr. Sen's annotated edition of the Bengal Tenancy Act is treated both by the Bench and the Bar as the leading authority on the subject. His very valuable services as a member of the Bengal Tenancy Act Amendment Committee were specially appreciated by Government.

The Advocate-General on behalf of the Bar and Mr. Mohini Mohan Chatterjee, on behalf of the Incorporated Law Society, associated themselves with what the previous speaker had said.

CHIEF JUSTICE'S WORDS OF SYMPATHY.

The Chief Justice said:—"Every one who knew him will be exceedingly sorry to hear of the death of Mr. Surendra Chandra Sen. He was one of those who, in my opinion, can be ill-spared and his death will cause a severe loss not only to the Court, but also to his large circle of friends. I was always glad to see Mr. Sen in Court, for I knew that the points which he desired to argue would be stated forcibly and concisely without any waste of time. Furthermore I was sure that

if there were any real objections to the case which he was presenting he would not fail to bring them to the attention of the Court. He was well-known as a sound lawyer and in one particular branch of it he was recognized as an expert and whenever he appeared in Court he was a real assistance to it. He was one of the old school—a true gentleman in the real sense of the word, always reliable and invariably considerate and courteous. I regarded him as a personal friend and I regret very much that I did not know that he was ill, for I should have liked very much to have seen him, at any rate, once more before he died. I should be glad, Mr. Roy, if you will convey the sympathy of my learned brothers and of myself to the members of his family for the great loss which they have sustained."

At an extraordinary meeting of the Vakils' Association the following resolution was unanimously adopted: "That this Association places on record its deep sense of sorrow at the sad and untimely death of Rai Surendra Chandra Sen Bahadur, a distinguished member of the Association."

Reviews.

THE YEARLY DIGEST OF INDIAN AND SELECT ENGLISH CASES, reported in all the important Legal Journals, during the year 1924. By R. Narayanaswami Iyer, B.A., B.L. and V. V. Chittall, B.A., LL.B. Published by the Madras Law Journal Office, Mylapur, Madras.

This new issue of the indispensable annual is quite up to expectations. The decisions are carefully arranged and classified under suitable headings and sub-headings. The English cases digested are well chosen. The tables of cases digested and of cases judicially noticed are prefixed to the digest as in previous issues.

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REPORTS (See Index.)

Ministers and journalism.

The following extract from the *Law Times* will show that we were not wrong in setting out the reasons for which strong exceptions were taken both in Parliament and outside to Lord Birkenhead adding to his income by his journalistic contributions.

Some twenty years ago the question of Ministers of the Crown as directors of public companies reached an acute stage after six years' agitation, and no surprise will be felt that in 1925 the question of Ministers as paid journalists which we have discussed in these columns and has equally attracted public attention, should have at last come prominently before both the House of Commons and the Cabinet itself. And the reasons why, in both cases, Ministers should confine themselves to the duties of their office are identical. In the first place the country is entitled to the whole-time services of those who accept high positions in the Government; and, also, there should be no suspicion that Ministers of the Crown may be placed in a position of private obligation. The parliamentary adroitness of Mr. Baldwin in replying to the questions and supplementaries on the subject in the House of Commons this week will do nothing to allay public feeling in this matter. The principle, according to the Prime Minister, which the Government have decided to re-affirm—"that Ministers of the Crown while holding office should refrain from writing articles for publication in any way connected with matters of current public policy"—has never been called in question. That field of literature apparently only explored by ex-Ministers.

The passage that our contemporary quotes in the *Times* newspaper is particularly strong in condemnation of the practice. The following editorial comments were made

before the question was considered by the Cabinet Council at the instance of the Prime Minister. Since then the Cabinet having endorsed the public opinion in the matter, Lord Birkenhead gave the Prime Minister an assurance that he would discontinue the practice during his tenure of office. The present Prime Minister of England may not be a very brilliant man but he is universally respected as a man of character who is noted for his honesty, probity and sound judgment. Our contemporary observes :—

The whole question is admirably summed up by *The Times* in a trenchant leader on the subject two extracts from which are as follows:—

The plain truth is that, if the present practice is admitted as correct, then there is no sort of reason why other Secretaries of State should abandon many of their directorships, their work at the Bar, their profession as doctors, land agents, solicitors, or whatever they may be. The one restriction left would be the obligation to withdraw from any active part in those occasional cases where their private interests and those of the State might be held to compete or to clash with one another.

It is frankly impossible to assess precisely the relative importance to newspapers of an eminent contributor and to Ministers of an additional income. What is both possible, however, and most urgently required, is that Ministers should rid themselves once for all of the whole case for any speculation of the kind. If it were clearly laid down that they are debarred from paid journalism so long as they remain in office, then there would be an end both of the injustice and of the real scandal of the present practice. The House of Commons should not rest content until that ordinance is added to the elusive Ministerial code."

Conflict of views between one High Court and another.

One High Court is not bound to follow a decision of the other High Court in the sense in which subordinate Courts are bound to administer the law according to the interpretation put upon it by the High Court to which they are subordinate, but surely the rulings of

one High Court are entitled to respect and serious consideration by any other High Court. In the case of a Chief Court raised to the status of a High Court it stands to reason that in order to preserve the continuity of the current of judicial decisions the newly created High Court will follow its own decisions passed at a time when it had not the status of a Court established by Royal Charter, but on this ground the decisions of the other High Courts should not be lightly given the go-by and should be given the consideration which they deserve. To cite one or two instances, in *Nga Hla U v. King-Emperor*, 3 Rangoon 139, the Rangoon High Court has placed an interpretation on sec. 537 of the Code of Criminal Procedure, which is quite peculiar and which is not shared by any of the other High Courts in India. It has been held: "It has been suggested that a non-compliance with a mandatory provision of the Code of Criminal Procedure cannot in any circumstances be cured by the provisions of sec. 537 of the Code and must invalidate the whole trial. I cannot find any authority for this view. . . . The decision of their Lordships of the Privy Council in the case of *Subramania Ayyar v. King-Emperor* reported in I. L. R. 25 Mad. at p. 61, has sometimes been referred to as authority for the principle that non-compliance with a mandatory provision of the Code is fatal to the trial but I can find nothing in the judgment of their Lordships to justify this view." Taking this view it has been held that non-compliance with the provisions of sec. 342 of the Code of Criminal Procedure is not fatal to a trial and the observation is made—"A positive enactment by the Code that certain trial shall not take place is obviously a very different thing from a positive enactment that in the course of such a trial certain detailed procedure shall be followed."

In *Maung Mauk v. Maung Po You*, 3 Rangoon 169, in a short judgment which contains no reference to any decided case it has been held that the failure to serve a copy of the preliminary order under sec. 145, cl. 1 on the Respondent and the failure to post the order on the land are irregularities cured by sec. 537 of the Code of Criminal Procedure.

THE STATUS OF A PATNIDAR.

In his judgment in the case of *Surendra Narayan Sinha v. Bijay Singh Dhudhuria*, Chakravarti, J., has followed a course which

Judges are always chary of adopting and has attempted to lay down a principle of far-reaching importance. The question was whether a *patnidar* could be restrained from using the lands of the *patni* for the purposes of brick-making and making necessary excavations for the purpose. The judgment of the Court (Walmsley and Chakravarti, JJ.) must be taken to be that in the absence of any stipulation to the contrary a *patni* lease included a power to make bricks out of the land. But Chakravarti, J., placed his decision on a much wider principle and attempted to classify the somewhat anomalous and, for that reason, confusing relation between a *patnidar* and the landlord by laying down that a *patni* is, in the absence of anything to the contrary in the *patta*, a transfer of the totality of the zemindar's rights for a consideration of yearly payments instead of a lump sum. In this view, as Chakravarti, J., indicates, the land will be regarded as subject to a charge for the rent (which is hardly rent), and as security for its payment.

Novel as this view of the *patni* taluk seems to be, it has certainly strong reasons in support of it. As Chakravarti, J., himself points out, at the time of the Permanent Settlement, talukdars holding similar estates were regarded as proprietors and were given the option of making direct engagement with the Government. There is no reason why the permanent tenures of a later date should not be looked upon in the same light.

Apart from that, there is nothing in principle against this view. When a perpetual non-forfeitable lease is granted for a rent fixed in perpetuity, there are two possible ways in which the relation may be looked at. Either the property—a *nuda proprietas*—may be said to be vested in the lessor and the lessee's right may be looked upon as a *Jus in re aliena* with the most extensive rights. This is the view of Roman law with regard to the Emphyteusis. Or the property may be looked upon as vested in the lessee, the lessor's right being looked upon as a mere incorporeal right—a rent-charge, distinct from the ownership of the land. This is the English view.

The Permanent Settlement gave no power to the proprietor to grant perpetual leases. This power was recognised by subsequent legislation—the *patni* regulation. In recognising this institution which the Government of the time found growing up the legislators

were not troubled by any question of the category of legal right under which the right of the *patnidar* should be placed. They laid down certain concrete rules for regulating his relations with the landlord.

The result was a very complex institution which united in it a great many features of ownership and some features of a lease. The result has been confusion when Courts have had to deal with special incidents of *patni* tenures which are not covered by the regulation.

The question was squarely raised in the case of *Kallydas Ahiri v. Monmohini Dasi* (I. L. R. 24 Cal. 440), in which case Jenkins, J., held that a *patni* was a lease, and as such it was forfeitable in certain circumstances.

This decision was quoted with approval by the Judicial Committee in the case of *Abhiram v. Syama Charan* (14 C. W. N. 1) and, on the whole, it must be said that judicial opinion has always looked upon a *patni* as a lease, though with special incidents, not exactly conformable to the provisions of the Transfer of Property Act.

This view was put to a severe test when the Judicial Committee was called upon to decide whether a *patnidar* had underground rights as an incident of the *patni*. If the proprietary view had been adopted, there would have been no difficulty in answering the question. But the Judicial Committee when faced with the question answered it practically in the negative, holding that the mineral rights must be presumed to rest in the zemindar unless they are expressly granted, as in the case of any other lease (*Harinarayan v. Srimam*, 14 C. W. N. 746). This case was not clearly one of a *patni* lease. But the principle, it is submitted, was exactly same. And in a subsequent case, *Girdhari Singh v. Meghlal Pande* (22 C. W. N. 201), their Lordships extended the same principle to a *patni* tenure. That case is clearly authority for the proposition that in the absence of express grant of mineral rights they do not pass to the *patnidar*. Other cases apply the same principle to similar other tenures. In other words, in this case the Judicial Committee has treated the *patni* exactly as a lease.

The anomaly which this view led to has recently been felt by the Privy Council in the case of *Satya Niranjan v. Ram Lal* (29 C. W. N. 725) and while they held upon a construction of the *patta* that it had the effect of conveying mineral rights to the *patnidar*, their

Lordships were at pains to strictly limit the scope of their previous decisions to the raising of a mere presumption. The fact is that *patni* tenures have generally been looked upon so long as a transfer of all the proprietor's interest that round them there have grown up a body of incidents which can hardly be fitted to the idea of a lease under the Transfer of Property Act. So soon as you seek to deal with these relations on the basis of the *patni* being nothing more than a lease, you are bound to find anomalies and difficulties. The Judicial Committee in its previous decisions attempted to follow a strictly logical course and and to that extent whittled down the rights of the *patnidar*. Their latest decision, however, shows that very little will induce them to leave the untenable position.

The point of view put forward by Chakravarti, J., offers a much simpler and a perfectly intelligible position. If the *patnidar* is looked upon as the grantee of the proprietor's rights, subject to a liability to pay rent and the special limitation placed on them by the *patni* regulation, difficulties like these will never occur. The Courts would then apply the concept of ownership rather than that of a lease to the interpretation of the position of a *patnidar*. There is no doubt that this view would be more in conformity with the views of the people and the older decisions (see *Ali Quader v. Jogendra Nath*, 16 C. L. J. 7).

No doubt the opinion of the Judicial Committee in *Abhiram Goswami's* case is directly against the principle laid down by Chakravarti, J., and, the underlying principle of the other cases also is that a *patni* is essentially a lease, differing from other leases in nothing but the perpetuity of the tenure. At the same time it must be remembered that although the view that the *patnidar* is a grantee of the proprietor's rights was put forward before the Judicial Committee in some of the cases, the reasons founded on the history of the land system of Bengal given by Chakravarti, J., were never considered by their Lordships. It would not be surprising therefore if, upon a consideration of these arguments their Lordships were induced to change their view with regard to *patni* at any rate, if not with regard to other *mokurari* grants. If that is done, there is no doubt that the status of the *patnidar* would have been placed on a similar and more intelligible footing and, if we may venture to say so, on a footing more conformable

to the notions of the people prior to the decisions of the Judicial Committee above referred to.

N. C. SEN GUPTA.

LEGAL EFFECTS OF INJURY BY SHOCK.

By A. P. PANDEY, M.Sc., LL.B.

A runs to kill B on a public high-way with a naked sword in his hand. C, a casual passer-by, gets frightened to see this with the result that there is a general breakdown of his nervous system and his health is shattered. Can C sue A for damages? Obviously there is no physical impact, assault or battery. The nervous shock was caused by fear of imminent danger to his safety. Does the law recognise mental shock, followed by physical sufferings, as a ground of action for damages?

The cardinal maxim of the law of torts, "*Injuria sine damno*" prompts one to answer the above question at once in the affirmative. The word "*Injuria*" is of comprehensive signification and one of its well-known meanings is a breach of law in violation of another's absolute right. Every one is entitled to use a high-way and he is further entitled to perfect safety with respect to his person including mind during the course of its use. Any one using the road in a way to endanger his safety causes a breach of duty owed to another passer-by and infringes the latter's primary right. The presence of physical damages does not seem to be a condition precedent to the application of this doctrine. However, it will be interesting to trace the history of the breach of law relating to the responsibility for causing nervous shock.

Early in the nineteenth century, the law declined to assign mental shock a place in the category of injuries entitling the injured party to damages. Of those days, the decision in the case of *Lynch v. Knight*, 9 H. L. C. 577, illustrates the judicial attitude. There the action was brought by the wife for the loss of the consortium of her husband occasioned by certain slanderous words uttered by the Defendant against her imputing unchastity. Lord Wensleydale ruled that the law cannot value mental pain or anxiety and does not pretend to redress where the wrongful act complained of causes that alone. The ratio for the decision seems to be that the law can take cognisance of such physical injuries as are the

natural and reasonable result of the act complained of and directly flow from such act but it will be putting a premium upon baseless actions if mental anxiety is also recognised as a ground of action for torts. Mental anxiety is a question of sentiment, more or less temporary, and it will, no doubt, be very difficult—nay, rather very nearly impossible—to assess the same in damages. On similar grounds, a father was entitled to no relief in an action for damages, founded on the fact that the Defendant had seduced his daughter. It may be a severe blot on his otherwise unsullied honour and unblemished reputation but there was no remedy in the law of torts for the deeply wounded feelings of a father, robbed of his daughter. In order to found a cause of action and to induce a Court to take cognisance of his grievances, the father had to set out in the forefront of his claim that the abducted daughter was in his service and the Defendant's wrongful conduct has resulted in the loss of such service. On such pleadings, the jury used to take into consideration the humiliation of the father while assessing damages.

This unsatisfactory state of the law continued till the close of the nineteenth century when it received an impetus for the worse on the 15th of December 1887 by the clear pronouncement of Sir R. Couch, J., in the case of *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222. The facts of the case, in very brief, are that the Plaintiff was coming home in a buggy along with her brother. On the way, they had to pass a railway level crossing. When they neared the crossing, the watchman opened the gate and proceeded with the buggy to open the gate opposite to the railway. When the Plaintiff was on the line, she saw a train coming towards her at a very rapid speed. The Plaintiff's brother shouted to the watchman to open the gate at once. In the meantime, the train passed very close to the back of the buggy without actually touching her, as the buggy had just crossed the rails by that time. Thereupon the Plaintiff fainted and fell down in her brother's arms. She received a severe nervous shock and suffered from profound impression on her nervous system, the result of which was precarious health, impaired memory and defective vision. The Plaintiff brought an action for damages in respect to her physical and mental injuries caused by fright. The cause of action relied upon was

the nervous shock, unaccompanied by any physical injury at the time of the accident. By the process of reasoning embodied in the fundamental rule that damages must be the natural and reasonable result of a tort, the Court of Appeal dismissed the claim on the ground that physical damages produced by the nervous shock are too remote a consequence of the negligence of the gate-keeper and therefore the Plaintiff was not entitled to any relief. "According to the evidence of the female Plaintiff," observes Sir R. Couch, "her fright was caused by seeing the train approaching and thinking that they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a mental or nervous shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would follow from the negligence of the gate-keeper. If it were held that they can, it would appear to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims." It is obvious, from the above, that three considerations weighed with the learned Judge. In the first place, nervous shock cannot be looked upon as the natural and reasonable result of the gate-keeper's negligence. In the second place, to recognise such claims would be introducing complications in the difficult question of ascertaining whether the alleged physical injuries are the effect of the alleged tort. Lastly, an attempt to redress mental injury will be to encourage multiplicity of claims. It is respectfully submitted that the reasoning is not convincing. Remoteness as the legal ground for the exclusion of damages in an action of tort means not severance in point of time, but the absence of direct and natural causal sequence.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Easter Sittings commenced on the 28th April and the list of business contains 26 Indian Appeals, 4 from Crown Colonies, 1 from Canada and one from New Zealand. As the Courts rise again for Whitsun on the 28th May it would seem doubtful whether the Judicial Committee will be able to finish off so long a list.

At present 2 Courts are sitting. LORD ATKINSON, LORD SHAW and LORD PARMOOR are dealing with the Crown Colony Appeals. They also have in their list the breach of promise case from Bengal, *Jacob v. Wills*. LORD SUMNER is presiding over the Board which is hearing exclusively Indian Appeals. The other members are LORD BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI and LORD SALVESEN.

April 28th.—Judgment was delivered in *H. K. Gosari v. Anand Bharti Gosari* (C. P.). The appeal was dismissed.

The following motion and petitions for special leave to appeal were heard by the Board presided over by LORD SUMNER:—

(1) *Mahabir Prosad Tewari v. Jamuna Singh*. This was a motion that the appeal might stand over until Mr. L. P. E. Pugh should arrive from India. Leave was granted.

(2) *Ratanchand Dayachand v. Damji Darsi*. Sir Geo. Lowndes, K. C. and Mr. M. R. Jardine appeared for the Appellant, Mr. E. B. Raikes for the Respondent. Leave was refused.

(3) *Ghuri Sanker v. Ikkhara Zemindaries Ltd.* Sir G. Lowndes, K. C. and Mr. E. B. Raikes appeared for the Petitioner. Leave was granted.

(4) *Ganesh Narayan Sahi v. Pratap Uday Nath Sahi Deo*. Sir G. Lowndes and Mr. W. Wallach appeared for the Petitioner.

Messrs. A. M. D'Anne, K. C. and Ramsay for the Respondent. Leave was refused.

(5) *Ram Nath Chundamal v. Mul Chand*. Mr. W. Wallach for the Appellant. Leave was refused.

(6) *Nirmala Nanah Shahi v. Muhammad Abdul Aziz*. Sir G. R. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant. Leave was refused.

(7) *Sourendra N. Mitter v. Sm. Tarubala*

Dasi. Sir E. B. Lowndes, K. C. and Mr. L. M. Parikh appeared for the Appellant, Messrs. L. DeGruyther, K. C., A. M. Dunne, K. C. and Ramsay for the Respondent. Leave was granted.

Sura Lakshmiah Chetty v. Kothandarama Pillai. This appeal which was a dispute as to the possession of houses in Madras and raised a question whether a transaction was or was not *benami*, was heard *ex parte* on January 23rd and 26th of this year. Later the Respondent was granted leave on terms to come in and argue the appeal. He was represented by Mr. K. V. L. Narasimham and judgment has been reserved.

April 30th and May 1st.—*Nowraj Rustomji Wadia v. Government of Bombay.* Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes appeared for the Appellant.

Messrs. A. M. Dunne, K. C. and A. M. Talbot for the Respondent.

This appeal was concerned with a dispute as to the value of land compulsorily acquired by the Bombay Corporation for the extension of the Municipal Hospital for infectious diseases in Arthur Road. Judgment was reserved.

May 1st, 4th, 5th and 7th.—*Mt. Farid-un-nisa v. Mukhtar Ahmad* (Oudh). In this appeal it is sought to set aside a deed of *wakf* executed by a *purdanashin* lady. The evidence is considerable and conflicting and the hearing has not yet concluded. Mr. S. Hyam appeared for the Appellant, Mr. W. Wallach for the Respondent.

Musammatt Farid-un-nissa v. Mukhtar Ahmad mentioned in last week's London Notes was heard on the 1st, 4th, 5th, 7th and 8th May and judgment was reserved. The question at issue was whether a deed executed by a *purdanashin* lady constituted a valid *wakf*.

May 8th, 11th and 12th.—The same Board consisting of LORD SUMNER, LORD BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI and LORD SALVESSEN also reserved judgment in *Lal Bahadur v. Ambika Prasad* (Oudh).

Messrs. Dunne, K. C., Hyam and B. N. Srivastava represented the Appellants, Messrs. DeGruyther, K. C. and Parikh the Respondents. Part of a joint Hindu family estate had been sold by two brothers. The Plaintiffs are grandsons of one of the vendors and they contend that the sale was not for necessity and was not binding on them.

May 13th.—Judgment was delivered in *J. C. Aguilar v. Gangananda Singh*. The appeal was allowed.

May 13th.—Arguments were heard and the hearing concluded in *Kondapalli Vijayaratnam v. M. Sudarsana*. Mr. Hyam appeared for the Appellant, Mr. Ingram for the Respondent. The subject-matter of the appeal relates to the validity of a document. The document was registered as a Will but owing to the minority of the testator was held invalid as such. It is contended that though invalid as a Will the document may operate as an authority to adopt and that the registration was valid for that purpose. Judgment was reserved.

May 12th and 14th.—The hearing was commenced of *Mata Prasad v. Nageshar Sahai*. This appeal relates to rival claims to the Oudh Taluqdari Estates of Wali and Baragaon. In previous litigation the Privy Council have decided in favour of the validity of a Will. In the present suit the Appellant contends that that decision does not operate as *res judicata* against him. Further questions arise as to the effect of a compromise and as to the proper construction of various sections of the Oudh Estates Act, 1869. Messrs. Dunne, K. C. and Wallach are appearing for the Appellant, Messrs. DeGruyther, K. C. and Parikh for the Respondent. Mr. Dunne is still opening the appeal.

A special Board consisting of LORDS ATKINSON, SHAW and DARLING heard the appeal from Bengal of *Jacob v. Wills*. This was said to be the first breach of promise case that had come before the Privy Council and it attracted a good deal of public attention.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellant.

Messrs. Barrington Wadd, K. C. and Nissim (with them Hyam) for the Respondent.

Mata Prasad v. Nageshar Sahai (Allahabad), an appeal, raising important questions regarding the succession to the Wali and Baragaon Estates in Oudh, was further heard during the past week. The arguments were concluded on May 21st and the Board will consider their judgment. The appeal was heard by LORDS SUMNER and BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI and LORD SALVESEN.

Messrs. Dunne, K. C. and Wallach for the Appellant.

Messrs. DeGruyther, K. C. and Parikh for the Respondent.

May 15th.—LORDS ATKINSON and SHAW, SIR JOHN EDGE and MR. AMEER ALI heard arguments and dismissed the appeal from Madras in *Parthasarathi Appu Rao v. Secretary of State*. The question for decision was whether the land claimed by the Plaintiffs was held on a 99 years' lease or on a ryotwari tenure. The Subordinate Judge held that it was ryotwari but the judgment appealed from had decided otherwise. It was admitted that the original grant in 1846 was for a term of years but it was contended that the tenure was converted to ryotwari in 1856, but the grant, which purported to effect the conversion, was not in evidence.

Messrs. DeGruyther, K. C. and Narasimham for the Appellants.

Sir G. Lowndes, K. C. and Mr. Kenworthy Brown for the Respondent.

In *Raja Venkatadri Appa Rao v. The Revenue Divisional Officer, Guntur*, Mr. Narasimham appeared for the Appellant. The point at issue was identical with that in the above appeal and the decree of the High Court was confirmed.

May 18th and 19th.—*Doddama Kom Bennepgowda v. Bennepgowda Bin Yarkangowda* was heard before LORDS BUCKMASTER, ATKINSON and SHAW. This appeal which raised a question of succession to *watan* property was argued by Mr. Wallach. Their Lordships dismissed the appeal without calling on Mr. E. B. Raikes for the Respondent.

May 19th.—The following petitions for special leave to appeal were heard by the same Board:—

(1) *Hari Kishun Das v. Md. Safi Jan* (Oudh). *Messrs. Clouston, K. C. and Wallach* for the Petitioner. Leave was refused.

(2) *Rukmini K. Chakravarti v. Baldeodas Benani* (Bengal). *Sir G. Lowndes, K. C. and Mr. W. Wallach* appeared for the Petitioner. Leave was refused.

(3) *Mt. Bibi Amina v. Md. Musu* (Baluchistan). *Mr. A. Majid* appeared for the Petitioner. Leave was refused.

May 21st.—Two Boards were again constituted for the hearing of Indian Appeals.

In the Council Chamber, LORDS SUMNER and BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI and LORD SALVESEN concluded the hearing of arguments in *Mata Prasad v. Nageshar Sahai* and took time to consider the advice that they will tender to His Majesty.

May 21st and 22nd.—The same Board but without LORD BLANESBURGH heard and decided an appeal from Bombay, *Bai Monghibai v. Pragji Dayal*. In this litigation the Respondent sought to establish the Will of Vassanji Madhavji, a wealthy inhabitant of Bombay. The Appellant who was the widow of the testator entered caveats on behalf of herself and her infant sons, who had been practically disinherited. Both Courts in Bombay found in favour of the Will and leave to appeal was given under sec. 109 (c) of the Code of Civil Procedure. The Privy Council were of opinion that there was no sufficient reason for disturbing the concurrent findings of the lower Courts and the appeal was dismissed.

Mr. L. DeGruyther, K. C., Sir Geo. Lowndes, K. C. and Mr. Douglas McNair for the Appellants.

Messrs. Fairfax Lummoore, K. C. and E. B. Raikes for the Respondent.

May 8th, 11th, 22nd and 25th.—In the Board Room, LORDS ATKINSON, SHAW and DARLING concluded the hearing of *Maung Bya v. Maung Kyi Nyo*, an appeal from Lower Burma. The hearing of this case had been adjourned owing to the hearing of Canadian Appeals. The question at issue relates to a claim for compensation for damage done to crops by the blocking of a canal. Judgment was reserved.

Hon. Geoffrey Lawrence, K. C. and Mr. Besley for the Appellants.

Messrs. Hanney, K. C. and Leach for the Respondents.

On May 22nd judgment was delivered in *Sura Lakshmiah Chetty v. Kothandanama Pillai*. The appeal was allowed.

May 22nd and 25th.—**LORD SUMNER, SIR J. EDGE and AMEER ALI** heard the appeal of *Burn & Co. v. The Thakur of Morvi*.

The Respondent had ordered metre gauge wagons for the Morvi Railway. There was delay by the Appellants in delivery and delay by the Respondent in payment. The Appellants eventually cancelled the contract and the Respondent sued for damages for breach. Questions arose as to whether time was of the essence of the contract, whether the Appellants had given a reasonable notice before cancellation and as to the measure of damages. Judgment was reserved.

Messrs. Dunne, K. C. and Sir Robert Aske for the Appellants.

Sir Geo. Lowndes, K. C. and Mr. T. J. O'Connor for the Respondent.

G. D. M.

Correspondence.

AMENDMENT OF LAW NEEDED FOR TAXING VEHICLES NOT DRAWN BY ANIMALS BY LOCAL BODIES IN MOFFUSIL.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

In sub-secs. (1) and (2) of sec 6 of the Bengal Municipal Act (III, B. C., of 1884) where "carriage and carts" have respectively been defined, the expression "ordinarily drawn by animals" occurs. This strange qualification, which occurred in the old Calcutta Municipal Act of 1876, excludes motor cars, motor cycles, motor lorries, cycles, tricycles, jin-rickshaws, which are not liable to any taxation or registration at the hands of the Moffusil Municipalities, District Boards, Local Boards, Union Boards, etc. Is it not an irony of fate that while a bullock cart cannot escape the clutches of tax-gathering bodies like the Municipalities and District Boards, motor cars, motor lorries and motor cycles, which generally damage the roads heavily are honourably exempt from the payment of taxes or registration fees? Sometime ago the Municipality of Krishnagar (Nadia) used to re-lieve taxes from motor cars running between Krishnagar City Railway Station and Swarupgunj (Nawadwip). But the point has been set at rest by a recent decision of the Hon'ble High

Court that motor cars are not liable to taxation under the Bengal Municipal Act III of 1884.

It is needless to point out that for want of proper provisions in the statute-book the Moffusil Municipalities and local bodies have been deprived of the just right of realising taxes or registration fees for vehicles of these descriptions, which were not contemplated by the legislature in those days.

The definitions of carriage and cart given in sec. 3 of the Calcutta Municipal Act, 1923 (Bengal Act III of 1923 as modified by Bengal Act XI of 1923) are naturally quite up-to-date.

Sub-sec. (1) of sec 3 of that Act runs thus:—

"Carriage means any wheeled vehicle with springs or other appliances acting as springs, which is ordinarily used for the conveyance of human beings; and includes a jin-rickshaw, but does not include a bicycle and a tricycle (other than a motor bicycle or motor tricycle) or a perambulator, or other form of vehicle designed for the conveyance of small children."

Sub-sec. (2) of sec. 3 of the said Act runs thus:—

"Cart means any cart, hackery or wheeled vehicle with or without springs which is not a carriage as defined in this section and includes a hand-cart."

Sec. 165 of that Act provides for the taxation of carriages and animals at rates specified in Schedule VIII of the Act, while section 183 provides for the registration and numbering of carts at rates of registration fees mentioned in section 184.

The corresponding sections and schedules of the Bengal Municipal Act are respectively sec. 131, Fifth Schedule, sec. 142 and sec. 143. These sections as well as sub-secs. (1) and (2) of sec. 6 and several other sections ought to be amended on the lines of the above-cited sections and secs. 166, 167, 168, 169, 170, 171, 172, 186 and 187 of the Calcutta Act.

Provision should also be made in similar other Acts for the realisation of taxes and registration fees for motor vehicles by local bodies.

The attention and co-operation of the Municipal Corporations and other self-governing bodies are essential in the matter of securing these amendments, which, if made, will provide good sources of income to them.

S. P. GHOSH,
Pleader, Faridpur.

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Proposed drastic powers of Police search in England.

We notice that the Criminal Justice Bill which was referred to a Standing Committee by the House of Commons contains a provision which proposes to empower a Magistrate to issue a search warrant authorising any policeman or other person to forcibly enter and search any place or person in a manner which seems to be more drastic than the powers conferred on the police by the Rowlatt Act, now defunct, but recently revived by the Bengal Ordinance so far as this Presidency is concerned. The Bill we refer to, however, stops short here and does not seek to confer powers of arrest or detention or internment. This is so, evidently because with regard to arrests or detention without trial, His Majesty's Judges in England possess powers of issuing writs of *habeas corpus* which cannot be taken away except by a suspension of the *Habeas Corpus* Act. This has never been done in times of peace. All the same it seems that the bureaucratic rule in India is promoting also bureaucratic tendencies in the executive in England. Evidently such legislation is being resorted to as a precaution against the spread of communist propaganda in England. We reproduce below cl. 30 of the Bill.

(1) If a justice is satisfied by information on oath that there is reasonable ground for suspecting that an indictable offence has been or is about to be committed, he may issue a search warrant authorising any constable or other person named in the warrant at any time or times to enter, if need be by force, any place named in the warrant, being a place which in the opinion of the justice ought, having regard to the facts disclosed in the information, to be searched as being connected with the suspected offence or

otherwise, and to search the place and any persons found therein, and to seize any articles of whatsoever nature (including documents) which he may find on the place or in the possession of any such persons, being either articles in relation to or in connection with which he has reasonable ground for suspecting that an indictable offence has been committed, or is being, or about to be committed, or articles which are evidence of an indictable offence having been, or being, or being about to be committed:

Provided that a person who is a female shall not be searched in pursuance of this sub-section except by a female.

The following extract from the *Law Times* will show how far the above clause has been modified in committee. The substitution of an inspector of police in place of a constable has been made because it was suggested by some that the law in India in this respect was more reasonable. But the provision as has now been amended in committee is drastic enough and it is no wonder that our contemporary enters a protest against it:—

At the outset the Home Secretary moved to leave out the words "or otherwise," italicised above, thus confining the search to "any place, . . . connected with the suspected offence" and indicated his willingness also to restrict the right of application for a warrant to a police officer not under rank of inspector and to limit the power of search to the place, excluding persons found therein, and as amended the clause was carried by twenty-one votes to nine. In its present form the clause is a distinct improvement upon the original draft, but it still gives a blank cheque to the authorities to issue a search warrant in all those cases on suspicion that such an offence has been or is about to be committed. Until the present proposals were put forward, Parliament has always specified in particular statutes the particular offences for which the machinery of the search warrant is to be applicable, although at common law a justice could issue such a warrant in respect of stolen goods within his jurisdiction. Sir William Joynson-Hicks stated that there are some thirty-six Acts of Parliament already where there are these powers to issue search warrants. There are, in fact, nearly fifty, but we believe we are

correct in saying that with two exceptions—the Official Secrets Act 1911 and the Firearms Act 1920—excluding, of course, war regulations—all the powers of granting search warrants are confined to cases where an offence has been committed or is suspected to have been committed. In the Acts of 1911 and 1920 the power was given where an offence “has been or is about to be committed,” and “has been, is being, or is about to be committed.” It may be that the wide powers now sought in the Bill are required for other than these two offences, but they should be specifically asked for and specifically granted. But the question is not a party one and must be approached quite apart from political controversy.

Prosecution for offence against public justice.

A correspondent draws our attention to the question whether it is competent for an Appellate Court to direct the subordinate Court to make a complaint under sec. 476, Cr. P. C., when it has already refused to make one. The amendment made by Act XVIII of 1923 has made a great change in the procedure to be followed by the Courts in respect of prosecutions for certain offences against public justice. Formerly under sec. 195 either the sanction or the complaint of the public servant or Court concerned or superior officer of such public servant or the Court exercising Appellate authority over such Court was necessary as a condition precedent to the initiation of proceedings and when in cases mentioned in sec. 195 any Court thought it proper to move on its own initiative it might in its discretion hold a preliminary enquiry and send the case for enquiry or trial to a Magistrate. In respect of orders under sec. 476 the Appellate Courts had no power to interfere. Now the legislature has made it imperative that in cases coming within the purview of both secs. 195 and 476 a complaint is necessary to enable the Magistrate to take seisin of the case and in cases dealt with under sec. 476 the Appellate Court has been empowered to make a complaint when the subordinate Court has not at all considered the desirability or otherwise of taking action under the section and has neither made a complaint nor rejected an application for the making of such complaint (sec. 476A) and in cases where the subordinate Court has made a complaint or refused to make one the Appellate Court has been authorised to “direct the withdrawal of the complaint or itself make the complaint which the subordinate Court might have made.”

We have not got the facts of the case referred to by our correspondent before us but generally speaking the policy of the law seems to be that whenever action is to be taken it is to be taken on the complaint of the Court which holds that it is expedient in the interests of justice that such action should be taken. The entire responsibility is cast on the Court in whose judgment the facts of the case in question do or do not attract the operation of sec. 476 and in each case the Appellate Court has the power to set the subordinate Court right if it has gone wrong, in one case by directing the withdrawal of the complaint as it must necessarily be and in the other by making a complaint. The plain meaning of the words of the section seems to be that in the latter case the Appellate Court must itself make the complaint and there is no reason why it should not. For all that is necessary to be done is that a complaint should be drawn up in writing and forwarded to a Magistrate for being dealt with according to law.

The concatenation of words used, “may direct the withdrawal of the complaint” or “itself make the complaint,” makes the conclusion irresistible that the Appellate Court is to make the complaint itself when occasion arises. There may be no harm in directing the subordinate Court to make a complaint but a consideration like this is of no avail in interpreting the statute. The words actually used must be given effect to and it is absolutely immaterial whether this or that was the intention of the legislature. The Court is not to be guided by what the legislature intended to express but by what has actually been expressed by the words used no matter whether they have faithfully expressed that intention or not. The province of the Judge does not go beyond this and therefore it is that Courts have to and are bound to become technical in administering the law.

LEGAL EFFECTS OF INJURY BY SHOCK.

By A. P. PANDEY, M.Sc., LL.B.

However the blessing of the twentieth century was to give the go-by to the above rule of law and extend the legal remedy to the grievances of the recipients of mental shock. The Plaintiff in the case of *Dulien v. White & Sons*, (1901) 2 K. B. 669, claimed damages for ill-

ness and premature delivery of an idiot child brought about by nervous shock occasioned by the negligence of the Defendant's servant in driving a pair horse-van into the house of the Plaintiff. The Defendant, in his answer, raised the plea of demurrer that the statement of claim does not disclose any cause of action. In other words, the chief issue in the case was whether mental shock, *per se*, unaccompanied by any actual physical impact can entitle the Plaintiff to a relief for damages? Thereupon Kennedy, J., says: "The fear is proved to have naturally and directly produced physical effects, so that the ill-results of the negligence which caused the fear are as measureable in damages as the same results would be if they arose from an actual impact, why should not an action for damages lie just as well as it lies where there has been an actual impact." Happily, the learned Judge did not surrender his judgment to the Privy Council decision and to the considerations governing the same and held that the physical injuries in consequence of the mental shock and the breach of duty on the part of the Defendant are connected with each other by an uninterrupted and continuous sequence. It does not need any elaboration to show that there is a continuous chain of causation between the physical injuries and the tort. The wrongful act causes mental shock which in its turn produces physical injuries. But for the accident, there would have been no physical injuries.

But the rule thus laid down by the above decision was subject to one limitation. To quote again the words of Kennedy, J.: "There is, I am inclined to think, one limitation. The shock where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C." The qualification suffers from an obvious fallacy; it may be respectfully submitted, what difference does it make if the mental shock is the result of fear of harm to one's dear and close relation? How does it affect the position of the tort-feaser?

Naturally, therefore, the qualification has been eliminated in the latest case of *Hambrook v. Stokes Bros.*, [1925] 1 K. B. 141. The case is so interesting that a short synopsis of the facts may be given with ample justification.

One morning, the Defendant's servant left a motor-lorry on the top of a steep street unattended, with the engine running, and omitted to take proper precautions to prevent it from running. Mrs. Hambrook had escorted her children, two boys and a girl, named Mabel, aged 10, to a place on the street where they were joined by other children on their way to school. They had hardly proceeded a short distance when the derelict lorry thundering down the street dashed into the children, inflicting serious injuries to Mabel. After injuring the child, it shot round a corner and was pulled up by running into a house within twenty-feet of Mrs. Hambrook, who received a mental shock caused by fear of injury to her children. Complications followed the nervous shock, as a result of which Mrs. Hambrook died. The action was brought by the husband for damages for the death of his wife caused by physical injuries resulting from nervous shock produced by apprehension of injury to her children. Referring to the limitation imposed by Kennedy, J., Bankes, L. J., observes at p. 151: "Take a case in point as a test. Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to the child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She is also terrified but thinks of damage to herself and not at all about the child. The health of both mothers is severely affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the Defendant ought reasonably to have anticipated the non-natural feeling of the timid mother and not the natural 'feeling of the courageous mother? I think not.' Their Lordships entered judgment for the Plaintiff.

The above case is therefore now an authority for the proposition that the recipient of a mental shock caused by apprehension of injury to a relation is entitled to damages if his health is affected adversely by such fright.

But suppose the mental shock is not followed by any illness or physical damages, can then an action lie for damages? Sir Frederick Pollock

answers this question in the negative in his treatise on torts. The learned author is of the opinion that fear alone falls short of actual damages not because it is a remote and unlikely consequence but because it can be proved and measured only by physical effects.

The world is progressing fast and there seems no end of scientific researches. One inclines to look forward to the day when the medical science will be able to detect the ill-results of fright or mental shock and the degree of pernicious effect it leaves behind on one's constitution. Then mental shock, *per se*, will be successfully made a ground of action for damages. This would be the finishing stage of the development of the branch of law under discussion.

(Concluded.)

Correspondence.

CRIMINAL PROCEDURE CODE, SEC 476.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

I request the favour of your kindly publishing the following in your much esteemed journal.

Where application under sec 476, Cr. P. C., is made before a munsif for taking action under the section and the munsif after a preliminary enquiry rejects the application and an appeal is made to the District Judge under sec. 476B, Cr. P. C., can the learned Judge instead of complaining himself under sec. 476B direct the lower Court to file a complaint? In a recent case, Criminal Revision No 268 of 1925, such a complaint was filed under orders of the District Judge and the accused was convicted. On appeal the conviction was upheld by the learned Sessions Judge. Against this order of the Sessions Judge an application for revision was made before the High Court which also held that the conviction was properly had.

In the above case their Lordships did not think it necessary to go so far as to hold that the Appellate Court had jurisdiction to direct the lower Court to file a complaint but held that if there had been any defect in the complaint it was cured by sec. 537, Cr. P. C.

The above view seems inconsistent with the present law on the point as would appear from sec. 476B: "..... the superior Court may, thereupon, after notice to the parties concerned direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under sec. 476, and if it makes such complaint the provisions of that section shall apply accordingly."

The section is quite clear. The Appellate Court may direct withdrawal or itself make the complaint.

It is noteworthy that sec. 537 has also been amended. Cl. (b) of this section, which was—“(b) of the want of, or any irregularity in, any sanction required by sec. 195 or any irregularity in proceedings taken under section 476” has now been deleted and this change makes it necessary to look at the matter from quite a new point of view.

Yours truly,
SUDHIR LAL MAJUMDAR, B.L.,
Sattkhira.

"TAXING MOTOR-VEHICLES IN THE MOFUSSIL.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
Dear Sir,

Permit me to point out that I join with Mr. S. P. Ghosh, Pleader, Faridpur, in his views about the amendment of the existing (rather, the non-existing) law about the Motor vehicles. I shall only refer to a recent instance in which practically insuperable difficulties have arisen owing to the non-existence of any law compelling the taxation or registration of Motor vehicles plying within Mofussil Municipalities. Of late, big Motor Lorries, fully loaded with articles for Messrs. D. Waldie & Co., Hatirjool Oil Co., and Presidency Jute Mill have begun to pass through some of the streets of Konnagar (within the area of Rishra Konnagar Municipality). Motor Lorries did not come into existence when these streets were made, so that although they were strong enough for the passage of men, animals, bullock-carts and horse-drawn carriages, they were too weak to bear the weight of heavily loaded Motor Lorries, constantly plying on them. The result has been that these streets have been seriously damaged. It is beyond the resources of the Municipality to make those streets fit for the said motor traffic. The District Magistrate of Hooghly was referred to and he has expressed his opinion that the Mill-owners whose Motor Lorries have damaged those streets are not bound to pay anything towards their repair. The position has thus become hopeless so far as the Municipality is concerned. Under the existing Bengal Municipal Act, the Municipality cannot tax the Lorry owners in any way and has practically no control over the motor traffic. On the other hand, these lorries are seriously injuring the Municipal property without their owners being liable for any damage. Seeing no way out of this difficulty, three of the elected Commissioners of the Municipality have resigned and a fourth is likely to follow suit at the next Municipal meeting.

This will show how an amendment of the law is urgently needed for controlling the motor traffic within the Municipal area by local bodies in the Mofussil.

Yours faithfully,
HARISATYA BHATTACHARYA,
Pleader, Howrah.

THE Calcutta Weekly Notes.

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What is Dominion Status?

The terms Dominion Government and Dominion Status are in frequent use now-a-days. We know what it means. But if we look for a definition we find the terms nowhere defined. Such countries outside the United Kingdom of England and Scotland, which form an integral part of the British Empire, as have a responsible Government of their own may be said to possess a Dominion Status or Dominion Government. Their constitutions greatly differ from each other but the one thing common amongst them is that in each the executive is responsible to the legislature. They are practically autonomous so far as their internal affairs are concerned. But there is another element in their constitution, namely, the relationship that exists between a self-governing member of the British Empire and Great Britain, which forms the most important link between the two and is incapable of any definition. At the Imperial Conference that was held after the termination of the Great War, this imperial relationship was sought to be defined but the Dominion Premiers and delegates rejected the proposal to embody in a written instrument the constitution and the relation to each other of "the community of nations forming the British Commonwealth of Nations." Any written constitution defining such imperial relationship would have surely interfered with the autonomy of these self-governing members and their recent claims of being independent of the Colonial office and of freedom from International obligations of the Imperial Government. The relationship be-

tween the Dominion and Imperial Government is daily drifting towards a mere defensive and offensive alliance and allegiance to a common sovereign.

The Status of the Irish Free State is also essentially one of Dominion Government although the constitution formed the subject-matter of a treaty. Mr. Lloyd George when speaking as Prime Minister in the House of Commons on the 14th of December 1921 in exposition and explanation of the Anglo-Irish Treaty and of the absence therefrom of any definition of the term "Dominion Status" said :-

"What does Dominion Status mean? It is difficult and dangerous to give a definition. When I made a statement, at the request of the Imperial Conference, to the House, as to what had passed at our gathering, I pointed out the anxiety of all the Dominion delegates not to have any rigid definitions. That is not the way of British Constitution. We avoid the danger of rigidity and the danger of limiting our constitution by too many formalities. Many of the Premiers, in the course of that conference, delivered notable speeches, explaining the importance of not defining too precisely what the relations of the Dominions were to ourselves. It is something that has never been defined by an Act of Parliament. All we can say is that whatever measure of freedom Dominion Status gives to Canada, Australia, New Zealand, or South Africa, that will be extended to Ireland."

Accessory after the fact.

An accessory after the fact is a person who knowing a felony to have been committed by another receives, relieves, comforts or assists the felon, for example, in the case of murder by assisting the murderer to conceal the death

or to evade the pursuit of justice. Any assistance given to one known to be a felon in order to hinder his being apprehended or tried or suffering the punishment to which he is condemned seems to be sufficient to make a man an accessory after the fact. There is a considerable difference between the English and the Indian law on the subject, the latter not making an accessory after the fact punishable as in English law. The only provision in the Indian Penal Code which deals with offenders who may be included in the category of accessories after the fact is sec. 201 which lays down that whoever knowing or having reason to believe that an offence has been committed causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment or with that intention gives any information respecting the offence which he knows or believes to be false shall be punished.

Whenever an offence has actually been committed any person other than the offender who knowing or having reason to believe that it has been committed and intending to screen the offender from legal punishment causes any evidence of the commission to disappear or gives any information respecting the offence which he knows or believes to be false shall be punishable under this section. In reported cases the question has arisen as to the guilt or otherwise of a person who causes the disappearance of evidence under threat or compulsion. In *Queen v. Gobordhur Bera*, 6 W. R. Cr. 80, the prisoner was present when the murder took place. He was not aware that such an act was to be committed but he did not interfere to prevent the commission of the crime being apparently too much frightened to do so. He joined the murderers in concealing the body being frightened into compliance by their threats. It does not appear from the report what was the exact nature of the threat. It is apparent that there was no occasion for considering the effect of sec. 94, I. P. C., and the learned Judges Loch and Shumbhoonath Pandit, JJ., held that the prisoner was liable to be punished under sec. 201, I. P. C.

In *Emperor v. Autar*, 47 All. 306, the masters of the accused committed murder. The accused himself was called and was or-

dered to assist them in removing the corpse. He refused and they ran at him using language which meant that they were threatening to kill him or that they were threatening to beat him. Thereupon he submitted and assisted them in removing the corpse from the house to the deceased's own field when it was subsequently found.

Their Lordships said that the position was that the accused had just seen a fellow creature done to death quietly and expeditiously and his own death unless he complied with his master's order was not unlikely to follow and while what the accused did would have been an offence under sec. 201, I. P. C. if he had acted without overpowering compulsion he was entitled to the benefit of the doubt whether within the meaning of sec. 94, I. P. C., he was not compelled by threats which reasonably caused his apprehension of instant death. This is undoubtedly the correct view to take of the matter. The existence or otherwise of the apprehension of instant death must always be a matter of inference having regard to all the circumstances of the case.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

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X

The Indian Arbitration Act, 1899, was enacted with a view to facilitate quick and satisfactory settlement of disputes that might arise amongst the commercial classes. So, we find in 'contracts between traders in commercial centres a clause to the effect that all future disputes should be referred to some corporate body or some arbitrators named. It was considered inexpedient to extend the enactment to mufassil, where money-lenders and zemindars might oust the jurisdiction of the Civil Courts by insertion in bonds and leases of a clause that some nominees of them were to interpret the documents and to decide all disputes that might arise. So, the Act has been restricted in its operations to the Presidency Towns and the Second Schedule of the Civil Procedure Code was enacted to facilitate arbitration of disputes in the mufassil. The Committee think that the time has now come

for giving effect to the intention of the legislature that in course of time the Second Schedule was to be replaced by a comprehensive Arbitration Act. Arbitrators in commercial centres are very often hampered in their work by the unwilling party securing an injunction or a declaration of a maffasil Court, restraining them from doing their work or by his instituting a suit in such a Court relating to the subject-matter of the suit and thereby ousting the jurisdiction of the arbitrators. The Committee think that if it be possible not to prevent by legislation such suits, the jurisdiction to try them should be reserved to the highest Civil Courts in the Presidency Towns.

The Committee think that the rule in the Transfer of Property Act that mortgage and sale of lands valued below one hundred rupees need not under certain circumstances be effected by a registered instrument, has failed to protect those poor people, for whose benefit the rule was enacted, and that the ignorant and the poor find it very difficult to bring the necessary evidence of possession to Court. They think therefore that the exemption should be removed. They would allow however the unregistered instrument to be used in evidence in suits to enforce specific performance of the contract. They recommend that the rule requiring attesting witnesses to a mortgage-bond to see execution of the deed before attestation may be modified so as to bring it on the same line as in the case of Wills, where admission of execution by the testator is considered sufficient for witnesses to attest.

It is considered desirable, that registration should be made compulsory in all contracts of partnership where the principal sum exceeds Rs. 500, and that non-registration should debar a partner from suing for accounts, but will not interfere with the rights of third persons. An exception is proposed to be made in the case of a partnership confined to members of a joint family.

The very limited right of a Hindu female heir and the uncertainty of the person who will be the reversionary heir at the time of her death, have been responsible for inadequate price of properties sold by her and for a large mass of intricate litigation, some of which are instituted several decades after the sales. The Committee propose to restrict the right of suit to a period of 12 years from

the date of the alienation and that the reversioner then alive should be considered as the representative of the person to whom the estate may ultimately revert. They suggest that for the purpose of saving limitation of a debt, payments of interest should not be recognised unless endorsed in writing by the debtor, as is the rule in the case of part payments of principal, and that for summary suits under Art. 3 of the Limitation Act in the High Courts to recover liquidated damages, the period of limitation should be increased from 6 months to 3 years. The period of limitation is proposed to be reduced from 3 years to one year in suits to have forgery declared, a fraudulent decree set aside, suits for relief on the ground of mistake, suits under Art. 47, by a person bound by an order under sec. 145, Criminal Procedure Code, and in certain classes of suits for specific performance of a contract. The period of limitation is proposed to be reduced from 12 years to 3 years, in suits for maintenance by a Hindu under Art. 128, when the rate of maintenance is fixed. The Committee have not considered whether the periods of one year's limitation in pre-emption suits and of six years' for suits for which no period of limitation is prescribed, are too long or not it may also be worth while for the legislators to consider if compulsory deposit by Plaintiffs should be enforced in pre-emption suits and some classes of suits for specific performance.

One of the proposals of the Committee is that the Courts should be empowered by statute to disallow contracts of a champertous nature, and to give relief to the financier by giving him a refund of the money advanced with reasonable profit instead of allowing him a share of the estate, to allow costs to the successful defendant on a special scale and to require the plaintiff, when he is a man without means, to give security for all costs likely to be incurred by the defendant.

Insolvency proceedings have afforded in this country, a very convenient machinery for defrauding creditors, though in England the Bankruptcy Court is a real terror to dishonest debtors. The Committee think that this abuse is not due so much to the defects in the law as to the laxity of the Courts and the absence of proper administrative machinery for enforcing rules which are not only reasonable but are sometimes very hard on the debtors.

The laxity which prevails in Courts in the grant of temporary injunctions, orders for stay of execution proceedings and proceedings in suits and of attachment before judgment is considered by the Committee a fruitful source of delay and of injustice, and an "open invitation to blackmail." *Ex parte* grant of such prayers is condemned in severe terms, and the prevalence of the lax practice is attributed to "inexperience and weakness on the part of officers."

It is suggested that the existing Codes should be revised periodically. Since the passing of the Indian Contract Act, it has been recognised by eminent jurists as an "abortive attempt at codification." This enactment should in the opinion of the Committee be recast. Unless there be a permanent establishment of Judicial Officers and Administrative Officers in each of the Provincial Councils and the Supreme Council, it will not be possible to maintain the Codes as a live machinery. It is to the interest of the public that minor changes in enactments, when not accompanied by a marked change in policy, should not be made dependant on changes in political leadership and should never be the subject-matter of an electoral programme.

In cases keenly contested, the successful party can only recover a very small portion of the expenses incurred by him. The Committee suggest that measures should be devised to ensure that the costs allowed represent approximately the costs reasonably incurred, and for that purpose they propose a varying scale of pleaders' fees according to the nature of the contest and a system of taxation of costs analogous to what obtains in the Calcutta High Court. The low scale of fees for pleaders in contested suits, especially in suits relating to immoveable property, has been responsible for several abuses, which, both in the interest of the legal profession and of the litigant public, deserve to be speedily remedied. But, much caution is required in moving on this line. In the town of Calcutta, where costs are usually excessive, debtors and mortgagors are sometimes compelled to pay some money in addition to the sum due, to save themselves from the liability for costs of a law suit. It is the consideration of costs of a litigation, which makes tenants pay *abwabs* or illegal enhancement to landlords, debtors and tenants pay their dues in whole or in part, without written acknowledgment, and

throw themselves at the mercy of the other party. Moreover, it is doubtful whether the State will be able to bear the expenses of the machinery for carrying on the task of taxation, honestly and independently. In this connection it may be suggested that some provision of law should be enacted empowering persons to deposit in Court the sum due to a creditor on a bond or on a promissory note. If a creditor be unwilling to accept payment with the view that a large amount of interest on the loan would accumulate, the debtor is put to much difficulty in proving tender.

The absence of a clear rule of procedure for realisation from a "defaulting party" the fees sanctioned to a Commissioner who has carried out a local investigation, the expenses allowed to a witness and deficit court-fee on a plaint or a petition, has led to conflicting rulings. No suggestion has been made by the Committee for removing these defects.

The main recommendations of the Committee and some of their omissions have been outlined in brief. The Committee evidently displayed conspicuous ability in appreciating the several defects of the present system, in drawing broad and general conclusions from the large mass of statistics supplied to them, in taking a comprehensive view of the different phases of the innumerable questions placed before them and in generally arriving at the proper solution. The value of the work must not be judged from any error or omission but from what has been done. The labour that was thrown upon the members was herculean, the time which they took to finish their work was short, the problems they had to deal with were infinitely varied, complex and sometimes bewildering to a degree, the opinions that they received were conflicting and strongly pronounced on either side and the tenacity with which conservative judicial officers and legal practitioners cling to the existing system must have occasionally been trying if not irritating. Judging from the stand-point of style, the report is admirable. The chapter on Champerty and those dealing with appeals deserve special notice. Every student of law and every lawyer will find the labour devoted to reading those chapters well recompensed.

"S. S."

(To be continued.)

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THE LATE

SIR SURENDRANATH BANERJEA.

Sir Surendranath Banerjea is dead. But the inspiration of his public utterances, the example of his life-work will live for ever to guide the future generations of India in the path of duty to their motherland and fellow beings. Like Rammohan Roy and Iswar Chandra Vidyasagar he was one of the makers of modern India. Each one of this immortal trio drew much enlightenment, culture and inspiration from what is best in modern civilization, blended them with what was best in our own and dedicated their lives to uplift their motherland to the high pedestal that she once occupied in the ancient world. Sir Surendranath's life is so crowded with events that it is impossible to give even a brief resumé of it in our columns. In the recently published reminiscences of his life which has been styled by his publishers "A Nation In Making," he has said very little about himself. It would take volumes to give an account of this nation-builder who made the political emancipation of his people the sole mission of his life. No man in India has worked so hard and worked so long and so selflessly and ceaselessly for the accomplishment of his ideals. On one side of his death-bed lay the plain silver watch which was the constant companion of his life-time and which had helped him to regulate every minute of his day's work including the taking of periodic rest, relaxa-

tion, recreation and meals for renovating him for further work all through his long and eventful career. His public career is too well-known to require recapitulation. Like Mazzini his dream from early life was to see India united by a common bond of nationalism. But as a keen student of English history and constitution he preferred the path of reformation to revolution. He honestly believed that if India made an united demand for Self-Government on Dominion lines, England would never be able to refuse the demand. He began his political career by promoting a unity movement all over India and the Indian National Congress furnished him with a congenial platform for popularizing his political ideals. His unity movement had to undergo the severest test during the Partition of Bengal and testified to the triumph of his lead and guidance after prolonged trial and severe ordeals lasting over seven long years. From 1905 and 1912 he brought about such unity in Bengal that the Partition, which was repeatedly declared by the Executive in India and England alike to be a "settled fact," was unsettled. The Reforms of 1919 were largely the fruits of his life-long labours. He used to regard it as a half-way house and he fully believed that the day we could do away with dissensions amongst ourselves we shall be masters in our own house.

He has been much abused for having accepted the Ministry. But he was in honour bound to work out the Reforms, which he had accepted as a provisional measure after prolonged negotiations. As a minister he made the District Boards and Municipalities autonomous bodies in Bengal. He gave the Calcutta Corporation a democratic constitution. He fought hard to do away with communal representation. He had his way in appointing an Indian for the first time as the Chairman of the Calcutta Corporation against stubborn official

opposition. In the face of like opposition he gave a number of appointments in the medical department, which was formerly the preserve of the I. M. S. recruited from England, to well-qualified Indian medical men, and that proved to be as unqualified a success as the former. No body can lay charge against him of having jobbed any appointment in his gift. During the Chandpur cooly exodus, he went out of his way to help the poor sufferers, such relief did not fall within the scope of his department. During the North Bengal flood he trolied all over the worst affected parts in the burfing sun in indifferent health, which likewise was no concern of the department in his charge, and went back to Darjeeling with high fever and broncho-pneumonia. After alighting from train in such a state of health, he attended a Select Committee meeting on the Calcutta Municipal Bill and that prostrated him and shattered his health for good. He was all this time the victim of misinformed misrepresentation but he never complained. Work and duty in life was his religion. He used to say, even before his closing days, that he knew of none higher. In his retirement when his health had broken down, it was his strength of mind and buoyant spirit that kept him up. His mind, intellect and memory were as keen as ever. Though his body had failed, his spirit and faith in the future were never wanting. He often used to say that he would like to live another ten years, not to cling to life, but to see the consummation of his life-work; to see India united once again and see her firmly established in the path of Self-Government. He often repeated to the visitors that if we closed in our ranks no earthly power could resist our just demands and he could not comprehend what good would come out of creating bad blood amongst ourselves and between us and England. He was, however, a robust optimist and believed that the present dissension and division amongst us was but a passing phase of our national life and that our people would soon be convinced that united we would rise, and divided we would fall.

The closing chapter of his life when it comes to be written will reveal all that was sublime and beautiful in a man. All through life he has been a people's man. Be it in the Bengalee Office or in the Minister's Chamber in the Secretariat, be it in the days of dire

adversity or of later prosperity, the highest or the lowest, the richest or the poorest were equally welcome to him. He would never turn away a man who had a grievance, or a man who had suffered for his country. Leakat Hussain, for instance, who knows neither English nor Bengalee, and has during the last two decades led procession of boys and given expression to his thoughts and ideas in Urdu which the boys only imperfectly understood and who, since the days of partition has been more than half a dozen times imprisoned or bound down for political offences, who has led a life of want and poverty and lived on precarious voluntary gifts, occupied always a soft corner in Surendranath's heart and he has assigned him a place of honour in his reminiscences. Surendranath's attire and habits often brought on him the ridicule of his old bearer who predeceased him and he used to enjoy a hearty laugh over his ideas of propriety and impropriety. He used to crack jokes at him or make fun of him when he wanted some diversion after hours of hard work and he never got reconciled to the loss of this devoted companion of his. With all his fund of fun and frolic he would, however, brook no disturbance from even the best of his friends or nearest or dearest of his relatives when he was at work. But when he wanted relaxation he would be jovile like a child and few men had keener sense of humour and could laugh more heartily. He never bore anybody any malice.

Popularity and fame came to him unsolicited because he devoted all his energy, talent, command over language, power of expression and the rare qualities of head and heart with which God had endowed him in the service of his country and people. But he never hunted for it. Honesty and regard for truth were the guiding principles of his political career. He used to say that he would never knowingly give his people a wrong lead or mislead them and he would always say what he believed to be to their best interest even at the risk of getting unpopular. In his retirement he had freed himself from all passions, desires and vanities of life and had made up his mind to continue to work to the best of his powers for the fulfilment of the ideals of a life-time till his end came and he religiously kept to his determination till his strength failed him. As Ram-mohan Roy was the apostle of the spiritual and social emancipation of modern India so

Surendranath was the apostle of India's political rebirth and he set her children on their feet to march on in the path of modern ideals for taking an honoured place amongst the progressive nations of the world. The educated community of to-day may not be all followers of the faith founded by Ram-mohan Roy but who amongst them is there who would deny its potent influence in the enlightenment of our thoughts, ideas and culture. In the same sense Surendranath, more than anybody else, has been a maker of modern India. In the last days of his peaceful life he never desired to have any hysteric or histrionic demonstration over his services to his motherland. He was in perfect peace of mind in the faith that he had done his duty to God and man and that it is through work (*karma*) alone that a man as also a nation can attain salvation. Work to him was the sole *dharma* of his life. He used to say that his ashes would float down the Ganges, on the bank of which he lived and find their eternal resting place in the body of his dearly beloved motherland, and his spirit would hereafter find its most congenial home in the mind of his fellow-beings through which alone God reveals himself to mankind. On the evening of the 6th of August, the eve of the inauguration of the *Swadeshi* movement 20 years ago, his flaming funeral pile lit up the sky above and the brimful bed of the Ganges below adjoining his lovely garden and villa, when the western sky was aglow with the rays of the setting sun. His mortal remains were then washed away by the rising tide and the smouldering embers of the funeral fire were quenched by a welcome shower, and thus Mother Nature amidst a scene of sublime beauty and pathos dropped the curtain of nightfall on a great and glorious career.

REFORMATION OF CRIMINALS.

Bentham and other jurists speak of the prevention of offences as the paramount end of punishment in comparison with which all other ends may be disregarded. Punishment though inflicted for some offence committed is inflicted not for the sake of retribution or compensation but to prevent a repetition of that offence by the offender or some other persons. In ancient times disabling punishments were resorted to and most frequently in order to achieve this object. They partly answered the

demand of revenge and retaliation and being sharp, strong and permanent they better suited the rough and ready character of those times. In almost every country a thief had his right hand cut off and a ravisher was castrated. Manu ordained that with whatever limb a man of a low caste should hurt that limb was to be cut off. It is specifically laid down in Manu's Institutes that "he who raises his hand or a stick shall have his hand cut off, he who in anger kicks his foot shall have his foot cut off" and that "with whatever limb a thief in any way commits an offence against men even of that the King shall deprive him in order to prevent a repetition of the crime." As for a low caste man it is even laid down that if "he tries to place himself in the same seat with a man of high caste he shall be branded on his hip and be banished or the king shall cause his buttock to be gashed and that, if out of arrogance he spits on a superior the king shall cause both his lips to be cut off." Increasing humane notions have swept away these physical disabilities but death the most absolute and the permanent disabler of all has survived all attacks and is still a frequent and in some cases a compulsory punishment in most parts of the world.

Restraining punishments were not so frequent in early times as disabling, still an offender was often banished from the state. In modern times transportation has taken the place of banishment. The most ordinary and at the same time most effective restraining punishment however is that of imprisonment which involves a physical restraint for a certain period.

The advocates of the theory of the criminal's reformation respect the human being in the criminal and refuse to use him merely as a means for the preservation of the state and therefore accept punishment for the crime not so much with a view to deter persons from its commission as to preserve the criminal from a relapse. They maintain that this end is more effectively attained by reform than terror, because while violent punishments become familiar and are despised and habitual criminals are more common in countries where the severest penalties are inflicted, mild punishments avoid stirring up hatred and the desire of revenge in the mind of the criminal and may easily tend to his reform.

The theory of reformation alone may not be adequate or correct but whatever the mode or

theory of punishment adopted the desirability of the offender's reform should not be lost sight of, and though punishments must be determined with a view to restrain and deter persons from crime, they should be so inflicted as to afford the greatest facilities for the training best calculated to help the offender's reform. The question becomes of paramount importance especially in the case of youthful offenders. The chief objection against sending these offenders to jail is the forced association of criminals in circumstances which materially increase or tend to increase their moral depravity and their knowledge of crime and of the modes of its commission and of the means of eluding punishment. The tendency of all modern systems of legislation is to take the criminal's will into greater consideration and to try not only to prevent the criminal act but also to eradicate or reform the criminal will. The legislature in this country has not been unmindful of this sacred duty of the state and provision has been made in the Reformatory Schools Act for dealing with youthful offenders under the age of fifteen years and in the Code of Criminal Procedure (sec. 562) for dealing with first offenders of a mature age. This latter provision empowers the Court to release certain convicted offenders on probation of good conduct instead of sentencing to imprisonment. The Reformatory Schools Act provides for the detention of a boy of less than fifteen years of age for a period which may extend to seven years in a reformatory school which must provide (a) sufficient means of separating the inmates at night, (b) proper sanitary arrangements, water supply, food, clothing and bedding for the youthful offenders detained therein, (c) the means of giving the youthful offenders industrial training, (d) an infirmary or proper place for the reception of such youthful offenders when sick. Humanitarian efforts cannot find a better field of action than in this direction and the state should always lend its unstinted support to the maintenance and improvement of these institutions. The number of such institutions and the facilities for training to be given therein, should, whenever possible, be increased. To reclaim a youthful offender and to transform him to a useful citizen is one of the noblest services the state can render to itself and to the world at large.

THE REPORT OF THE CIVIL JUSTICE COMMITTEE, 1924-1925.

(Continued from p. cxvii.)

XI

It is almost certain that with the progress of time the report will gain in weight. But, it is proper to warn people that they should not expect too much from a reform of the judicial system. The chief limitation to the proper working of any system in this country is the ignorance, the poverty and the backwardness of the large mass of the population. They can never appreciate a refined and delicate system, under which they must continue to remain easy victims of touts and pettifoggers. A crude system adapted to their needs cannot satisfy the progressive section of the people. The second limitation is the peculiar position of the judicial officers, which does not enable them to command the same amount of respect as in the advanced countries of the west. So far as the mufassil judiciary are concerned, their subordinate position stands in the way of commanding that amount of respect which on ultimate analysis must be regarded as the principal basis of a successful administration of justice. Though the calibre of Indian officers has much improved of late, the point has not been reached when control over them can safely be withdrawn. Finally, there must be the limitation of inherent weakness in every human device in the field of administration. When the weaknesses of a particular system are discovered, there must be some sections of the people who will try to take advantage of those weaknesses. The Committee have suggested means for removing some of the most glaring weaknesses and it is the duty of every public-spirited citizen to see that these are removed.

"S. S."

(Concluded.)

THE
Calcutta Weekly Notes.

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MONDAY, AUGUST 17, 1925.

[No. 89.]

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The late Mr. Mohendra Nath Roy.

We have to record with deep sorrow the death on Thursday, the 13th August last, of Mr. Mohendra Nath Roy, who had been for years a leader of the Bar on the Appellate Side of the High Court and at the time of his death was the President of the Vakils' Association. Born in the year 1862, after a brilliant academical career, he was enrolled as a Vakil of the Calcutta High Court in 1886. Naturally shy and of an unobtrusive temperament, he did not seek honours or distinctions either in his professional life or outside it. But of so high an order were his abilities and intellectual attainments, that these came to him unsought, whilst his inborn amiability and gentleness of disposition secured for him the love and affection of all with whom he came in contact. His connection with the Calcutta University, in whose growing activities he had participated in one capacity or another, began in 1891 and ended only with his death. He was the first non-official elected Chairman of the Howrah Municipality and for many years was Vice-Chairman of the Howrah District Board. As a member of the Bengal Legislative Council, his services were constantly in requisition in Select Committees and in all transactions which called for clear thinking and the exercise of sound judgment, with both of which he was endowed in a pre-eminent degree. The C. I. E. conferred on him in 1914 bears some testimony to the value of his public services in the eyes of Government. His arguments in Court reflected the clarity of his intellect. A fairer advocate did not exist, and the Officiating Chief Justice Sir Nalini Ranjan Chatterjee echoed the sense of the whole body of his

fellow practitioners in the High Court who assembled to do honour to his memory, when he said that he lived up to the highest ideal of professional integrity. As a fitting expression of the loss the profession and the Court suffered by his death, the High Court did not sit on Thursday last till 2-30 P.M., when referring to his death, feeling tributes to his memory were paid before a Full Court by the leaders of the several branches of the profession and by the Officiating Chief Justice.

Speaking with evident emotion, His Lordship said :—

Dr. Dwarkanath Mitter, Mr. Advocate-General and Mr. Mohini Mohan Chatterjee, my colleagues and I are deeply grieved at the death of Mr. Mohendra Nath Roy this morning. To all of you who knew Mr. Roy so well, I need not say much, but I desire to take this opportunity of giving expression to our deep sense of the loss caused by his death.

For nearly 40 years Mr. Roy was a well-known figure in this Court, which he joined in 1886 as a Vakil after an academic career of exceptional brilliance. A very able and learned lawyer and a distinguished advocate he won the confidence and esteem of both the Bench and the Bar and lived up to the highest ideal of professional integrity. He commanded a very extensive practice and was one of the leaders of the profession on the Appellate Side. He was always very fair in his advocacy, and it was a pleasure to listen to his arguments at the Bar, which were always clear, concise and cogent. His death is a real loss to the Court and to the profession.

Mr. Roy did not allow his talents to be engrossed solely by the occupation of the law. He was a distinguished scholar in Mathematics and a man of wide culture, and was a prominent figure in the University of Calcutta, of which he was an elected fellow from 1891 onwards. Latterly, he was the Dean of the Faculty of Law. He was the first non-official elected Chairman of the Howrah Municipality and for many years Vice-Chairman of the District

Board of Howrah. In all these capacities he rendered public services of a high order. In 1914, as you know, the Government conferred on him the honour of a Companionship of the Indian Empire.

Mr. Roy was one of the most lovable of men, sincere and simple in habits, and was liked by every one who came into contact with him. I consider his death as a personal loss.

I hope, Dr. Mitter, you will kindly convey the sympathy of my learned brothers and myself to Babu Manmatha Nath Roy and the other members of the bereaved family in the great loss they have suffered."

LONDON NOTES

(FROM OUR CORRESPONDENT.)

May 21st.—In the Board Room before LORDS ATKINSON, SHAW, and DARLING, in *Kanchumarthi V. S. Chandra Rao v. Kanchumarthi Raja*, the question for determination was the validity of an adoption. Judgment was reserved.

Messrs. Upjohn, K. C. and Parikh for the Appellant.

Messrs. DeGruyther, K. C. and Nerasimham for the Respondents were not called upon.

May 21st, 22nd and 25th.—*Hira Bibi v. Hari Lall* (Patna). This was a suit on a mortgage. The Appellant is a *purdanashin* woman and contends that she was compelled to execute the deed without knowing its contents.

The main plea is that the mortgage was attested on "the admission of the executors," and that such an attestation is not an attestation within the meaning of sec. 59 of the Transfer of Property Act, 1882. Judgment was reserved.

Messrs. DeGruyther, K. C. and Wallach for the Appellants.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

May 25th.—Judgment was delivered in *Mir Subhan Ali v. Imami Begum* (Bengal). The appeal and cross-appeal were dismissed.

May 25th.—The same Board dismissed on a preliminary objection that the appeal was

not competent, *Ganesh Narayan v. Manik Lal* (Patna).

Sir G. Lowndes, K. C. and Mr. W. Wallach for the Appellant.

Messrs. A. M. Dunne, K. C. and T. Ramsay for the Respondent.

May 26th.—*Mt. Nag Kuer v. Sham Lal Sahu*. This appeal was heard by LORD SHAW, SIR J. EDGE, LORD BLANESBURGH and MR. AMERR ALI. Judgment was reserved.

Messrs. A. M. Dunne, K. C. and Wallach for the Appellant.

Mr. S. Hyam for the Respondent.

June 11th.—The Trinity sittings of the Privy Council commenced on June 11th. The list of business contains twenty-one Indian appeals and fourteen from Canada, Australia and the Crown Colonies. The majority of the Indian cases are from Bengal and Patna, among them being the appeals by the Secretary of State and the Bengal Iron and Steel Co. and the New Birbhum Coal Co. against the Maharaja of Pachete. These appeals raise questions of great interest to the mining community of India and raise the question whether Government parted with mineral rights in the sub-soil at the time of the Permanent Settlement. The appeals were heard *ex parte* last term, but the Raja was able to petition the Judicial Committee before judgment was delivered and to establish the fact that his failure to be represented at the time of the hearing was due to the fault of his agent. The appeal is therefore to be heard *de novo* and a Special Board will be constituted for the hearing on July 13th.

June 11th.—LORD PHILLIMORE, LORD CARSON and SIR JOHN EDGE sat to-day on the Board hearing Indian appeals.

In *Allah Jawai v. Sat Bharai* (Lahore), Mr. Wallach applied for special leave to appeal to the Privy Council. The suit was of the requisite value but the Indian Courts were of opinion that no substantial question of law was involved, the appeal Court having affirmed the decree of the trial Judge.

Counsel contended that a custom had been pleaded and that the lower Courts had erred in law in pronouncing in its favour in the absence of satisfactory evidence. Leave was refused.

June 11th.—In *Ganesh Narayan Sahi v. Pratap Udai Nath Sahi* (Patna), the Maharaja of Chota Nagpur claimed to resume Pargana Burway on the failure of heirs male of the grantee. The Maharaja had now bought up the rights of the 1st Appellant and the appeal was dismissed as against him without prejudice to the rights of his son, the 2nd Appellant.

Sir G. Lowndes, K. C. and Mr. W. Wallach for the Appellant.

Messrs. A. M. Dunne, K. C. and Ramsay for the Respondent.

June 11th.—In *Hameshwar Singh v. Jugal Kishore* (Patna), the question was as to the construction of a contract to cut trees for making sleepers.

The Appellants were owners of sal forests and entered into an agreement with the Respondents that the latter should cut 15,000 sleepers a month or 1,35,000 sleepers in 9 months and pay a royalty on a fixed scale according to the dimensions of the sleepers. At the conclusion of the 2nd month only some 4,000 sleepers had been cut and the Zamindar terminated the contract, contending that he was entitled to do so on failure of the contractors to cut 15,000 in the month. The latter contend that provided the total for the 9 months is up to the minimum it is unnecessary that the monthly total should be 15,000. The Indian Courts have differed.

Messrs. DeGruyther, K. C. and Hyam for the Appellants.

Messrs. A. M. Dunne, K. C., K. Brown and Douglas McNair for the Respondents.

June 11th.—Judgment was delivered in *Kandapalli Vijayanatuam v. Mandapaka Savana Rao*. The appeal was allowed.

The following business has been transacted by the Privy Council during the past week:—

June 12th.—Judgment was delivered by LORD SUMNER in *Nowroji R. Wadia v. Govt. of Bombay*. The appeal was dismissed.

In the Board Room before LORDS PHILLIMORE and CARSON and SIR JOHN EDGE was heard *Bhupendra N. Singh v. Narapat Singh* (Bengal), which raises the question whether on the resumption of *chowkidari chakran* lands the *putnidar* is entitled to *khas* possession or whether he is only entitled to such

possession on payment of additional rent. Judgment was reserved.

Sir G. Lowndes, K. C. and Mr. Dubé for the Appellant.

Messrs. DeGruyther, K. C. and R. Hodge for the Respondent.

June 15th.—Judgment was delivered by LORD DARLING in *Jacob v. Wills* (Bengal). The appeal was allowed.

June 15th, 16th and 18th.—Before LORD SHAW, LORD CARSON, SIR JOHN EDGE and MR. AMEER ALI was heard *Sourendra Mohun Sinha v. Hari Prasad Sinha*.

This was a suit on a mortgage in which the question of jurisdiction as to property in the Santal Parganas being litigated in Bhagalpur, again becomes prominent. The question of jurisdiction was decided by the Board in L. R. 41 I. A. 203 and a similar question arises over the interest payable—it being alleged that the rule of *dandapat* applies.

Messrs. DeGruyther, K. C. and Hyam for the Appellant.

Sir G. Lowndes, K. C. and Mr. E. B. Bakes for the Respondent.

New Privy Council Rules.

Through the courtesy of the Registrar of the Privy Council I have received a copy of the new Code of Judicial Committee Rules which will come into force on the 1st January 1926.

The new Rules are mainly a revision of the practice to be followed in England after the arrival of the record, but there are certain alterations which have a bearing on the procedure to be followed by practitioners in India, and attention may be drawn to these.

Rule 4 alters the practice in connection with applying for special leave to appeal to His Majesty in Council.

By the practice in force under the Judicial Committee Rules, 1908, the Petitioner had to lodge 5 copies of his petition together with an affidavit in support verifying the statements contained therein, and if a caveat had been lodged by the Opposite Party, notice of the application was sent to him by the Registrar of the Privy Council.

Under the new Rules if no caveat has been lodged, the Petitioner must, in addition to the documents enumerated above, lodge an affidavit of service of notice of the intended

application upon all parties who appeared in the Courts below.

The net result is that the Respondent must always have received notice of any intended application for special leave and presumably such notice will as a rule be given to the other parties by the Petitioner's agent in India before the application is made in England.

The new Rule 11 provides that in the event of special leave being granted and the appeal not prosecuted with due diligence the grant may be rescinded and the Respondent awarded costs.

Schedule A contains the rules as to printing and gives detailed instructions as to the method in which the record should be prepared.

G. D. M.

Correspondence.

"PROCLAIMED OFFENDER" AND "PROCLAIMED PERSON."

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

There seems to be a certain amount of uncertainty with regard to the interpretation of the words "proclaimed offender" which are used in sec. 54 and sec. 59 of the Code of Criminal Procedure.

There is a definition of "proclaimed offender" in sec. 45 (2) (ii) of the Code of Criminal Procedure which says that the expression includes any person proclaimed as an offender by any Court or authority established or continued by the Governor-General in Council in any part of India in respect of any act which if committed in British India would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460.

Apparently this definition is not exhaustive and the common view is that a person against whom a proclamation has been issued under sec. 87 of the Code of Criminal Procedure would also be included in this category. The decision in I. L. R. 7 Mad. 436 (*In the matter of the petition of Pandya Nayak*) proceeds upon this view. Sohoni and Sanjiv Rao in their well-known annotations refer to sec. 87 in their notes under secs. 54 and 59 of the Code. The view, however, seems to be in conflict with the scope and wording of sec. 87 et seq. of the Code of Criminal Procedure.

Sec. 87, Criminal Procedure Code, provides that proclamation may be published for the appearance of any person against whom a warrant has been issued if such person has absconded or is concealing himself. Hence a proclamation may issue even in summons cases and as against witnesses (*Yasin Khan*, 5 Nagpur L. R. 125). Sch. V, form 5 prescribes the form of proclamation as against witnesses. Would it be proper to treat a witness against whom a proclamation has been issued under sec. 87, Criminal Procedure Code, on the same footing as a man proclaimed an offender [under sec. 45 (2) (ii)] under such serious sections of the law as secs. 302, 304, 392, 395, I. P. C.?

Then again the form of Sch. V, forms 4 and 5, shows that the proclamation is "made that a certain person is required to appear at a certain place before the Court" and there is nothing to show that such person is proclaimed as an offender.

Finally the person against whom a proclamation has been issued under sec. 87 of the Code of Criminal Procedure is referred to in subsequent sections, e.g., in sec. 88 (1), 88 (6A), 88 (7), as the proclaimed "person" and not as the proclaimed "offender" which suggests a distinction between these two terms.

For these reasons it does not appear probable that a person against whom proclamation has been issued under sec. 87, Criminal Procedure Code, would be regarded as a "proclaimed offender" for the purposes of secs. 54 and 59 of the Code.

The point is not a merely technical one as the right of arrest by a private person under sec. 59, Criminal Procedure Code, will depend on an interpretation of the term. I shall be obliged if any of your readers will kindly quote some recent rulings on the subject.

sec. 54 (1), "thirdly," speaks of "any person who has been proclaimed as an offender either under this Code or by order of the Local Government." What are the respective provisions under the Cr. P. Code and for the Local Government for proclaiming a person as an offender?

I remain,

Yours, etc.,

SUSIL KUMAR MUKHARJI,

Sub Divisional Officer, Noakhali.

NOAKHALI:

The 5th August 1925.

THE

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[No. 40]

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REPORTS (See Index.)

Dominion Status of Canada and of the Irish Free State.

We stated in a recent issue that although Dominion Status is incapable of definition yet it is well-understood what it means. We also pointed out that the constitution of the Irish Free State has after all given it the status of a self-governing Dominion within the British Empire. In fact the Anglo-Irish treaty on which the Irish Constitution is based provides that South Ireland is to have the same status as the Dominion of Canada. The late Sir Surendranath Banerjea used to say that the goal of his political ideal for India was the Dominion Status of Canada and thus it will be seen that his ideal and that of the Irish patriots did not materially differ and that he was never a political reactionary that he has been misrepresented to be. It will be remembered that when he was invited to the Imperial Press Conference held in England Mr. Stead at a private interview peremptorily put it to him—that if he was under sentence of death and the executioner's axe was about to fall on his neck and he was told to ask for a boon, what boon would he ask for? Surendranath at once replied that it would be the "Status of the Dominion of Canada" for India. He was well versed in the history and constitution of the British Empire and was as great an admirer of the British Constitution as Dicey and Anson, because of its elasticity and growth and expansion by conventions. The Canadian Constitution is more akin to that of the British Parliament than that of the Commonwealth of Australia which draws its inspiration more from the United States Constitution. It will be seen from what Bonar Law said about Dominion Status that

it is one of perfect autonomy and equal partnership which may be dissolved at will and is maintained only by the good-will between the partners. Sir Surendranath knew that those who quibbled about it did so because they did not know what it meant.

The following extract, for which we are indebted to the *Law Times*, will show how Canada at the Coronation of the late Queen Victoria, then on the point of rising in rebellion, abstained from taking any part in the Divine Services held in celebration of it in the Canadian Churches. She had then a representative form of Government but the executive, as now in India, were irresponsible. But since the grant of responsible Government and at the present moment, how she appreciates her status of an honourable partner in the British Empire will be evident from the report of the 58th Dominion Day Dinner. Recently we quoted the opinion of Mr. Lloyd George as regards the Dominion Status and in the extract below is cited the opinion of another Prime Minister of England, Mr. Bonar Law, who was Canadian by birth, in the same connection. It also gives the clauses of the Anglo-Irish treaty which provides that the constitutional status of the Irish Free State will be the same as the status of the Dominion of Canada.

Mr. Larkin, the High Commissioner for Canada, presided at the Dominion Day Dinner to celebrate the fifty-eighth anniversary of the Canadian Federation, established under the provisions of the Imperial Act known as the British North America Act, 1867 (30 & 31 Vict.). Mr. Howard Ferguson, Prime Minister of Ontario, responding to the toast "The Dominion of Canada," verified, albeit unconsciously, the judgment of Mr. Payne, in his "Colonies and Dependencies," writing in the early eighties of last century, that the concession to Canada of responsible government is "the emancipation of the Empire and the principal event in our modern Colonial history." "I say," said Mr. Howard Ferguson, "speaking with a full sense of my

responsibility that every Canadian and every donor of Canadian money would be spent in resisting separation from the British Empire. Canada has no other purposes or object." In 1857, the year of the accession to the throne of Queen Victoria, Lower Canada was in insurrection and Upper Canada was preparing to rise. When Te Deums were sung in Canadian churches to celebrate the coming to the Throne of Queen Victoria the congregations left their seats and walked out. Lord Durham, who had been sent out as Governor had been recalled in disgrace in consequence of his famous report, in which he laid it down that the true policy for Canada was to allow the Canadians who had representative government, but not responsible government "to execute as well as to make the law"—in other words, to establish responsible government by the institution of a Cabinet responsible to assemblies elected by the people and through these assemblies to the people at large. The concession to Canada by the Act (3 & 4 Vict., c. 35) of a constitution similar in principle, to quote the words of the statute, "to that of the United Kingdom, whereby the executive council was made responsible to the Legislature" in the same way as the British Cabinet is responsible to Parliament, transformed the revolted Canadians into loyal subjects of the British Empire, and supplied Great Britain with the very best method for the retention of the other colonies—namely the concession to them of responsible government and the establishment of a union with the Mother Country, based not on force but on the community of interests of blood and language and the sympathy and affection which spring from such community. Mr. Bonar Law, who was himself a Canadian by birth, speaking in the House of Commons on the 30th March 1920, described the nature of the union between Great Britain and the Dominions, to whose strength and intensity the Premier of Ontario has testified "What," said Mr. Bonar Law, "is the essence of Dominion Home Rule? The essence of it is that they have control over their own destinies, of their fighting forces, and of the amounts which they will contribute to the general security of the Empire. All these things are vital to Home Rule. . . . There is not a man in the House who would not admit that the connection of the Dominions with the Empire depends upon themselves. If the self-governing Dominions—Australia, Canada—chose to-morrow to say: 'We will no longer make a part of the British Empire,' we would not try to force them. Dominion Home Rule means the right to decide for themselves." The British North America Act, 1867, may be regarded as the complement of the Act establishing self-government in Canada. It united the Canadian colonies with New Brunswick and Nova Scotia into one colony under the name of the Dominion of Canada, Upper Canada becoming the province of Ontario, and Lower Canada the province of Quebec. It is of interest to the student of constitutional history and de-

velopment, and to persons learned in the law who take a natural pride in the achievements of members of the Legal Profession to record that the statesman principally concerned on the Canadian side with the agreement for a federal union was the Hon. Edward Blake, Q.C., who was a leader of great eminence at the Canadian bar, but who occupied the very highest judicial position. He became eventually Prime Minister of Ontario.

The establishment of responsible government in Canada may well be regarded, not only as "the principal event in our modern colonial history," but as the principal event in the establishment of the relations between Great Britain and Ireland under the Irish Free State Constitution. Ireland was not a colony, nor a dependency, but theoretically an independent kingdom before the Union, whose Crown was adherent to the Crown of Great Britain in the articles of agreement for a treaty between Great Britain and Ireland, set forth in the Second Schedule of the Constitution of the Irish Free State Act, 1922, whose second section enacts that the Constitution of the Irish Free State "shall be construed with reference to these articles, the example of the Canadian Constitution is declared to be followed in the working of the Irish Constitution. This, the first article of the Anglo-Irish Treaty declares that Ireland "shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada . . . with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament." The second article declares that "the position of the Irish Free State [subject to provisions therein-after set forth] in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." The third article declares "The representative of Crown in Ireland shall be appointed in like manner as the Governor-General of Canada, and in accordance with the practice observed in the making of such appointments." The governing institutions and the constitutional law and practice of the Dominion of Canada are powerful factors in the growth of the Constitution of the British Empire, which is progressing in unabated strength and vigour from day to day before our eyes.

Parliamentary opposition and obstruction.

The following extract which we also take from our legal contemporary will be found interesting as showing the functions of the opposition party in Parliament with regard to the

carrying on of the internal administration and the foreign affairs of State. The Opposition is not without its influence on the party in power or the Government of the day. They do not oppose for the sake of opposition which would amount to obstruction but do so only on crucial questions of policy or in matters of moment regarding which they feel or believe that the policy or measure would be prejudicial to the best interests of the people. It is this spirit of discipline and self-control and the good sense of the members that has secured the British Parliament the high esteem in which it is held in the world.

A lay contemporary, dealing with the system of government by party in this country, quotes the acknowledged phrase, "It is the duty of the Opposition to oppose." The very existence of an efficient party system is in absolute refutation of that principle in its entirety. Parliamentary opposition, conducted on lines in accordance with the genius of the British people and of the British Constitution, is subject to many limitations. Professor Redlich, an acute observer of the working of the British Constitution and of Parliamentary practice, in a work to which the late Sir Courtenay Ilbert has written the introduction, writes: "On all the more important matters which have to be brought forward by the Government as the executive organ of the majority, it has become customary to arrive at some understanding between the two great parties and their leaders which often forms a basis of joint political action. This practice dates back to the time when the system of Cabinet Government was perfected, and when the existence of two great compact parties became a standing and dominant element in English politics, i.e., to about the beginning of the nineteenth century. On certain subjects of great national importance, such as foreign affairs, especially when it is to the interest of the State that the decision of Parliament should appear to be the unanimous decision of the nation, it is a recognised convention that the consent of the Opposition to the proposals of the Government should be obtained by unofficial communications or, at all events, that a serious endeavour should be made to obtain such consent. [These words, written in 1908, have been abundantly verified by the attitude of the Opposition during the Great War.] Another custom belonging to the same class of Parliamentary usages is that of arriving, or trying to arrive, at some kind of compact as to the speed at which the chief measures of a session shall be taken, and as to the distribution over the session of the work that has to be got through. . . . It is always worth while for the Cabinet to make a strong effort to arrive at some understanding with the Opposition as to any large project of legislation. It is one of the ordinary incidents of Parliamentary busi-

ness for an official declaration to be made by the leader of the Opposition as to the attitude of his party towards the great legislative proposals before the House. Professor Redlich directs attention to the profound differences between the political parties of England and those of Continental States. "There can," he writes, "be no better illustration of this than the way in which the elaborate parallelism in the Parliamentary arrangements of the two great parties in the House of Commons is applied to bring about a permanent organisation for the maintenance of a constant understanding between Majority and Opposition, and even for common work in the interests of the State. This remarkable phenomenon casts a vivid light upon the inmost character of English parties, and will not in the least harmonise with the lurid pictures which most German constitutional teachers have been accustomed to paint of 'party rule' and of the dangers of unbridled 'party tyranny.' The presence of a party or parties in the House of Commons not in unison with the official Opposition, does not alter the essential character of Cabinet Government, which pre-supposes two parties only for the all intents and purposes representing cardinal principles of Government authority on the one side, popular rights and privileges on the other."

Let us hope that attempts at the organisation of "party rule" in this country will not degenerate into "party tyranny."

LONDON NOTES

(FROM OUR CORRESPONDENT.)

June 29th.—After a week's interval Indian appeals are once more being heard by the Judicial Committee.

Judgment was delivered in *Homeswar Singh v. Jugal Kishore*, the appeal being allowed and the cross-appeal dismissed.

A Board composed of VISCOUNT FINLAY, LORD CARSON and LORD BLANESBURGH heard an appeal from Hyderabad, Deccan, *Bansilal Abirchand v. Ghulam Mahbub Khan*. This was a suit for principal and interest due on three bonds and the main question was one of jurisdiction. The suit was brought in the Court of the Civil Judge at Secunderabad to recover money lent to the grandfather of the 1st Respondent. The borrowers were residents in Hyderabad, Deccan, but it was claimed that the loans were made and were repayable in Secunderabad. The original loan was made in 1891 and the suit, if brought in the Hyderabad Courts, would have been barred by limitation. Exemption, however, was claimed on the ground of foreign residence under sec.

13 of the Indian Limitation Act, 1908. The decree under appeal dismissed the suit for want of jurisdiction. Judgment was reserved. *Messrs. DeGruyther, K. C. and Dubé* for the Appellant.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

Before the same Board the following applications were made :—

(1) *Khas Hooi Lerug v. Khas Hean Kwee* (Straits Settlements). *Mr. Whinney* applied for re-instatement of this appeal and obtained leave on condition of paying costs and setting down the appeal for trial in the Michaelmas term. *Gorin Simmonds* appeared for the Respondent.

(2) *Sarju Ram v. Oudh Behari Panda* (Allahabad). *Mr. Wallach* applied for special leave to appeal from a judgment of the High Court. There were concurrent findings against him but the Appellant alleged a substantial question of law. Leave was refused.

(3) *Dhanpat Rai v. Kahan Singh* (Lahore). *Sir G. Lowndes, K. C. and Mr. Douglas McNair* applied for special leave to appeal. The decree of the Appellate Court had confirmed the decree of the trial Court in dismissing the Appellant's claim but the legal findings of the two Courts differed. Leave was granted.

June 30th.—*Ma Chit Su v. The National Bank of India*. This was an appeal from the High Court at Rangoon and was heard by a Board composed of VISCOUNT FINLAY, SIR JOHN EDGE, MR. AMEER ALI and MR. JUSTICE DUFF. The suit was brought by the Respondent Bank for specific performance of a contract for the sale of certain buildings abutting on Phayre St. and 37th St., Rangoon. The Appellant contested the suit on the ground that the proposed vendor, who was the administrator of her husband's estate, was acting beyond the scope of his authority in contracting to sell. Judgment was reserved.

Hon. Geoffrey Lawrence, K. C. and Mr. E. F. W. Besley for the Appellant.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

July 2nd.—The same Board are now hearing an appeal from Lahore, *Ahmad Khan v. Mt. Channi Bibi*, in which questions are

being litigated regarding rights to property among Khattar agriculturists of the Attock District. The Plaintiff alleges that the villages in dispute are "acquired" and not "ancestral" property and that she is entitled to them under a custom whereby a sister inherits the property of her childless brother. *Messrs. DeGruyther, K. C. and E. B. Raikes* for the Appellant.

Mr. A. Majid for the Respondent.

July 2nd.—Appeals from Canada are now being heard in the Council Chamber and Indian appeals in the Board Room.

July 2nd and 6th.—*Ahmad Khan v. Channi Bibi* (Lahore) was heard by VISCOUNT FINLAY, SIR JOHN EDGE, MR. AMEER ALI and MR. JUSTICE DUFF. The Appellants were represented by *Messrs. DeGruyther, K. C. and E. B. Raikes*, the Respondent by *Mr. A. Majid*.

The suit was instituted by the Respondent to obtain possession of property in the Attock District which had belonged to her father. The main question for decision is as to whether the Plaintiff has established a custom entitling her to succeed to the property as the sister of the last male owner. Judgment was reserved.

July 6th.—Judgment was delivered by LORD SUMNER in *Mt. Farid-un-nisa v. Mukhtar Ahmad* (Oudh). The appeal was allowed.

In *Khuchaldas Goculdas v. Chunilal* (Bombay), *Sir G. Lowndes, K. C. and Mr. L. M. Parikh* applied for special leave to appeal from a decision of the Bombay High Court. Counsel contended that there were two main questions for determination—

(1) the construction of a document on which both lower Courts were agreed, and
(2) limitation, on which the lower Courts had differed,

and in the circumstances there was an appeal to the Board as of right. Leave was granted.

G. D. M.

THE Calcutta Weekly Notes.

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MONDAY, AUGUST 31, 1925.

[No. 41.]

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EDITORIAL NOTE—

The Legality and Effect of Conditional Pardon to Accomplices outside the Scope of sec. 337 of the Code of Criminal Procedure

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REPORTS (See Index)

Preliminary hearing in criminal appeals.

Some very wholesome directions have been given by the Madras High Court in the case of *Turka Hussain Saheb*, 48 Mad. 585, regarding the summary dismissal of criminal appeals. In *Ram Tahal Dosul v. King-Emperor*, 36 Cal. 385, Holmwood and Ryves, J.J., observed: "It is in accordance with the experience of both of us in two different provinces as regards the practice in the Mofussil that appeals which are supported by a pleader are in practice admitted without any hearing except on the question of bail; the only cases which are usually dealt with under sec. 421 of the Criminal Procedure Code being jail appeals." This seems no longer to be the practice for it is a matter of common knowledge that in many districts at least, if not all, the petition of appeal has to be supported as soon as it is presented and this is the preliminary hearing under sec. 421 of the Code. How in matters like this a practice grows up which is against the rule laid down by the highest Court it is difficult to say, but it is surely due to the negligent manner in which work is done in the Mofussil Courts. In the case noticed above reported in 36 Calcutta the learned Judges distinctly laid down that a pleader for an Appellant should not be called upon immediately on the filing of an appeal to support it but should be afforded a reasonable opportunity of being heard. If the appeal is not admitted at once and the Court desires to hear the Appellant before admitting it, he should be given at least a week's notice. In the Madras case under notice the pleader who filed the appeal on being immediately called upon to argue it asked for two days' time to prepare his arguments but the

request was not granted and the appeal was dismissed. The Sessions Judge on being moved in the matter called for an explanation from the lower Appellate Court, in this case the Sub-Divisional Magistrate who remarked to the following effect—"After preparing the appeal petition if a vakil says he is not ready with the case I should consider his conduct quite unprofessional." Of course the curious notions entertained by the learned Magistrate about unprofessional conduct have not found favour with the High Court and Mr. Justice Ramasami held in agreement with the view taken by the Calcutta High Court in the case referred to above that a criminal appeal should not be heard at the time of presenting the papers even for the purpose of dismissal under sec. 421, Cr. P. C. There must be a special posting of the appeal after a reasonable time for the purpose of hearing under sec. 421, Cr. P. C. An appeal raising questions of fact ought not to be disposed of under sec. 421 without the original records being called for from the lower Court.

THE LEGALITY AND EFFECT OF CONDITIONAL PARDON TO AC- COMPLICES OUTSIDE THE SCOPE OF SEC. 337 OF THE CODE OF CRIMINAL PROCEDURE.

We understand that Mr. Amarnath Dutt, M.L.A., has given notice for leave to introduce in the Legislative Assembly a Bill to amend sec. 337 of the Code of Criminal Procedure, by insertion of a clause to the effect that a conditional pardon shall not be tendered to an accomplice in any case, in any manner not provided for in that section. In the statement of objects and reasons the necessity for amendment is said to have arisen from the decision of the Allahabad High Court in the case of *Emperor v. Har Prasad Bhargava*, reported in I. L. R. 45 All. 226. We think that

the matter of the proposed legislation is one of considerable importance and public attention was drawn to it by a petition signed by several members of the Agra Bar to the Statute Revision Committee of the Government of India, and to both Houses of the Central Legislature, a copy of which appeared in the "Hindustan Times" of the 21st March last. The Allahabad High Court has held in this case that an executive authority like a Local Government has inherent power to grant conditional pardon to accomplices in cases outside the scope of sec. 337 of the Code of Criminal Procedure to obtain and tender their evidence against others actually prosecuted. This view of the Allahabad High Court has been recently followed by the Nagpur Judicial Commissioner's Court in the case of *A. W. Chandekar v. Emperor*, decided on 6th July 1925 and reported in All-India Reporter, 1925, Nagpur 313. In its issue of the 15th August 1925, the *Amrita Bazar Patrika* has drawn public attention to this matter.

Both these cases were against public servants, one against a Subordinate Judge and the other against a Tahsildar, under sec. 161, Indian Penal Code, and arose in the Central Provinces in which the Local Government had proclaimed conditional pardon to accomplices, namely, the bribers and their abettors. The guarantee was held out that the Government would not institute any criminal proceedings against the bribers and abettors who gave evidence against the persons notified to be proceeded against. We also understand that the Local Government recently gave a similar amnesty to certain defence witnesses in the case of *Jagpat Rao v. Satidas and others* now pending in the Court of the Sub-Divisional Magistrate of Betul District in order to allow them to give evidence of having bribed the complainant who is prosecuting the accused in that case for defamation. In the Agra Bar petition several considerations have been raised to show that the view of the Allahabad High Court is not sound and is fraught with difficult and dangerous consequences.

Looking first to the legality of a conditional pardon to accomplices outside the scope of sec. 337 of the Code, we find that the view of the Allahabad High Court is directly in opposition to that of the Calcutta High Court in *Banusing v. Emperor* (33 Cal. 1353) and of the Nagpur Judicial Commissioner's Court in *Govinda v. Emperor* (16 Nagpur Law Reports 9). In the

Calcutta case the High Court has held that a Local Government in India has no power to tender conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others accused with him. That Court after referring to the English and the Indian law on the subject came to this conclusion and Mitra, Additional Judicial Commissioner, in deciding the Nagpur case followed this view. The Allahabad High Court, and the Nagpur Judicial Commissioner's Court while deciding *Chandekar's* case recently, cited no authority in support of their view and we confess it is difficult to find any to support it. Regarding the view in *Banusing's* case the Allahabad High Court simply said: "In a case to which we referred above, that of *Banusing v. Emperor*, the learned Judges held that a Local Government in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others accused with him. If this pronouncement only means that the Legislature, in India has provided no method outside the scope of sec. 337 or 494 of the Code of Criminal Procedure, by which a Local Government can provide an accomplice with a judicial order which he can subsequently plead in bar of his own prosecution, should such prosecution be instituted, it is undoubtedly correct." But it seems clear from the judgment in *Banusing's* case that the above is not the meaning of the Calcutta High Court's ruling. On the other hand, the question of the competency of the Local Government to tender conditional pardon in a case outside the pale of sec. 337 was actually and directly before the Court and was decided by it. In support of their view the Allahabad High Court argued, "It seems to us obvious at the same time that a discretion to refrain from instituting a prosecution, in any particular case, is inherent in any authority to which the law has entrusted the power to institute the prosecution. Nor can any law prevent a person or body of persons, exercising such authority from determining beforehand how that discretion shall be exercised upon the happening of a certain contingent event. If such determination is communicated beforehand to any person or body of persons to whom it may concern we can find no provision in the Indian Statute law which lays down that the competency of such person or persons to testify as witnesses in a Criminal Court about any matter

in such communication is thereby affected." Now this argument does not seem faultless, for to refrain from instituting a prosecution against a person unconditionally is one thing and to tender him a conditional pardon extrajudicially in order to induce him to give evidence against another person is an entirely different thing, because apart from the one being legal and the other illegal the effect of such procedure on the mind of the accomplice is entirely different in the two cases.

It is obvious that the power of instituting a prosecution does not always rest with a Local Government, for, barring a few cases wherein the previous sanction of the Local Government is required to institute prosecution, any private individual, even a party not actually aggrieved but aware of the facts of the case, can institute a prosecution against an offender. A Local Government is a constituted body and consequently it can have only such powers as are given to it by its constitution or expressly by any other law. In *R. v. Hanumanth* (1 Bom. 611), Melvil, J., seems to have been of opinion that the tender of pardon in this country must be in conformity with the Code of Criminal Procedure which and which alone should regulate trials in criminal cases. In view of this and other considerations which follow, the tender of pardon to an accomplice by a Local Government or any executive authority outside the scope of sec. 337 appears to be illegal.

We next consider the effects of such conditional pardons by executive authority on the admissibility, and value of accomplices' evidence in criminal trials which must be governed by the mandatory provisions of sec. 5 of the Criminal Procedure Code. The first point deserving consideration is why the Code of Criminal Procedure has made no provision for the grant of conditional pardon in cases outside the scope of sec. 337. To our mind the reason is plain and it is this. Law disfavours the evidence of accomplices on grounds of public policy and natural justice. Hence it is that the scope of the section is limited to particular offences and the procedure is hedged with safe-guards and limitations. It is significant that the recent amendment of the Code of Criminal Procedure, while extending the scope of sec. 337, did not bring sec. 161 of the Indian Penal Code under its operation. Whenever the Legislature considered it necessary to extend the scope of that section it had to enact special or local laws. Sec. 7 of the

Punjab Frontier Crimes Regulation (No. 3 of 1901) and sec. 8 of the Bengal Criminal Law Amendment Act of 1925 are illustrations in point. And further secs. 163 and 343 of the Code expressly prohibit any person in authority or Court from obtaining any disclosure from an accomplice or accused person by offering any inducement, promise or threat. Again the statement of an accomplice in pursuance of a conditional pardon not authorised by sec. 337 becomes, by reason of sec. 24 of the Evidence Act, inadmissible and irrelevant against him in his own prosecution for the offence in which he is an accomplice. In the words of Lord Campbell, C. J., in *R. v. Scott*, D. and B. 47, the reason is "because under such circumstances the party may have been influenced to say what is not true and the supposed confession cannot safely be acted upon." "It is not because law is afraid of having the truth elicited that these confessions are excluded, but because the law is jealous of not having the truth," *R. v. Mansfield*, 14 Cox C. C. 639. Confession not relevant against the maker is not relevant against a co-accused person. In two cases reported in I. L. R. 45 All. 300 and 633, the statements of accomplices were obtained on the basis of illegal pardons and they were held irrelevant not only against the persons making them but were not allowed to be used against other co-accused also. In 2 All. 260 and 1 Lahore 102, the evidence of accomplices obtained on illegal pardons was rejected as altogether inadmissible. If then instead of the statement of the accomplice obtained by offer of an illegal pardon being used against him as accused person it is sought to be used by putting the accomplice into witness box against the other accused, it should have less relevancy and weight, for in this latter case the accomplice has not even the fear of the statement being used against him and feels fortified by the pardon.

Even assuming that the evidence of an accomplice obtained on the basis of a conditional pardon outside the scope of sec. 337 is technically admissible under the Evidence Act, it can hardly be denied that it may cause great hardship and perhaps grave injustice. The position has been well brought out in the judgment of Mitra, J., in *Govinda v. Emperor* (16 Nagpur Law Reports 9). There Mitra, J., has clearly shown that to tender conditional pardon to accomplices in cases and in manner not authorised by sec. 337 is practically a direc-

tion to the Police Officer or the Magistrate holding the investigation or enquiry not to do their duty under secs. 170 and 204 of the Code, and both these sections are obligatory and not directory. Under the former section it is the clear duty of the investigating Police Officer to move the Court to take proceeding against all the persons whom the investigation shows to be guilty and under sec. 204 the Magistrate taking cognisance of the offence is bound to issue process against all the accused when there is sufficient ground for proceeding. Under sec. 239 of the Code, the Magistrate has no doubt a discretion to proceed jointly or separately against all the accused but not to proceed at all against some is not within the competency of the Magistrate. The power to convert an accomplice or accused into a competent witness legally rests with the Magistrate or Court under sec. 494 or 337 of the Code and it is an evasion of law not to adopt any of these courses and tender him as a witness under an unauthorised promise of pardon by pledging public faith not to prosecute him. The evidence of such accomplice is thus obtained in disregard of statute law, and herein lies the illegality as also in not proceeding against such accomplice at all. The consequences of these illegalities were not considered by the Allahabad High Court and the Nagpur Judicial Commissioner's Court in their judgments referred to above. It is unfortunate that neither Court referred to the view laid down in the case of *Govinda v. Emperor* (15 Nagpur Law Reports 9) nor gave a decision on such an important point of law.

Obviously sec. 537 of the Code of Criminal Procedure cannot be invoked to cure an illegality of the nature indicated above. As pointed out in an article at page lxxiv of 29 Calcutta Weekly Notes, "The only defects that can be condoned under the section are those which are mentioned in the section and those only. It is not a general 'curing' section governing all the provisions regarding procedure but in certain specified cases it can be invoked to cure certain defects on the ground that no prejudice has been caused or in the words of the section no failure of justice has been occasioned. When it is pleaded that a certain deviation from the established procedure comes within the scope of sec. 537 the points for determination are—(a) Is it one of the defects mentioned in the section? (b) Has it in the circumstances of the particular case occasioned

a failure of justice? The decision of the Court must be either (a) it is or it is not an irregularity contemplated by the section and (b) it has or it has not in the circumstances of the particular case occasioned a failure of justice." To hold otherwise will amount to saying that that section abolishes the rest of the Code by making the other sections non-obligatory. It is to be regretted that the High Court in 45 All. 226 contented itself by deciding "whatever effect the circumstances under which the evidence of the accomplice witnesses was given in that case might have been upon its credibility there could be no objection to its admissibility," and did not consider the consequences following from the evidence of those witnesses being obtained in pursuance of an unauthorised conditional tender of pardon as an illegality vitiating the trial and not cured by sec. 537 of the Code of Criminal Procedure. The Nagpur Court also left the matter there.

As a matter of public policy also the evidence of a witness to whom conditional pardon has been given outside the scope of sec. 337 should carry no weight whatsoever, for it is obvious that the case of such an illegally pardoned approver is quite different from that of one legally pardoned under sec. 337 or 494 because the former would naturally say as much as possible in favour of the prosecution, as he thinks his safety depends upon the executive authority's opinion and not upon any judicial finding and his statement cannot also be used against him in his prosecution for the same offence by reason of sec. 24 of the Evidence Act. Again—as pointed out by Jardine, J., in 14 Bom. 331, the evidence of an accomplice obtained on the strength of conditional pardon granted by the executive authority is likely to be a source of considerable danger to the purity of justice for it can lead to false evidence being easily got up.

We think it is desirable that a test case should be taken up to the Privy Council in order to obtain the pronouncement of the highest tribunal on the scope of sec. 337, Criminal Procedure Code. In the meantime we agree that the bill of Mr. Dutt is based on sound principles and hope that the Legislature will soon see their way to lay down the law on the subject expressly and correctly.

B. C. CHAUDHURI.

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High Court Notice.

ORIGINAL SIDE.

The High Court, Original Side, will be closed for the Annual Vacation (including Mahalaya, Durga and Lakshmi Pujas, Fateha-Doaz-Dahom, Kali Puja, Bhadratri-dwitya and Jagadhatri Puja) on and from Friday, the 28th August, to Saturday, the 7th November 1925, both days inclusive, and will resume its sittings on Monday, the 9th November 1925.

The offices of the Court, Original Side, will be closed for general business for the Annual Vacation on and from Monday, the 14th September, to Wednesday, the 4th November 1925, both days inclusive.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such Superior and subordinate officers as may be required for the disposal of urgent business.

The first motion-day after the holidays will be Monday, the 9th November 1925.

By Order,
MAURICE REMFRY,
Registrar.

HIGH COURT, O. S.:
The 17th August 1925.

The Hon'ble Mr. Justice Greaves will hear applications of specially urgent nature on Monday the 31st August and Monday the 7th September 1925 at 11 o'clock, otherwise His Lordship will sit only by special appointment, application for which should be made in writing to the Officer of duty.

Such specially urgent Chamber applications as may be dealt with by the Registrar or Master will be heard by the Master on the following specified days in August and September, viz.: the 31st August and 1st, 3rd, 7th, and the 9th September, after which date and up to the end of the vacation urgent Chamber applications will be taken by special appointment only by the Master, failing him by the Registrar upto 18th September by the Senior Asstt. Registrar on vacation duty from the 19th September to 11th October and by

the Registrar from 12th October to end of vacation.

No other applications will be taken during the Vacation.

Name.	Address.	Period.
Mr. F. Palsett	c/o Milton & Co., 115, Prinsep St.	Whole Vacation.
Mr. J. M. Ghosh	3/1, Ashton Road, Bhowanipur.	„ Failing Mr. Palsett.
Mr. J. S. Cotta	64, Bowbazar Street.	„ Specially for office work.
Mr. J. N. De	25, Chuckerbaria Road. South.	„ Specially for office work.

MAURICE REMFRY,
Registrar.

HIGH COURT, O. S.:
The 24th August 1925.

APPELLATE SIDE.

It is hereby notified that the High Court, Appellate Side, will be closed for the Annual Vacation from Friday, the 28th August, to Saturday, the 7th November, 1925, both days inclusive.

The Hon'ble Mr. Justice N. R. Chatterjea and the Hon'ble Mr. Justice B. B. Ghose will sit as the Vacation Judges, except during the following Court and Gazetted (Executive) holidays, viz:—

Gazetted holiday on account of Mahalaya.	Thursday, the 17th September 1925.
Gazetted holidays on account of Durga and Lakshmi Pujas and Fateha Dowzdaham	Monday to Friday the 21st September to 2nd October 1925.
Gazetted holidays on account of Kali Puja.	Friday and Saturday, the 16th and 17th October 1925.
Court holiday on account of Bhadratri-dwitya.	Monday, the 19th October 1925.
Gazetted holidays on account of Jagadhatri Puja.	Monday and Tuesday, the 26th and 27th October 1925.

Notice as to the days on which the Vacation Bench will sit for the hearing of motions and cases in which Vakils are engaged, and as to the distribution of business, will be given from time to time.

The Office of the Appellate Side will be closed for the Vacation from Thursday, the 17th September, to Monday, the 19th October, 1925, both days inclusive.

Such Bench Clerks, Editors, Translators, Assistants and Typists as may be required will attend throughout the Vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

H. C. STORK,
Registrar.

The 18th August 1925.

Capital sentence cases—Duty of Crown to provide Counsel for defence when necessary.

A glance at the list of undefended cases in the High Court shows that even many capital sentence cases have to be decided by the Hon'ble Judges without the assistance of Counsel on both sides. It is a notorious fact that in these cases convictions are had very often on circumstantial evidence, for direct evidence is seldom available in these cases. The heinousness of the offence and the gravity of the punishment involved inspire the perpetrators with a desperate effort to conceal all traces of the occurrence; on the other hand, the detective ability of the police is put to the severest test. The conjoint effect of all these is that the guilt must be fastened on some one who must be punished.

To refer to a few notable instances the case of Iswar Napit of Howrah is like a romance. Iswar had a grown up daughter who fell into evil ways and she disappeared from her father's house. The enemies of Iswar gave out that he had murdered his daughter. The dead body was found and identified and Iswar was placed on his trial and in due course convicted and sentenced to death. On the appointed day when Iswar was to pay the extreme penalty of law, the executioner was about to put the noose round his neck when a woman suddenly appeared on the scene and frantically cried out, "Save him I am alive." It was Iswar's daughter who in spite of all her faults had so much of the human being left in her that she could not bear the idea of her father losing his life for no fault of his but indirectly on account of her own misdeeds.

In the case of Madhab Chowkidar the victim was a little girl and the accused her father. Madhab was a village chowkidar who on coming home after doing his duty at night went to bed late at night, his only and beloved child a daughter of seven or eight sleeping by his side. Sometime after, the girl woke up the father as she wanted to go out to answer a call of nature. The place was infested with wild boars and hence the girl wanted her father to accompany her. The poor fellow was tired—sleep had not had sufficient time to refresh him and he asked the girl to go

out and fear nothing. While outside she raised an alarm and the father to scare away the wild animal threw a split bamboo with one end sharpened like a spear which struck the girl who expired with a groan. Nothing seemed to be more welcome to Madhab than his own death. His wife who had for long been on the look out for an opportunity to get rid of him as he had always stood as an obstacle in the way of her felicitous relations with her paramour proclaimed to the neighbours that the girl had been murdered by Madhab in a fit of anger. Madhab was tried, convicted and sentenced to death. His wife ran home and made offerings to the local deity to inaugurate the happy event. Madhab was ultimately saved by the gratuitous services of the late Mr. Mon Mohan Ghosh rendered in the cause of justice.

The Balladhan murder case, in which a tea planter of the name of Mr. Cockburn was murdered in the dead of night while sleeping in his bungalow with his mistress, a cooly woman named Sadi, was also peculiar for many reasons. For this murder two sets of accused persons were on two different trials which took place at an interval of thirteen years, convicted and sentenced to suffer the extreme penalty of the law. It is needless to say that on each occasion the accused were acquitted by the High Court. In the first Balladhan trial, Mr. J. T. Woodroffe who argued the appeal of the condemned men made a memorable speech in the course of which he said: "The ermine of justice has been frequently sullied in this country by the misconduct of the police but never has the course of—I would not say justice but of proceedings conducted in the name of justice—disclosed a more contemptuous disregard of law or an action more calculated to tarnish the name of British justice than the one which has just come under observation."

Coming to more recent times the Comilla shooting case created perhaps the greatest sensation at the time and the trial in this case was described by a local contemporary as "wonderland justice." About the same time came another case from the same district in which the deceased was done to death with a dao and the cervical column was severed yet he distinctly and audibly named his assailant. This trial also called for the strongest com-

ments in the press especially from the then editor of the *Capital* whose sledge-hammer criticism was very poignant.

Another sensational case came up to the High Court from the District of Maldah, the case of Emperor v. Birjis Kader. A school boy was found on his way home from school in the company of Birjis Kader. He never reached home and was missed for ever. He was last seen alive with Birjis Kader who was convicted as the murderer. In the High Court this case did not require much effort on the part of the learned Counsel who defended the accused. After the judgment was placed the Crown was called upon to reply and the Hon'ble Judges at once sent down an order to release the accused on his personal recognizance pending the delivery of a written judgment.

A case from Birbhum was perhaps the most unique. A diabolical murder took place in a respectable Brahmin family consisting of the father, two sons and the wife of the elder son who was away from home at the time. The victim was the youngest son, a boy of eight, who was hacked to pieces with an axe. The head of the family handed over his daughter-in-law to the police as the criminal. She was marched off to the Sudder, a distance of sixteen miles and after having walked the whole way when she reached the house of the Police Inspector, she begged of the people there to give her a glass of water to drink. There she spent the night and when morning came with it came a confession full of details as to how the monstrous act had actually been done. The chain of evidence was complete, she was found guilty but the Sessions Judge in consideration of her age and sex sentenced her to transportation for life.

The record was so very complete that it was indeed a very difficult case for Counsel for the defence. Suspicion was however roused and the Hon'ble Judges called for the special diary of the police—the confidential diary as it is called and this document disclosed startling facts which left no room for doubt as to the innocence of the girl. Their Lordships in a very well considered judgment acquitted her whom they described as the housewife, the cook and the housemaid all in one who became the victim of a foul conspiracy.

A story is current in legal circles that many years ago a large sum of money came into the local kutchery of a rich zemindar as remittance of rent collected in various centres and the same night the zemindar's naib was murdered and the money looted. A reward was proclaimed for the arrest of the offender and he was arrested, placed on his trial and convicted by the Sessions Judge. When the matter came in appeal to the High Court Sir Charles Paul, then Mr. Paul, the Advocate-General, supported the conviction on behalf of the Crown. The appeal was dismissed, the condemned man paid the penalty for the crime he had committed by his own life and peace and order were established in the locality and the zemindar's men went on with their ordinary duties as usual without any further trouble. Years rolled away, the facts of this sometime sensational case were all drowned in oblivion. Mr. Paul was one morning strolling in his garden giving instructions to his servants when a middle-aged man with an old fashioned umbrella in his hand entered the gateway and saluted the sahib. "Who are you and what do you want?" were naturally the questions put to him and these elicited the following answer: "Sir, I am the murdered naib of that zemindar from whose kutchery a large amount of money was stolen and whose murderer was at your instance convicted and hanged." The man was bidden to sit down and he related the whole story, how the money actually came to the kutchery, how a dacoity took place at night and the money was looted, how the naib apprehending that his master incensed at the loss of so much money would naturally put him into trouble fled before the day dawned, how for years he kept himself in concealment from which he came out after the death of the old zemindar, how the idea haunted him that an innocent man had been killed and even the great lawyer had been duped into believing him to be really guilty. The brain of the veteran lawyer began to reel, he asked the man to go, sank into his sofa and pondered over what had taken place.

All these go to show that it is very difficult to come to a definite conclusion in these cases which as stated above are mostly decided on circumstantial evidence. Mr. Justice Digambar Chatterji when presiding over the Criminal Bench used to request lawyers to take up these undefended cases, but this went on for

some time only. The late Sir Syed Shamsul Huda when in charge of the judicial portfolio in the Governor's Executive Council favoured the idea of the Crown providing for Counsel in these cases but he used to say that nothing substantial could be done unless the High Court took the initiative in the matter. We think the Hon'ble Judges should ask the Government to make the necessary provision.

JURISDICTION OF CIVIL COURT TO PULL DOWN HUTS WHEN GIVING DELIVERY OF POSSESSION.

In Mofussil Courts very often a certificated purchaser prays for taking delivery of possession by removing huts standing on the land and the reported cases of the High Courts do not throw much light on the point. Some Courts allow the prayer of the decree-holder provided a notice is duly served upon the judgment-debtor allowing him opportunity for removing the structures but it can be supported neither by any authority nor can it be said that it is done in strict compliance with any provision of the Civil Procedure Code. The result has been confusion when Courts have had to deal with matters of this description.

Now the question of the removal of huts may arise in three specific cases:—

- (1) Under a rent decree.
- (2) Under a money decree.
- (3) Under a mortgage decree.

In a case where the huts are specifically purchased there arises no difficulty in answering the question but the question becomes complicated where the decree, sale-certificate and the writ of delivery of possession are silent on the point and a writ is duly issued under Or. 21, r. 95.

Let us examine the different aspects of the case.

There are only two distinct and separate provisions in the Civil Procedure Code for taking *khas* possession. Or. 21, r. 35 refers to cases where a suit is brought for possession of immoveable property and a decree is passed in the suit for the delivery of the property to the decree-holder, while r. 95 of the same order refers to cases where immoveable property belonging to judgment-debtor is sold in execution of the decree against him and possession is sought by the auction-purchaser. Save

and except the difference that has been noted above the two rules are similar in scope. R. 35 consists of three distinct, separate and independent clauses and each of these clauses deals with different subject-matters. Cl. 3 speaks of delivery of possession when it is directed against buildings and enclosures. Cl. 1 is exactly parallel to r. 95 and the only distinguishing feature that is apparent is that in the latter portion of the former rule, the words "if necessary" have been inserted as against "if need be" in r. 95. The wordings of cl. 1 of r. 35 does not and cannot cover circumstances provided for in cl. 3. There is only one section in the Code for taking delivery of possession of houses, and this is contained in cl. 3 of r. 35. If the provisions of cl. 3 to r. 35 is not contemplated to cover a case coming within cl. 1, we cannot say that it is contemplated by r. 95 either.

Let us take up the matter from another point of view. It has already been pointed out that in the latter portion of both the sections the provisions are not similar in spirit or language. The wordings are different. In r. 35, cl. 1 the words "if necessary" have been inserted as against "if need be" in r. 95. There ought to be some difference otherwise the wordings could not have been quite different. Side by side, let us take into consideration the different forms and wordings of the writ of delivery of possession under both the rules. Form No. 11 and Form No. 39 to Appendix E are two distinct forms under rr. 35 and 95 respectively in accordance with which the order of the Civil Court is executed by the bailiff.

Form No. 11 (Or. 21, r. 35).

Warrant to the bailiff to give possession of land, etc., (Or. 21, r. 35).
(Title.)

To

The Bailiff of the Court.

Whereas the undermentioned property in the occupancy of _____ has been decreed to _____, the Plaintiff in this suit, you are hereby directed to put the said _____ in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____

Schedule.

Judge.

Form No. 39 (Or. 21, r. 95).

Order for delivery to certified purchaser of land at a sale.

In execution (Of. 21, r. 95).
(Title.)

To

The Bailiff of the Court.

Whereas . . . has become the certified purchaser of . . . at a sale in execution of decree in suit No. . . of 19 . . . ; you are hereby ordered to put the said . . . the certified purchaser, as aforesaid in possession of the same.

Given under my hand and the seal of the Court, this . . . day of . . . 19 . . . Judge.

The latter portion of both the sections are dissimilar in spirit and wording. In the former there is authority given for the removal of the person obstructing while in the latter it has been purposely omitted. The subsequent sections, viz., rr. 97 and 98 deal with resistance or obstruction to possession of immovable property. From the absence of positive direction for the removal of persons in Form No. 11 as well as from the direct provisions as laid down in rr. 97 and 98 it is apparent that the bailiff cannot apply force in delivering possession without any second order from the Court and the Court is to arrive at that decision by closely following the provisions as laid down in rr. 97 and 98. It has already been submitted that the Court is not in a position to deliver possession to the decree-holder by demolishing houses under cl. 1 to r. 35 and it can do so only under cl. 3. As the provisions in r. 95 is similar in spirit it cannot be said that the Court can direct the removal of houses while delivering possession under r. 95. From all these we can safely arrive at the conclusion that if the house itself is not specifically purchased then the auction-purchaser is not entitled under r. 95 to take delivery of possession of the land by removal of houses. The auction-purchaser has got his remedy open and he can bring a title suit for the khas possession of the site by removing the houses standing on it and then possession may be delivered to him in due course of law under cl. 3 to r. 35.

The position of the decree-holder under r. 35 is much better than what the certificated purchaser occupies under r. 95 because in the former the Defendant is treated all along as trespasser while in the latter the property even in the writ of delivery of possession is re-

presented by the judgment-debtor. A decree-holder is not entitled to break down houses under r. 35, if the decree is silent about it. It has been specifically laid down in *Radha Gobinda v. Brojendra*, 18 Wr. 527, that it is hardly within the province of the executing Court to deliver possession to decree-holder under r. 35 by the removal of buildings thereon, where the decree is silent on the point. If the decree is silent, can we say that the Court can do it under r. 95 where the house was not purchased.

It has already been laid down that in an execution case the question of the removal of huts may arise in three specific cases, viz. :—

- (1) Under a rent decree.
- (2) Under a money decree.
- (3) Under a mortgage decree.

For the sake of convenience let us take the first two cases together. In a rent sale the holding passes to the purchaser while in a sale under a money decree the right, title and interest of the judgment-debtor passes to the purchaser. It makes no difference between the two kinds of sales for our present purpose. In the above two cases neither the sale proclamation nor the sale certificate shows that the auction-purchaser has purchased the houses standing on the land, the houses standing on the land not having been advertised for sale. So, in the face of all these, can it be said by any stretch of imagination that the houses would pass to the decree-holder? The auction-purchaser certainly becomes the owner of the land upon which the house stands and he is entitled to take khas possession by removing the houses only by a regular suit.

An auction-purchaser at a mortgage sale stands on a different footing because it is governed by a special Act, viz., the Transfer of Property Act. Properties fall under two categories—moveable and immovable. Houses fall under the category of immovable property. Dr. Ghose observes in his monumental work on Mortgage at page 756: "It is hardly necessary to add that a house being imbedded in the earth is undoubtedly immovable property for though you can move a house, you cannot do it without destroying it." Mortgage is the transfer of an interest in some specific immovable property. Dr. Ghose observes at page 231 of his book: "The word specific in the T. P. Act is ordinarily used in common parlance, as something distinct from general and unless the property is specified in

the deed, there can hardly be a mortgage within the meaning of the statute.

The question arises whether the houses standing on the mortgaged land pass to the decree-holder or the auction-purchaser as the case may be, by the application of sec. 8 of the Transfer of Property Act though only the land was specifically mortgaged. It has been laid down in 16 C. W. N. at page 1101, that the law of fixtures has got no application in India. The gist of sec. 8 is that unless a contrary intention can be gathered things attached to the earth would pass with the land. The question is free from confusion where the house itself is mortgaged but the matter becomes complicated where the decree and the bond are silent about the houses standing on the land. In a simple mortgage where only lands are given in mortgage and a decree is drawn up on the basis of the bond and the inventory of the property is also prepared on the basis of the decree, can it be said that the houses standing on the land would pass to the decree-holder or auction-purchaser. The auction-purchaser purchased one kind of specific immoveable property and is he now entitled to say that he has become the owner of another kind of specific immoveable property which happened to be there though he did not purchase it. It would be preposterous to think that a valuable structure would pass with a piece of land which has been given in mortgage for a petty amount. The result is that where only the specific land has been given in mortgage the houses which themselves come under the category of immoveable property cannot be said to have passed with the land and as such the auction-purchaser under the mortgage decree is not entitled to take delivery of possession of the land by breaking down houses.

The conclusion is that decree-holder is not entitled under Or. 21, r. 35 to take delivery of possession by breaking down houses if the decree is silent about it nor is the certificated auction-purchaser entitled to do the same thing under Or. 21, r. 95 where he has become the owner of the land only by purchase through auction the description of the property being specific and definite in the inventory attached to the writ of delivery of possession and not embracing the house.

RAMESH CHANDRA DHAR, B.L.,

Pleader,

Neerakona, Mymensingh.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

July 6th, 7th and 9th. -- Before the same Board the hearing was commenced of *Muhammad Khalcel v. Les Tanneries Lyonnaises*. The Appellants are merchants in Madras and brought the suit against the French Company and a man named Marret who they contend was the Company's agent in commercial transactions with the Appellants. Marret had a tannery at Pandicherry and had evolved a patent process for "pickling" skins. The transactions in question were in regard to the purchase and sale of sheep and goat skins which were supplied to the French Government during the war for the needs of the army. The trial Judge made a decree for over a lakh and a half rupees, this was reduced to Rs. 30,000 by the appeal Court.

The appeal, the facts in which are most involved, was opened at some length by Counsel for the Appellants; after Counsel for the Respondents had commenced his argument, the Board intimated that VISCOUNT FINLAY would be unable to preside after July 10th, as he would be sitting on the Hague Tribunal, and realising that the hearing would be protracted, it was adjourned until after the Long Vacation.

Sir Geo. Lowndes, K. C. and Messrs. Kenworthy Brown and Kurup for the Appellants.

Messrs. A. M. Dunne, K. C. and Blanco White for the Respondent Company.

Mr. E. B. Raikes for Marret.

July 10th. A Board consisting of VISCOUNT FINLAY, LORD BLANESBURGH and SIR JOHN EDGE and MR. AMEER ALI dismissed the appeal from a judgment of the Calcutta High Court in *Md. Ali Mamoojee v. Howeson Bros.*

The Appellant had entered into a bond as surety for a Receiver appointed in a mortgage suit. The Respondents were the decree-holders. The Receiver defaulted and the Respondents applied to enforce payment against the surety under sec. 145 of the Civil Procedure Code.

The Appellant opposed the application mainly on the ground that he had given notice of his revocation of the guarantee under sec. 130 of the Contract Act. The High Court held that sec. 130 could not apply to a surety for a Receiver who had been appointed by the Court and that view is upheld by the Privy Council.

Messrs. L. DeGruyther, K. C. and K. Brown for the Appellant.

Messrs. A. M. Dunne, K. C. and Douglas McNair for the Respondent.

The appeal was dismissed.

July 13th and 14th.—Before LORDS BLANESBURGH and PARKING and SIR JOHN EDGE, the appeal was heard of *Ram Protap Chamarla v. Durga Prosad Chamarla*. This was an appeal from the Bengal High Court in a suit which had been instituted by the Appellant for dissolution of partnership. After the suit had been filed the parties executed a document referring all matters in dispute for settlement by arbitration. An award was made but on being filed in the suit objections were raised that it dealt with matters outside the suit and affected the rights of persons who were not parties to the suit. These objections were upheld by the Courts in India. Judgment was reserved.

Messrs. DeGruyther, K. C. and Wallach for the Appellant.

Messrs. Dunne, K. C. and Narasimham for the 1st Respondent.

Mr. W. H. Upjohn, K. C., Sir Geo. Lowndes, K. C. and Mr. Narasimham for the Respondents Nos. 4 and 5.

July 16th, 17th, 20th and 21st.—The hearing was commenced before LORDS PHILLIMORE and BLANESBURGH and SIR JOHN EDGE of *Saklat v. Bella*, an appeal from the Chief Court of Lower Burma which raises a question of paramount importance to the Parsi community.

The Appellants are three members of the Rangoon Parsi community and are worshippers in a Parsi fire temple endowed largely by a wealthy Parsi named Bomanjee Cowasjee. The Respondent Bella was the daughter of a Goanese Christian father and her mother was variously alleged to have been a Parsi and an Eurasian Christian. She was befriended by Bomanjee and in effect adopted by his Parsi brother Shapurji and the Narjot ceremony was performed on her by a Parsi priest. Bella was present at the temple in 1915 at an important ceremony and there was considerable indignation on the part of a section of the worshippers which resulted in the filing of this suit. The trial Judge dismissed the suit because the temple trustee was not a party, and the Appellants had failed to show that Bella was not a Zoroastrian. The

Chief Court held that the temple had been granted and endowed for the benefit of all Zoroastrians, whether Parsis or not.

The Appellants rely largely on the decision in Bombay in *Sir Dinsha Petit v. Sir Jamsetji Jeejeebhoy*, where the question of admitting a stranger into the Zoroastrian religion and the Parsi community was very fully considered (I. L. R. 33 Bom. 509). Judgment was reserved.

Mr. A. M. Dunne, K. C., Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellants.

Messrs. Upjohn, K. C. and Warwick Draper for the Respondent.

July 17th.—In *Chandra Sen v. Kanhaiya Lal* (Allahabad) application for special leave to appeal was made by *Mr. S. Hyam*. The original application was out of time. Leave was granted.

In *Beramji N. Gamadia v. Bai Shrinbai* (Bombay), *Messrs. Dunne, K. C. and Ramsay* applied for the further hearing of the appeal. The suit related to the mortgage of a cotton press situated in Hyderabad, Deccan, and was instituted in 1910. It was part heard by the Privy Council in 1916 and adjourned for a decision to be obtained from the Hyderabad Court. That decision was obtained in 1923. *Mr. E. B. Raikes* opposed. Leave was granted and the further hearing fixed for next sittings unless the parties came to terms in the meantime.

July 21st.—In *Maharaja of Burdwan v. Nritya Gopal Sinha*, *Mr. Parikh* applied for special leave to appeal in the above suit. Leave was refused.

An application was made by *Mr. E. B. Raikes* to vary the order in Council in *Jacob v. Wills*, so as to include interest on the damages awarded by the trial Judge whose findings were restored by the Privy Council. Leave was refused on the ground that the order was already drawn up and no variation was desirable.

Judgment was delivered in *Mahabir Prosad Tewari v. Jamuna Singh*. The appeal was dismissed.

G. D. M.

Correspondence.

PROCLAIMED OFFENDER AND "PROCLAIMED PERSON."

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,
There does not seem to be any such anomalies in the provisions of the Cr. P. Code as have been discussed by Mr. Susil K. Mukherjee in your last issue.

Sec. 87, Cr. P. Code, lays down cases in which proclamation may issue, and they certainly do cover cases of accused persons as well as witnesses. The Courts are bound to do their best to bring both the offenders and the witnesses before them, for there can be no administration of justice as conceived by the codes without either; proclamation is the last process to secure their attendance. The separate forms in Sch V make it clear. So the words "proclaimed persons" are properly used in sec. 87 and sec. 88 instead of "proclaimed offenders."

Now without a restrictive clause as is found in sec. 45 (2) (ii) "proclaimed offenders" would certainly mean all accused persons against whom proclamations have been issued. But the aforementioned clause restricts the meaning of the expression to persons proclaimed as being accused of committing offences under sec. 302, I. P. C., etc., only. The sections, etc., have got to be stated in the proclamation, *vide* form IV, Sch 5. The persons volunteering to effect the arrest are presumed to know the contents of the proclamation. A witness proclaimed therefore cannot be treated on the same footing as the offender proclaimed who comes within sec. 45 (2) (ii).

The form does not use the words "proclaimed offenders." The person seeking to arrest must deduce the fact by applying his mind to the contents thereof, just as a Police officer receiving a requisition must judge for himself whether he can legally comply, *vide* sec. 54 (9). The statement of the time and place for appearance in the proclamation does not present any real difficulty; for in spite of that, it has been held that a person against whom proclamation has been issued, is "in contempt and the Court can entertain no petition on their behalf until they actually surrender." On parity of reasoning, there is no incongruity in a person arresting before the time mentioned has expired. It should also be noted that attachment under sec. 88 may also be made immediately after the proclamation without waiting for the expiry of the time.

Judging from the other clauses of sec. 54 it would appear that a Police officer may arrest without warrant only in cases of specified classes of serious offences. The Legislature cannot have meant the authority under clause three to extend to all offences including the lightest, simply on the ground of the accused absconding. Sec. 89 invests private persons with authority still more limited and hence the power of arrest by private

persons must be limited to offences referred in sec. 45 (2) (ii).

Yours faithfully,
SATISH CHAND RAY CHOWDHURY,
Vakil, Mymensingh.

Review.

WOODROFFE AND AMEER ALI'S LAW OF EVIDENCE APPLICABLE TO BRITISH INDIA, EIGHTH EDITION. By Sir John Woodroffe, Messrs. Thacker, Spink & Co., Calcutta.

This well-known treatise on the Law of Evidence by Woodroffe and Ameër Ali has now been thoroughly revised by Sir John Woodroffe and the new edition contains much additional matter which considerably enhances the value of the work to students and practising lawyers. The remarkable feature of the book is its capacity "to meet the wants, both of the profession and of the student." Much that is necessary for a practising lawyer is superfluous for a student and much that is needed for a student is not ordinarily of much interest to a practising lawyer. The author has succeeded, by a judicious separation of the subject-matter, in re-arranging the commentaries in a way that satisfies the one without interfering with the wealth of information which are so useful to the practitioner.

The Indian Evidence Act is the skeleton on which a well-developed body of the law of evidence has been built up and it is a complete and comprehensive treatise on the subject. The sections on relevancy without a clear exposition of them is a hopeless task for a beginner to try to understand, but the author's lucid treatment of the subject, together with a masterly introduction full of copious illustrations from decided cases such as *R. v. Palmer*, *R. v. Donellan*, *R. v. Richardson*, will more than amply repay the labours of an earnest student, while a general and historical treatment of the subject, removes the dull and dreary aspect that invariably attaches to codified laws.

The author has spared no pains to make the work quite up-to-date in every respect. The cases in the addenda of the last edition have been incorporated in the body of the work in their appropriate places and important decisions from 1920 to 1924 have been noted in an addenda of cases.

The get-up of this edition is all that can be desired.

THE Calcutta Weekly Notes.

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REPORTS (See Index.)

Liability of one of several tenants of the land to be sued for the whole rent—Other tenants known to the landlord, if necessary parties.

The question which came up for consideration before the Full Bench in *Kailash Chandra Mitra v. Brojendra K. Chakravarti*, 29 C. W. N. 108, was one of considerable difficulty, and the difficulty was, to our mind, largely due to the language of sec. 43 of the Indian Contract Act. That section expressly says that when two or more persons make a joint promise the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise; and the intention of the legislature is made clear by the clause which follows relegating the other joint promisors to a suit for contribution. Sec. 42 which deals with the devolution of joint liabilities on the death of one of such joint promisors does not in so many words say that one of the representatives of a deceased joint promisor may be proceeded against singly in the same way, but that he may appear to follow inferentially from the language of sec. 43 read with that of sec. 42.

Now in the case before the Full Bench the interest of a lessee of land had passed by devo-

lution and assignment to a number of persons, and the first question that arose was as to the nature of the liability of these persons. The three Judges composing the majority and Mukerji, J., were all agreed that these persons held the land as tenants in common and their liability was joint and several—exactly what the position of joint promisors and their representatives of those of them who are dead has been made to be by secs. 42 and 43 of the Indian Contract Act. So, if the principle underlying these sections applied to the case, the conclusion inevitably followed that “a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record”—and that is what the majority have held in the case.

It is undeniable, however, that the application of this rule to suits for rents against some of the tenants in occupation must in most cases lead to anomalous consequences. It is impossible not to agree with Mukerji, J., that the presence of the other tenants is necessary, amongst other reasons, for determining whether the liability which is *prima facie* joint is joint and several, for protecting the Defendant from being made to pay what may have already been paid by the others, for safe-guarding against the eventuality of his being defeated in a suit for contribution, as the co-tenant against whom a suit for contribution is brought will not be bound by the result of the earlier suit, for preventing conflicting decisions as to the character and incidents of the same tenancy being arrived at in different suits. This being so, one understands the inwardness of the view of the majority, as expressed in B. B. Ghose, J.'s judgment that the tenants in the case in question may be taken to have impliedly

promised to pay the rent jointly within the meaning of sec. 43 of the Contract Act and of the opposing view of Mukerji, J., that the liability arose out of privity of estate and not on account of a joint promise to pay, express or implied, so as to attract the application of sec. 43 of the Contract Act.

As we have said, if secs. 42 and 43 of the Indian Contract Act had been out of the way, we would have no hesitation in agreeing with Mukerji, J.'s solution of the question, *viz.*, that the Defendant would have a right in such a case to insist on the Plaintiff making all the tenants known to be tenants of the holding Defendant in the suit, the suit being liable to dismissal as wrongly constituted on his failure. We would agree with him also that the suit would not fail merely because the remedy against the added Defendants may have been lost by lapse of time, and that a decree eventually obtained in the absence of all the tenants would not be a nullity but would not (and in this the majority agree) operate as a rent decree under Chap. XIV of the Bengal Tenancy Act. But secs. 42 and 43 of the Contract Act appear to us to be very much in the way, and our deliberate conclusion is that they have gone too far in their departure from the rules obtaining in England, and stand in need of amendment on the lines laid down in the judgment of Mukerji, J.

UNDER-RAIYATS.

In our previous article published in this volume at pp. 127-128 (Notes portion), we indicated how under-raiyats may acquire a right of occupancy in their tenancies. It was also pointed out that though they may acquire a right of occupancy in their tenancies, still they are no better than under-raiyats and that saving the provisions of sec. 49 of the Bengal Tenancy Act, all the other incidents of under-raiyati tenancies will apply to their tenancies.

Now, what are the incidents of such tenancies? Is the occupancy right of an under-raiyat heritable? In the light of our above remark, it may safely be said that such a right is not heritable. According to the view expressed by Das and Adami, JJ., in 75 I. C. 427, such tenants do not acquire the status of occupancy raiyats. Consequently, Chap. V of the Bengal Tenancy Act cannot apply to such

tenancies. Chap. VII of the same Act deals with under-raiyats. There is no provision similar to that of sec. 26 in Chap. V, regarding heritability of under-raiyati tenancies in Chap. VII of the Act. So, if an under-raiyat having a right of occupancy in his tenancy dies, his heirs have no right, apart from custom or usage, to inherit the same. And it was so held by Greaves and Cuming, JJ., overruling the decision of B. B. Ghose, J., in a recent case reported in this volume at pp. 733-38.

But how are we to ascertain the existence of such a custom or usage? A clue to it was hinted at by the Revenue Board in Rule 341, p. 98 in the Board's Manual, 1909, Part II, Chap. III, which we quote below:—

“Occupancy rights are most commonly acquired by under-raiyats in cases where they have reclaimed lands by their own exertions, or have occupied their holdings for a long period and been allowed by the superior raiyat to erect homesteads, dig tanks or plant trees on them. Where in such or analogous cases, occupancy rights have been acquired by under-raiyats, the occupancy right should be duly recorded. Where the local custom or usage is doubtful or is opposed to the acquisition of occupancy rights, no entry regarding occupancy rights need be made.”

Whether heritability is an incident of such custom or usage, is to be ascertained as a matter of fact. It is a question of fact and not one of law. In many localities, we find that there are different grades of tenants under under-raiyats, such as “darkorfadars,” “dara-darkorfadars” and so on and that under-raiyati tenancies descend from father to son. Landlords do not object to such descent which gradually becomes customary or sanctioned by usage.

Now, suppose the holding of a raiyat is sold in execution of a rent-decree against him. Will the purchaser of the holding be entitled to annul, by a notice under sec. 167 of the Bengal Tenancy Act, the interest of an under-raiyat with a right of occupancy under him? It may be argued that according to the view expressed in 75 I. C. 427, the tenant's status being that of an under-raiyat, his interest is liable to annulment. But that is not so. Sec. 160 deals with protected interests and cl. (2) of the same makes “any right of occupancy” a protected interest. So we see that the interest of an under-raiyat with a right of occupancy is not capable of annul-

ment by a notice under sec. 167 of the Bengal Tenancy Act.

Now, we come to the question of transferability of under-raiyati tenancies. Sec. 85 of the Bengal Tenancy Act restricts the grant of sub-leases by raiyats to a period not exceeding nine years. That section has, therefore, no application to under-raiyati tenancies. Under-raiyats can grant permanent sub-leases. It was so held in 18 C. W. N. 882. The principle laid down in this ruling was followed in the case reported in 19 C. W. N. 1110. These sub-lessees and their tenants, if any, are all under-raiyats as is evident from the definition of under-raiyats. According to the definition in cl. (3) of sec. 4 of the Bengal Tenancy Act, under-raiyats are those who hold their tenancies "immediately or mediately" under raiyats.

In the case of an out-and-out transfer, it was laid down in 20 C. L. J. 548, that where an under-raiyat transfers his entire tenancy to a third party, and there was no proof of payment of rent or of any arrangement made to pay the rent, and thus there was relinquishment of the holding, the landlord was entitled to *khas* possession.

In 18 C. L. J. 262, it was laid down that the provision of the Bengal Tenancy Act contemplates that an under-raiyat may, under certain circumstances, acquire an occupancy right. If he does so, such right may be transferable by custom or usage. But there is no authority for the proposition that the interest of an under-raiyat is *ipso facto* transferable.

An under-raiyat acquiring a right of occupancy in his tenancy, still being no better than an under-raiyat, will be subject to the operation under sec. 48 of the Bengal Tenancy Act.

There can be no commutation of rent in kind payable by an under-raiyat though he may acquire the right of occupancy in his tenancy. There is no provision for commutation in Chap. VII of the Act. So, according to the ruling reported in 25 C. W. N. 417, the order of a Revenue Officer for commutation of rent, where the tenant is not an occupancy raiyat, is without jurisdiction.

MATHURANATH HALDAR, B.L.,
Bagerhat.

INTERPRETATION OF SEC. 162, CRIMINAL PROCEDURE CODE.

Few amendments have given rise to so much controversy as the re-drafting of sec. 162 of the Code of Criminal Procedure by the Amending Act, XVIII of 1923. The Select Committee wrote as follows:—"The amendment of sec. 162 has been discussed at great length by the Committee. It has been the subject of amendment before and of constant difficulty in the Courts. We therefore propose to re-cast the section."

It must be acknowledged with regret, however, that whatever other merits may or may not be claimed on behalf of the re-constituted section, it has not succeeded in removing the difficulty of the Courts.

The new section runs as follows:—"No statement made by 'any person' to a police officer in the course of an investigation under this chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof whether in a police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

Do the words "any person" used in the section include an accused person who makes a statement before the police in the course of an investigation? The words are certainly wide enough in their import to include an accused person as well as a witness. But if this view is accepted, sec. 162, Cr. P. Code, would override and render nugatory the provision of sec. 27 of the Indian Evidence Act, which provides that "when any fact is deposited to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." Sec. 162, Cr. P. Code, would however exclude such statements simply because they are made to a police officer in the course of an investigation.

The anomaly may be removed by holding that the words "any person," in sec. 162, Cr. P. Code, refer to witnesses and not to accused persons. Authority for this view may probably be derived from the wording of sec. 161,

Cr. P. Code, which empowers certain police officers to examine orally "any person" supposed to be acquainted with the facts and circumstances of the case. The marginal note to the section shows that it refers to the "examination of witnesses by the police." It is clear therefore that the words "any person" in this section refer to witnesses and not to accused persons.

In *Queen-Empress v. Jadab Das*, 4 C. W. N. 129, the Calcutta High Court remarked on the impropriety of the police in taking down the statement of an accused professedly under sec. 161, Cr. P. Code, as preliminary to his arrest and pointed out that a statement under sec. 161, Cr. P. Code, was intended to be taken only for the purpose of obtaining evidence.

It may be argued from this that the words "any person" are used in sec. 162, Cr. P. C., in the same sense as in sec. 161, Cr. P. Code, that is to say, as referring to a witness and not to an accused person. It must be remembered, however, that the marginal note of sec. 161, Cr. P. Code, has not been reproduced in sec. 162, Cr. P. Code. The note is no doubt explanatory of the words used in sec. 161, Cr. P. Code, but it cannot, logically, be used to interpret any other section of the Code.

The legislature ought to signify clearly whether sec. 162, Cr. P. Code, is meant to repeal sec. 27 of the Indian Evidence Act. Such parts of a confessional statement as lead to the discovery of incriminating facts, as also statements made to the police by an accused person which are not of an incriminating nature have always been held to be admissible by all the High Courts. If sec. 162, Cr. P. Code, applies to the statement of an accused person, the law on the point must be held to have been entirely changed.

In a very recent case, *Umer Duraz Munshi v. Emperor*, 86 Ind. Cas. 410, the Court of the Judicial Commissioner at Sind has held that the words "statement of any person" in sec. 162, Cr. P. Code, do not refer to the statement of an accused person in respect of whom an investigation is being held by the police. It would be interesting to know the views of the High Courts on this important point.

SUSIL KUMAR MUKHARJI,
Sadar S. D. O., Noakhali.

Correspondence.

THE AGE OF CONSENT BILL.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

I have been noticing an inordinate amount of jubilation in that section of the public press which professes to hold advanced views on social and religious matters over the passage in the Legislative Assembly of the Bill raising the age of consent in the case of married girls to 13 and unmarried girls to 14 by the thumping majority of 84 to 11; and the report of the proceedings in the Assembly in the papers shows abundantly that most of this majority have been pacting themselves incontinently on the back for making what they imagine to be a heroic stand against the forces of blind orthodoxy and unreason. If this represents in any degree the normal mentality of the so-called advanced section of the community, I feel constrained to say that that section must be singularly lacking in the practice of introspection. So far as the raising of the age of consent to 13 of married girls is concerned, it will remain as much a dead letter as the age of 12 has been. The abuse of child-marriage—for abuse it is—needs dealing with by direct frontal attacks and not by diplomatic manœuvres which serve only to lull the conscience of the community and thereby retard real progress. What is needed is the raising of the legal age of marriage for girls and not the age of consent of such girls after they are married. But our advance-guards of the press and the Legislative Assemblies apparently lack the courage to hit even the most palpable of abuses in the eye for fear of rousing the demon of reaction. They no doubt flatter themselves that by simply registering pious wishes in the form of statutes which are bound to prove dead letters, they are yet making solid progress in the direction of educating public opinion. This must be sheer self-deception. Wrong tendencies whether individual or communal can never be effectively controlled by such cheap make-believes. They have to be fought down, if at all, directly by ranging the moral forces of the communal mind consciously against and making them prevail over such tendencies. That was the method of our Rammohun Roys and Vidya sagars, and that should be the method of the

Knights of our Legislative Assemblies out to bring succour to the helpless and the oppressed. There may, if the direct method be adopted, be a reaction in the first instance due to unreasoning fear. But the pendulum will swing back with all the greater force after a time. To place a measure like the Age of Consent Bill on the 'statute book' is not legislation but just playing at legislation.

Yours, etc.,

NAGENDRA NATH CHOSE.

Vakil's Library,
5-9-25.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

In Issue No. 42 of the Calcutta Weekly Notes (last number) I find an article with the heading "Jurisdiction of Civil Court to pull down huts when giving delivery of possession." The article purports to be contributed by Babu Ramesh Chandra Dhar, B.L., Pleader, Netrakona. A very sensational case recently arose in the Sub-Divisional town of Netrakona in connection with the pulling down of the judgment-debtor's huts by an auction-purchaser immediately on his getting delivery of possession under r. 95, Or. 21, C. P. C. It is alleged that the man whose huts were pulled down was a peon of the Sub-Divisional Magistrate's Court and the conduct of the Sub-Divisional Officer, in connection with the criminal proceedings that arose, is impugned by the auction-purchaser. Babu Ramesh Chandra Dhar, it appears, was a pleader engaged on behalf of the prosecution in the said case at Netrakona. The case has been transferred by the Additional Magistrate to his own file and it is pending there. The accused moved the Sessions Judge for a reference to the High Court for quashing the proceedings, and it was heard yesterday. The issue, in which the article in question appeared was received here the day before.

I think it is very undesirable that a party who has to argue a law-point in a case *sub-judice* should first air his views through his pleaders, in law journals, and it is equally undesirable that a highly respectable law journal like the Calcutta Weekly Notes should throw its columns open for such a purpose. The article is apparently an inspired one.

However it is evident that the writer of the said article has made a very poor study of the law which he professes to write upon.

Yours sincerely,

ROMESH CHANDRA BHATTACHARYA,

Pleader, Judge's Court,
Mymensingh.

10-9-25.

NOTE.—If the facts are as stated above we sincerely regret that the article in question was at all published in our columns. When such articles are sent to us it is understood that they do not relate to matters *sub-judice*. We accept such contributions relying on the good faith of our correspondents who are all lawyers. We request our readers not to send us any contributions which may directly or indirectly relate to any matter pending in a Court of law.—E. C. W. N.

Reviews.

THE COURT FEES ACT AND THE SUITS VALUATION ACT. By M. N. Basu, M.A., B.L. *Second Edition: Eastern Law House, Law Publishers, 15, College Square, Calcutta, 1925.*

That a second edition of this work should have been called for in so short a time is not at all surprising, since, Mr. Basu's commentaries have proved themselves far and out the most well-arranged and the completest amongst all those that have appeared since the provincial legislatures took to amending the Court Fees Act for revenue purposes. The case-law and the rules have been brought up to date and for this purpose as also for purposes of revision Mr. Basu has made the fullest use of the experience that his work as Stamp Reporter to the Calcutta High Court has brought him from day to day. Besides the text of the main Acts with the commentaries, the various Provincial Amendments and all the rules framed for application in the several provinces including the deductions and reversions sanctioned by the Central Government are incorporated in the book. The book is as handy and well got-up as one may wish it in a manual which is required for constant reference.

THE STAMP ACT, (II OF 1899). By S. Kasturi Rangachariar, B.A., B.L. *Second Edition, 1925. Printed and published by the Law Printing House and the Lawyer's Companion Office, Madras, 1925.*

This edition of the commentaries brings the legislative changes bearing on the Act and the case-law up to the end of March 1925 and the Stamp Rules published by the Govern-

ment of India so late as in May last have also been duly incorporated in the compilation of repealed Statutes, Rules and Notifications which are appended to the commentaries and form nearly a third of the book. This edition of the Stamp Act is about the most up to date available at the present moment. The texts of the main Act and the Provincial Amendments are also given, the alterations in the former made by the latter being referred to in notes appended to the text of the main Act and by reproducing the texts of the Amending Acts. This is followed by the text of the main Act with the commentaries. It is a most exhaustive compilation of all that one needs to know in connection with the law of stamps and is bound to prove most valuable as a book of ready reference.

COMMENTARIES ON THE USURIOUS LOANS ACT (X OF 1918), with a complete exposition of the Law of Interest in British India. By P. Ramanatha Aiyar, B.A., B.L. Second Edition: The Madras Law Journal Office, Mylapore, Madras, 1925.

This work is a treatise on the law of interest first and a commentary on the Usurious Loans Act afterwards. The latter indeed is relegated in an appendix of 40 pages, whilst nearly three hundred pages are devoted to an examination of the law relating to interest under 13 chapter headings. The Introductory Chapter goes deeply into history and even pre-history. Mr. P. Ramanatha Aiyar is a most painstaking commentator of law books and his industry is only equalled by the wide range of his explorations in and in relation to the subject which for the time interests him. The profession will without doubt profit by his industry and research in connection with the present subject.

COMMENTARIES ON THE PROVINCIAL SMALL CAUSE COURTS ACT. By P. Ramanatha Aiyar, B.A., B.L. The Madras Law Journal Office, Mylapore, Madras, 1925.

Unlike the previous work the present is a commentary on the statute in question in the orthodox style, texts of the sections followed by case-notes and comments. But in the usual style of Mr. Aiyar's compilations, the notes are exhaustive and well arranged—so much so that the book will, we expect, hold its own

amongst the most of other commentaries on this much-annotated Act.

THE INDIAN EVIDENCE ACT. By Subodh Chandra Lahiri, M.A., B.L. Ray and Ray Chowdhury. College Street Market, Calcutta. Price Rs. 2-8.

We like this little book, which is really smaller and bigger than it looks. Bigger, because it is annotated, the references to cases being abundant, but the notes are not commentaries but brief memorandum. In these commentary-ridden times, one feels the necessity of compilations like these and grateful to the author who has the courage and capacity to be brief without being unintelligible.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WALMSLEY AND MUKERJI, JJ. APPEAL FROM ORDER NO. 402 OF 1923. NAWAB NUZHATUDDOWLA ABBAS HUSSAIN KHAN, Judgment-debtor, Appellant v. BENI MADHO BASANT RAI and ors., Decree-holders, Respondents. The 30th June 1925.

Civil Procedure Code, Or. 21, rr. 11 and 15—Joint decree-holders—Application by one for execution of whole decree—Omission to state the names and interests of the other decree-holders in application, if fatal—Notice on other decree-holders, if obligatory—Court's duty to safeguard the interests of other decree-holders.

The appeal arose out of an application filed in the Court of the Subordinate Judge, 1st Court at Alipur on 11th April 1922 for execution of a decree of the Privy Council passed in favour of one Prince Naubeg Mirza and others. By assignment, or devolution, the decree-holder's interest passed into the hands of several persons as follows:—A ten annas share was sold to Mehdi Hossain who in his turn sold four annas of his ten annas to one Lal Mohan Lal, which share on the latter's death passed to his heirs Beni Madho and Basant Rai. The

six annas share remaining with Mehdi Hossain devolved on his death on his widow Haidari Begum, his two daughters Zakia and Taiba Begum and his two sons Nazir Hossain and Abid Hossain. The two and a half annas share of Haidari Begum, Zakia Begum and Taiba Begum vested in the said Beni Madho and Basant Rai as administrators to their estates. Nazir Hossain and Abid Hossain were declared insolvents and their three and a half annas share vested in one Prabhu Doyal Rastogi, the Receiver in Insolvency appointed by Court. The six annas share of the decree which remained after the assignment of ten annas to Mehdi Hossain devolved on Sultan Hossain, Mirza Akbari Begum and Delband Begum. The application for execution was made by Sultan Hossain Mirza. In the application, the name of the executing decree-holder and those of Beni Madho and Basant Rai and also of Nawab Delband Begum and Nawab Akbari Begum were mentioned, but it was not stated whether Beni Madho and Basant Rai were there as administrators to the estates of Haidari Begum, Zakia Begum and Taiba Begum or as heirs of Lala Mohan Lal. The names of Nazir Hossain and Abid Hossain, the insolvents, nor that of Prabhu Doyal Rastogi, the Receiver in Insolvency, were at all mentioned in the application. The application however purported to be under Or. 21, r. 15 of the Civil Procedure Code for the benefit of all the decree-holders. Applications were subsequently made by Beni Madho and Basant Rai and by Prabhu Doyal Rastogi disclosing the shares and interests held by them and the several capacities in which they held them. The judgment-debtor objected to the application proceeding on the grounds *inter alia* that the application was defective in form, that notices had not been issued to the other decree-holders and that the application was barred by limitation. All the objections having been overruled by the trial Court, the judgment-debtor preferred this appeal:

Held—That the omission on the part of the applying decree-holder to state in the application for execution the names of all the persons interested in the decree was not such a defect as having regard to the requirements of Or. 21, r. 11 invalidate the execution proceedings. The names of the parties to the decree have to be stated under the rule so that there may not be any difficulty in the matter of the identification of the decree in respect of which execution is sought. It is quite true that when an application is made under r. 15 by one of the decree-holders for execution of the whole decree which has been passed jointly in favour of himself and others, the Court has got to pass proper orders in order to protect the interests of all the decree-holders, but it is not absolutely necessary that the names of all the decree-holders should be given in the execution petition by the executing decree-holder.

As to notice to the other decree-holders, it is not obligatory on the Court to issue such notice. It is in the discretion of the Court whether or not notice should be given to the other decree-holders before making an order for execution under r. 15. In the present case the other decree-holders having subsequently come in and given their consent, there was not reason for apprehending that their interests had not been properly safeguarded, and the defect, if any, was not such as would invalidate the proceedings.

As to limitation, the objection was untenable in view of the fact established by the evidence that there were successful applications for execution in 1906 and 1914.

Messrs. Bimala Charan Deb and Tarakeswar Nath Mitra for the Appellant.

Messrs. Amarendra Nath Bose and A. S. M. Akran for the petitioning decree-holder.

Mr. Nagendra Nath Ghose for Beni Madho and Basant Rai.

N. G.

Appeal dismissed.

